STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **WASHINGTON 10 STORAGE CORPORATION** and **WASHINGTON 10 STORAGE PARTNERSHIP** for issuance of certificates of public convenience and necessity, for authority to issue and sell securities, and for approval of natural gas storage rates.	Case No. U-10424

At the December 16, 1994 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. Ronald E. Russell, Commissioner
Hon. John L. O'Donnell, Commissioner

ORDER GRANTING AMENDED APPLICATION

I.

HISTORY OF PROCEEDINGS

On October 7, 1993, Washington 10 Storage Corporation and Washington 10 Storage Partnership (Applicants) filed an application seeking certificates of public convenience and necessity to engage in the storage and transportation of natural gas under market-based rates. The application also sought authority to issue $130 million of securities needed to finance the capital costs of the proposed storage field and related facilities.

On November 22, 1993, Administrative Law Judge Daniel E. Nickerson, Jr., (ALJ) conducted a prehearing conference, which was attended by representatives of Applicants,

Armand, Inc., Katherine E. Roy, Energy Reserves, Inc., Geoseis, Inc., John and Carol Manners, Charles U. Lawrence, Craig A. Lawrence, Claude S. Lawrence, David and Janice Whipple, Norman and Joyce Beauchamp, ANR Production Company (ANR), ANR Storage Company, ANR Pipeline Company, the Village of Romeo, the J. Gerald McLean Trust, the Gladys D. McLean Trust, Mark L. Clark, Joseph A. Karam, Mr. and Mrs. Roberto Borello, Mark J. Van Ophem, and the Commission Staff (Staff).

The petitions for leave to intervene filed by Armand, Ms. Roy, Energy Reserves, Geoseis, Mr. and Mrs. Manners, Charles, Craig, and Claude Lawrence, Mr. and Mrs. Whipple, Mr. and Mrs. Beauchamp, the J. G. and G. D. McLean Trusts, Mr. Clark, and the Village of Romeo were granted.[1] The petition for intervention filed by ANR was granted, but limited to the rights of a property owner. Mr. and Mrs. Roberto Borello and Ann Cooper, who were represented at the prehearing conference, did not file petitions for intervention. Mr. Karam subsequently filed a petition for intervention, but he did not participate in any further proceedings. Interventions filed by ANR Pipeline, ANR Storage, and Consumers Gas Company, Ltd., were denied.

Evidentiary hearings were conducted on March 7, 8, and 9, and April 25 and 26, 1994. On May 9, 1994, Applicants amended their application to include a formal request for authority to construct, maintain, and operate a pipeline in conjunction with the storage facility. As part of this request, Applicants filed supplemental testimony, which was subject to cross-examination on June 22, 1994.

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[1]Subsequently, Geoseis, Mr. and Mrs. Manners, Charles, Craig, and Claude Lawrence, Mr. and Mrs. Whipple, Mr. and Mrs. Beauchamp, and Mr. Van Ophem withdrew their interventions. (7 Tr. 650.)

The record consists of 12 volumes of transcript totalling 1,313 pages and 97 exhibits that were admitted into evidence.[2] Briefs and reply briefs were filed by Applicants, ANR, and the Staff on July 8 and 22, 1994, respectively.

On August 22, 1994, the ALJ issued a Proposal for Decision (PFD) recommending approval of the application subject to the requirement that Applicants utilize a cost-of-service based storage rate of $0.621 per thousand cubic feet (Mcf) in lieu of the market-based rate requested in the application.

Applicants, ANR, and the Staff filed exceptions and replies to exceptions on September 6 and 20, 1994, respectively.

II.

BACKGROUND

The proposed storage field is a complex of three adjacent Salina-Niagaran reef reservoirs located in Macomb County, Michigan that have been producing gas since 1969. It is believed that these reservoirs, which are over 3,200 feet below surface level, collectively held about 50 billion cubic feet (Bcf) of gas before their discovery. Although the reservoirs were discovered separately, it is now established that they are sufficiently interconnected to permit them to be operated as a single storage facility. Given that approximately 8 Bcf of the original gas in

[2]Proposed Exhibits I-81, I-97, and I-98 were not admitted into evidence.

place cannot be economically produced, the proposed storage field would have a working gas volume of 42 Bcf at the proposed operating pressure.[3]

Washington 10 Storage Corporation is wholly-owned by Washington 10 Storage Partnership, which was described as a Michigan partnership composed of W-10 Holdings, Inc. (an affiliate of MCN Corporation), Panhandle Storage Company (an affiliate of Panhandle Eastern Corporation), Trillium Gas Company (an affiliate of Union Gas, Ltd.), and TCPL Storage, Ltd. (an affiliate of TransCanada Pipelines, Ltd).[4]

Washington 10 Storage Partnership has entered into three gas storage agreements that cover the entire capacity of the proposed field. The agreements are with CoEnergy Trading Company (CoEnergy) for 16.8 million dekatherms (MMDth) of storage service, TCPL Storage, Ltd. (TCPL) for 16.8 MMDth, and St. Clair Pipelines, Ltd. (St. Clair) for 8.4 MMDth.[5]

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[3]The testimony indicates that it is possible to increase the working gas volume of a reservoir by increasing pressure in the reservoir beyond the discovery pressure. The use of this enhancement mechanism, commonly referred to as "delta pressuring," was specifically disavowed by Applicants and was not supported by any other party. Accordingly, the Commission finds no support for issuance of a certificate of public convenience and necessity that would permit operation of the storage field at a working gas volume in excess of 42 Bcf.

[4]Although these prospective partners entered into a memorandum of agreement dated October 1, 1993, the testimony indicates that a formal partnership agreement has not yet been executed. (4 Tr. 221-222.)

[5]CoEnergy is an affiliate of MCN Corporation and Michigan Consolidated Gas Company (Mich Con). St. Clair is an affiliate of Union Gas.

III.

POSITIONS OF THE PARTIES

Applicants

Applicants maintained that the Commission has jurisdiction pursuant to 1923 PA 238, as amended (Act 238), MCL 486.251 et seq., to grant a certificate of public convenience and necessity that will permit them to acquire the property rights necessary to construct and operate the proposed storage field. Applicants insisted that their proposed activities are subject to state, not federal, jurisdiction because the storage field will initially be used exclusively to provide intrastate storage service to CoEnergy and because Applicants qualify as an intrastate pipeline under the Natural Gas Policy Act of 1978 (NGPA).[6] They also stated that they are eligible to use Section 311 of the NGPA, 15 USC 3371, to provide interstate transportation and storage services without endangering the Commission's jurisdiction over their intrastate activities.

Applicants asserted that the business structure that they have chosen for ownership of the storage field should not present an obstacle to the issuance of an Act 238 certificate. Specifically, Applicants argued that Act 238 should be construed as authorizing the Commission to issue a certificate of public convenience and necessity, which is a prerequisite to their right to exercise condemnation powers, not only to corporations but also to partnerships. However, in anticipation that the Commission might not agree with their analysis, Applicants entered into an agreement, admitted as Exhibit A-96, that assigns all rights and delegates all obligations of the Washington 10 Storage Partnership to the Washington 10 Storage Corporation.

[6]PL 95-621, 15 USC 3301 et seq.

Applicants also maintained that they have proven that the proposed storage field, gathering system, and transmission line will serve the present or future public convenience and necessity. They also argued that the proofs clearly support a finding of necessity and that it is undisputed that the project will benefit not only the public in Michigan, but also citizens in other states and Canada.

Applicants stated that they have proven that the storage field will be safe. Indeed, they pointed out that the evidence of their ability to operate the storage field without endangering the public is uncontested. Further, Applicants indicated that they will comply with all of the additional safety requirements recommended by the Staff.

Arguing that the gas industry is in a state of transition and is moving towards a deregulated, competitive marketplace, Applicants urged the Commission to recognize the need for market-based storage rates. They requested that the Commission approve a market-based storage charge not to exceed $1 per Mcf in lieu of the $0.621 per Mcf cost-of-service based rate. Further, based on a cost of service of $.0251 per Mcf for the new gathering and transmission system from the wellheads to Mich Con's 36-inch Belle River pipeline, Applicants proposed establishment of a maximum rate for injection or withdrawal services of $0.025 per Mcf.

Finally, Applicants urged the Commission to grant their request for authority to issue $130 million of securities. They maintained that the information submitted in support of the application supports a finding that the funds derived from the issuance of these securities will be applied for lawful purposes and that the amount is essential to the success of the project.

Staff

Noting that Applicants plan to install safety valves, adequate casing, and a new pipeline gathering system, the Staff concluded that the new storage field can be operated without

endangering the public. However, the Staff recommended that Applicants' proposed groundwater monitoring program should include background sampling for benzene, toluene, ethylbenzene, and xylene (BTEX). The Staff also supported monitoring for dissolved methane and chlorides and recommended adoption of a specific groundwater sampling program. The Staff also maintained that all plugged and abandoned wells should be monitored on a regular basis. For newly-drilled wells, the Staff found that Applicants' proposals for their completion, pressure testing, operation, and maintenance were appropriate. However, the Staff expressed concern that the noise level associated with the compressor facility might be too high.

With regard to the issue of necessity, the Staff testified that there was an increase in demand for storage services subsequent to issuance of Order No. 636 by the Federal Energy Regulatory Commission (FERC). The Staff explained that the unbundling of pipeline services required by FERC Order No. 636 has increased the need for storage service by end-users. The Staff explained that many customers have recently realized that the more rigid balancing requirements of a pipeline's restructured services require them to have access to their own storage. According to the Staff, many of these customers have complained to the FERC that they cannot get sufficient storage to implement seasonal supply management programs, to supplement transmission capacity, or to balance daily load requirements. Further, citing the bitter cold weather of the previous winter, the Staff noted that additional gas storage is critical to ensure that gas supplies are available to fuel the electric generators needed to meet winter peak load demands.

The Staff also agreed with Applicants that a flexible, market-based storage rate is appropriate because it will allow their customers to tailor storage services to meet specific needs. According to the Staff, flexible storage rates will provide appropriate price signals to potential

developers of storage in Michigan, encourage further development and competition, and guarantee that sufficient storage capacity will be available at reasonable prices.

ANR

ANR contended that the application should be renoticed, delayed, or dismissed. ANR stated that Section 71 of the Administrative Procedures Act of 1969, as amended, MCL 24.271 (APA), requires that reasonable notice be given to all interested parties of the pendency of this application. ANR claimed that the notice provided by Applicants did not specifically inform potential parties that three affiliated storage customers would be permitted to repackage and resell all storage services available from the storage field to third parties in Michigan and elsewhere without any regulatory oversight by the Commission. Accordingly, ANR contended that third parties to whom such storage service will be marketed have been deprived of an opportunity to participate in this proceeding. ANR also maintained that Applicants failed to provide notice to interested parties regarding their proposal to charge market-based rates for storage services, the proposed issuance of securities, and the amendment to the application, which includes a request for a certificate of public convenience and necessity to construct and operate a pipeline. Accordingly, ANR argued that the Commission must require that proper notice is given to all interested parties, including all third parties to whom Applicants' affiliates intend to provide storage and transportation services.

ANR also maintained that the markets that Applicants intend to serve have not been completely identified. ANR insisted that the users of the storage services should also be identified. According to ANR, until these matters are clarified, no relief should be granted. Indeed, citing the October 28, 1993 order in Cases Nos. U-10149 and U-10150, ANR main-

tained that a comprehensive analysis of market-based storage rates should be conducted before the Commission turns Applicants' affiliates loose in the storage services marketplace.

ANR also contended that it should not be deprived of its property rights[7] absent proof that the property taken will serve a public use. ANR insisted that Applicants' proposal does not constitute a public use. Further, ANR insisted that Applicants have not established that the present or future public convenience and necessity requires creation of a new gas storage field. Citing the inability of several witnesses to identify customers or to otherwise demonstrate market demand for the proposed facilities, ANR urged the Commission to deny the application.

Finally, ANR stated that the Commission might not have jurisdiction of this matter. ANR insisted that, until Applicants disclose how gas will be transported to and from the proposed storage facility and identify the ultimate customers, it is simply impossible to determine whether the primary purpose of the proposed storage field will involve the storage of gas in interstate commerce, which is subject to the exclusive jurisdiction of the FERC. Indeed, ANR insisted that unrebutted testimony establishes that, due to the design characteristics of Mich Con's transmission system, interstate gas will physically flow to and from the proposed storage field. Further, ANR maintained that storage gas may eventually be exported to the mid-western and northeastern regions of the United States or to Canada.

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[7]ANR owns oil and gas leases that cover lands located within the boundaries of proposed storage field.

IV.

PROPOSAL FOR DECISION

The ALJ rejected ANR's argument that the Commission lacks jurisdiction to issue a certificate of public convenience and necessity for the proposed storage field. In so doing, the ALJ relied upon the Commission's February 6, 1990 order in Case No. U-9369, which he found to be controlling. Further, the ALJ was persuaded that, because only CoEnergy's portion of the storage capacity was under contract at this time and because there was testimony that CoEnergy would initially devote 100% of its leased capacity to intrastate customers, any incidental commingling of the storage gas with interstate gas would not pre-empt the Commission's exercise of jurisdiction over the storage field. Additionally, the ALJ was not persuaded by evidence that, at some time in the future, gas from the storage field might be marketed to customers in other states or Canada. The ALJ concluded that mere attempts to market gas outside Michigan do not deprive the Commission of jurisdiction because, at the present time, the only actual contract for gas storage involves gas to be consumed solely within the boundaries of this state.

The ALJ also rejected ANR's argument that the record was not sufficient for the Commission to resolve the jurisdictional issue. In this regard, he concluded that the proofs were sufficient and that Applicants had not filed their application prematurely.

The ALJ also found that ANR's arguments regarding the sufficiency of the notice of hearing were not well taken. He observed that the notice of hearing satisfied all of the requirements established by the Commission's Executive Secretary. Additionally, he observed that the notice was published in a newspaper of general circulation in Macomb County and in a trade publication that is generally followed by potential storage customers.

Next, the ALJ found that Applicants had established that a need exists for the proposed storage field. In reaching this conclusion, the ALJ noted many of the benefits of additional storage, including enhancement of the dependability and reliability of gas supplies in Michigan. He also recognized that the storage field would effectively provide a reliable and inexpensive source of supply.

After reviewing the testimony regarding the development and operation of the proposed storage field and noting the absence of contrary evidence, the ALJ found that Applicants had established that the storage field could be developed and operated in a safe manner.

Finding that Applicants had failed to demonstrate that they would be unable to exercise significant market power, the ALJ rejected their request for market-based rates in favor of a cost-of-service based rate of $0.621 per Mcf. In so doing, the ALJ chose to adopt the rationale expressed by the FERC in its July 19, 1994 order in Docket No. PR94-9-00.[8] However, while rejecting market-based rates at the present time, the ALJ indicated that Applicants could seek market-based rates at a later date upon a showing of the competitive nature of the marketplace due to availability of alternatives to customers.

Finally, the ALJ recommended approval of Applicant's request for authority to construct and operate gathering lines and a transmission pipeline to serve the proposed storage field. Noting that the proposed pipeline system would be necessary for the operation of the storage field, the ALJ concluded that its construction and operation would serve the public convenience and necessity.

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[8]Michigan Consolidated Gas Company, 68 FERC ¶61,090 (1994).

V.

DISCUSSION

Safety

Before a certificate of public convenience and necessity can be granted pursuant to MCL 486.252, the Commission must ensure that the proposed storage field will not endanger the public. John W. Emory, a Senior Design Engineer for Mich Con, described the operation, design, and safety systems of the natural gas compressor station and the pipeline gathering system. He indicated that the equipment and pipelines will meet or exceed the requirements of the Michigan Gas Safety Code. Additionally, he stated that instruments capable of shutting down the equipment in a safe and orderly fashion, if necessary, will monitor the operations.

Applicants also presented the testimony of Frederick W. Metzger, a Senior Geologist with Mich Con. Mr. Metzger described the basic geology of the storage formation and the plans for existing and future wells in the field. According to Mr. Metzger, each well in the field will be equipped with a down-hole safety valve that will seal automatically in the event of an emergency.

In its testimony, the Staff generally supported Applicants' positions, but expressed some concerns. Patricia M. Poli, a Geological Engineer with the Commission's Gas Division, indicated that Applicants should expand their monitoring program to include background groundwater sampling for BTEX, dissolved methane, and chlorides. She also proposed ongoing BTEX testing. According to Ms. Poli, background groundwater sampling is necessary to establish the groundwater quality prior to commencement of the storage field's operations. Further, she indicated that ongoing BTEX sampling would provide an indication of well integrity.

Mark C. Nida, a Gas Storage Specialist with the Commission's Gas Division, reviewed the safety of the drilling, completion, testing, and maintenance of the wells necessary to the operation of the storage field. Mr. Nida concluded that if Applicants' proposals were followed, the storage field could be operated safely. However, he expressed some concern that the proposed noise level of 58 decibels (db) measured at a distance of 1,320 feet from the compressor station was too high. Although he recommended a noise level of 45 db at that distance, Mr. Nida agreed that it might be inappropriate to set a reduced noise level until the compressor begins operation.

In finding that the proposed storage field may be developed and operated in a safe manner, the ALJ noted that not only was the evidence uncontradicted, but that Applicants had accepted Ms. Poli's proposal for BTEX testing and had responded to Mr. Nida's concerns by agreeing to curb noise levels at the compressor station, if necessary, in accordance with the Staff's recommendation that the noise level issue be resolved within one year of commencement of operations.

No exceptions were filed regarding the ALJ's recommendations on this issue. Accordingly, based upon the uncontradicted evidence, the Commission finds that the field is safe for development and operation as a gas storage field.

Intervention Status

In its first exception, ANR contends that its intervention should not have been limited by the ALJ. According to ANR, because the ALJ did not place any limitations on the intervention of other mineral interest owners, there is no basis for his decision to limit ANR's participation to the "rights that a property owner would have in this particular matter." [1 Tr. 28.]

Applicants and the Staff support the ALJ's ruling. They insist that ANR's intervention had to be limited in order to avoid circumvention of the ALJ's ruling that denied the interventions filed by ANR's affiliated corporations, ANR Pipeline and ANR Storage. Further, they stress that the interventions of the other parties did not have to be limited because those parties had no reason to pursue a hidden agenda unrelated to their property rights.

The Commission finds that the ALJ properly limited ANR's intervention. R 460.17205 (Rule 205) of the Commission's Rules of Practice and Procedure provides that an administrative law judge may, if appropriate, authorize limited participation by a party seeking leave to intervene. Under the circumstances, the Commission finds that it was reasonable and appropriate for the ALJ to have limited ANR's intervention. Indeed, the Commission agrees that failure to limit ANR's intervention would have permitted ANR to circumvent the ALJ's ruling denying the petitions for intervention filed by ANR Pipeline and ANR Storage.

Jurisdiction

ANR raises a variety of challenges to the Commission's jurisdiction to authorize the construction and operation of the proposed storage field and related pipeline facilities. First, ANR argues that the record does not contain sufficient evidence for a determination whether the Commission has jurisdiction to grant the certificates and authorizations requested by Applicants. ANR argues that Applicants have not proven that they will be an intrastate pipeline within the meaning of Section 2(16) of the NGPA,[9] and not a natural gas company engaged in interstate commerce within the meaning of Section 7(b) of the Natural Gas Act

[9]15 USC 3301(16).

(NGA).[10] Further, ANR maintains that Applicants cannot qualify as a Hinshaw pipeline[11] under Section 1(c) of the NGA because not all of the gas destined for the proposed storage field will ultimately be consumed in Michigan. Indeed, ANR maintains that absent a showing that the primary purpose of the proposed storage field is to provide storage to Michigan customers, the application must be denied. Moreover, ANR contends that until the record is supplemented with additional evidence identifying the actual storage service customers, describing how the gas will be transported, and detailing where the gas will ultimately be consumed, the Commission does not have sufficient evidence to make a determination whether it has jurisdiction to grant the certificates and authorizations requested by Applicants.

Second, ANR maintains that this proceeding is distinguishable from the Commission's February 6, 1990 order in Case No. U-9369, which was relied upon by the ALJ. According to ANR, Case No. U-9369 differs from the instant proceeding because the proponents of the Eaton Rapids 36 storage field established their intention to serve three Michigan local distribution companies pursuant to executed gas storage agreements. On the other hand, ANR argues that at least 60% of the gas to be stored in the Washington 10 storage field may ultimately be consumed outside of Michigan. Indeed, ANR points out that St. Clair and TCPL have already initiated discussions with potential interstate customers.

Third, ANR insists that the likely commingling of intrastate and interstate gas in the stream of gas delivered to and from the proposed storage field subjects it to the jurisdiction

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[10]15 USC 717 et seq.

[11]Section 1(c) of the NGA, 15 USC 717(c), commonly referred to as the Hinshaw amendment, insulates a person (Hinshaw pipeline) involved in the transportation or sale of interstate gas from the jurisdiction of the FERC in the event that the interstate gas being transported or sold is received by the Hinshaw pipeline from another source within or at the boundary of a state if all of the gas so received ultimately is consumed in that state.

of the FERC. According to ANR, federal case law establishes that the commingling of intrastate and interstate gas will subject the subsequent transportation or sale for resale of the entire commingled gas stream to federal regulation. Although acknowledging that the commingling doctrine has not yet been applied where intrastate gas, albeit commingled with interstate gas, is transported and consumed entirely within the same state, ANR insists that different circumstances control this proceeding. Moreover, ANR points out that Applicants propose to interconnect the proposed storage field with Mich Con's 36-inch Belle River pipeline, which is used by Mich Con for both intrastate and interstate transportation of gas. ANR also maintains that Applicants admitted that the transportation of gas to and from the proposed storage field for CoEnergy will in most cases be accomplished by displacement. Relying upon simulations of the patterns of gas flows on Mich Con's system, ANR argues that the record does not support a finding that all of the gas to be stored in the proposed storage field will be produced or consumed in Michigan.

Fourth, ANR maintains that Mich Con's status as a Hinshaw pipeline has no bearing on whether Applicants qualify for a Hinshaw exemption. Further, ANR insists that the facts demonstrate that Applicants cannot qualify for a Hinshaw exemption. According to ANR, the assurance by CoEnergy that all of the gas that CoEnergy intends to store in the proposed storage field will be consumed in Michigan is meaningless in light of testimony that CoEnergy's customers will actually own and control the gas after it leaves the storage field. Given the uncertainty of the disposition of the gas delivered to CoEnergy's customers and the inability of Applicants to identify the ultimate consumers of the gas to be stored in the proposed storage field, ANR insists that Applicants have not established that the Hinshaw exemption applies to them.

In response, Applicants maintain that ANR's exceptions are more likely related to the desire of its affiliated companies to thwart competition in the storage market than to an interest in preserving the sanctity of the FERC's jurisdiction over the transportation and storage of gas in interstate commerce. Applicants insist that the case law relied upon by ANR is either readily distinguishable or wholly inapposite. Further, Applicants maintain that ANR's arguments persistently ignore important record evidence. For example, Applicants point out that the proposed initial storage service by CoEnergy will be exclusively intrastate. Further, Applicants insist that the storage field will not be directly interconnected or operated on an integrated basis with any natural gas company regulated by the FERC.

Applicants also urge the Commission to reject ANR's contention that the record is inadequate to resolve the jurisdictional issues presented by their application. They maintain that CoEnergy has warranted that all of the gas to be stored in the proposed storage field during the initial 30-day period and one-half of the gas to be stored during the 20-year storage agreement will be purchased exclusively from Michigan suppliers. Further, Applicants maintain that even though storage service provided to St. Clair and TCPL may involve a certain amount of service to customers located in Canada or other states, such service would not defeat the Commission's exercise of jurisdiction. According to Applicants, intrastate gas that is stored in the proposed storage field and subsequently exported to Canada will be transported by Mich Con in foreign, not interstate commerce. Applicants explain that they will not require any federal authority to have Mich Con transport gas in foreign commerce on behalf of storage customers because such gas is not being transported in interstate commerce. Applicants maintain that their position in this case is entirely compatible with the definition of an intrastate pipeline set forth in Section 2(16) of the NGPA. Further, they contend that

because the initial service proposed will be entirely intrastate in character, the federal cases relied upon by ANR concerning the "primary purpose" standard are not applicable.

According to Applicants, although Mich Con's transportation of CoEnergy's gas to and from the proposed storage field will be accomplished either by displacement or by use of a pipeline used to ship gas in interstate commerce, the commingling doctrine articulated by the United States Supreme Court in California v Lo-Vaca Gathering Co., 379 US 366 (1965), does not present a barrier to the Commission's exercise of jurisdiction. Rather, Applicants assert that commingling alone cannot form the basis for the FERC's preemption of the Commission's jurisdiction. Citing Mississippi Valley Gas Company v Gulf Fuels, Inc., 48 FERC ¶61,178 (1989), Applicants insist that the mere fact that CoEnergy's intrastate gas will be transported by displacement or in common stream along with the gas that Mich Con transports in interstate commerce, does not compel a conclusion that this transaction and the associated storage service to be provided by Applicants will lose its intrastate character.

Moreover, Applicants insist that Mich Con's Order No. 63 certificate shields their activities from the FERC's jurisdiction. According to Applicants, the FERC held in Weststar Transmission Co., 21 FERC ¶62,027 (1982), that the intrastate customers and suppliers of a Hinshaw pipeline that possesses a limited jurisdiction blanket certificate pursuant to Order No. 63 are immune from the FERC's NGA jurisdiction on the same basis as under the Section 601(a) exemptions of the NGPA.[12] They maintain that the FERC's adoption of Order No. 63 was

[12]Section 601(a)(2)(A) of the NGPA provides that the FERC's jurisdiction under NGA Section 1(b) shall not apply to any transportation in interstate commerce of natural gas that is authorized under Section 311 of the NGPA. In addition, Sections 601(a)(1)(D) and 601(a)(2)(B) provide that for purposes of Section 1(b) of the NGA, the term "natural gas company" does not include any person by reason of, or with respect to, any sale or transportation of gas if Section 601 exempts the sale or transportation from the FERC's jurisdiction under the NGA.

prompted by its recognition that an important objective of the NGPA was to remove all artificial restraints on the flow of gas between the interstate and intrastate markets. The FERC noted that Sections 311 and 312 of the NGPA permitted it to authorize intrastate pipelines to transport, sell, or assign natural gas to the interstate market. However, because the NGPA requires that Hinshaw pipelines be treated like local distribution companies, the FERC was persuaded that it should adopt an administrative rule that established a blanket certificate procedure permitting Hinshaw pipelines to carry out transactions of the kind otherwise permitted by NGPA Sections 311 and 312.

Finally, Applicants argue that it is unnecessary for the Commission to determine the identity of every eventual storage customer. Indeed, Applicants insist that it is sufficient that they have described with reasonable accuracy the type of end-user who will need storage service.

The Staff contends that ANR's jurisdictional arguments ignore evidence that CoEnergy will initially provide only intrastate storage service. The Staff also insists that Applicants have demonstrated that they will be an intrastate pipeline within the meaning of Section 2(16) of the NGPA. Further, the Staff agrees with Applicants and the ALJ that the Commission's February 6, 1990 order in Case No. U-9369 supports a finding that the intention of Applicants regarding the initial operations of the proposed storage field is sufficient to enable the Commission to make a determination whether it has jurisdiction to issue the certificate of public convenience and necessity.

Arguing that ANR conceded that the FERC has no jurisdiction over transporters or sellers of gas produced or consumed in the same state even if the intrastate gas is being transported in a commingled stream with interstate gas, the Staff points out that Applicants' activities fall

within this recognized exception to the commingling rule. The Staff also criticizes ANR's suggestion that the factual situation in Texas Utilities Fuel Company, 68 FERC ¶61,027 (1994), must be duplicated in order for the Commission to exercise jurisdiction over the proposed storage field. To the contrary, the Staff argues that the only conclusion reached by the FERC in the Texas Utilities case was that given those unique facts, the FERC did not have jurisdiction, which the Staff insists does not mean that other factual situations automatically require the FERC to assert the jurisdiction.

Finally, the Staff maintains that precise identification of the ultimate users of the storage field is not required. According to the Staff, the first-tier customers are known. Further, the Staff points out that the Commission has never before required the proponent of either a pipeline or a storage field to submit completely executed contracts with second-tier customers. Accordingly, the Staff urges the Commission to grant the application.

The Commission finds that ANR's jurisdictional objections to the application for issuance of a certificate of public convenience and necessity are not well taken. The circumstances in which federal law pre-empts state regulation are set forth in Arkansas Electric Cooperative Corporation v Arkansas Public Service Commission, 461 US 375 (1983). The pre-emption doctrine, which has its roots in the Supremacy Clause of the U.S. Constitution[13], requires examination of Congressional intent. Pre-emption may be either expressed or implied and is compelled when Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emption language, Congress' intent to supersede state law altogether may be inferred if the federal regulatory scheme is so perva-

[13]Article VI, Clause 2.

sive as to make reasonable an inference that Congress left no room for the states to supplement it.

It is undisputed that interstate transportation and storage of natural gas is subject to regulation by the FERC. See Schneidewind v ANR Pipeline Company, 485 US 293, 295 (1988). However, it is readily apparent from statutes and case law that the Commission's authority to regulate intrastate aspects of gas transportation and storage have not been preempted by the FERC's authority to regulate interstate transportation and storage activities. Further, there is no indication that the Commission's authority to issue a certificate of public convenience and necessity pursuant to Act 238 for the development of a storage field that will be, at least initially, devoted entirely to intrastate commerce would be the subject of preemption by the FERC.

The facts of this case are markedly different from the circumstances in Lo-vaca, supra, and Texas Utilities, supra. The Lo-vaca case predates the restructuring of the gas industry and involves a substantial interstate transaction that was present at the outset of the entire transaction under scrutiny. The Texas Utilities case, a declaratory order of the FERC, is limited to its unique facts, which are not present in this proceeding. However, the Texas Utilities case establishes that a common purpose of Section 311 of the NGPA and FERC Order No. 63 was to eliminate any artificial restraints on the flow of gas between interstate and intrastate markets. Section 311 of the NGPA authorizes the FERC to permit an intrastate pipeline to transport gas on behalf of an interstate pipeline or a local distribution company served by an interstate pipeline. Further, Section 601(a) of the NGPA provides that the jurisdiction of the FERC under the NGA shall not apply by reason of any sale or assignment authorized by Section 311 of the NGPA. Indeed, as pointed out by Applicants, the

FERC has held that an interstate pipeline's transportation of gas owned by a third party between two points in the same state in a commingled stream does not subject the seller of the gas to the FERC's jurisdiction:

> "The fact that Utah Gas' purchased gas is commingled with Northwest [Pipeline Corporations]'s system supply does not, in itself, render the sale to Utah Gas from its producer one in 'interstate commerce' and require that the Commission exercise its Section 7(c) NGA authority." [Utah Gas Services Co., 13 FERC ¶ 61,247 at 61,549 (1980).]

Further, the FERC has also held that a downstream shipper of gas that has been transported between two points in a commingled stream entirely within one state was not subject to the FERC's jurisdiction. [See Mississippi Valley Gas Co. v Gulf Fuels, Inc., 48 FERC ¶ 61,178 at 61,656 (1989).] Accordingly, given that FERC Order No. 63 and Section 311 of the NGPA immunize intrastate customers of a Hinshaw pipeline from the FERC's NGA jurisdiction, there is no basis for concluding that the commingling of the intrastate gas destined to the proposed storage field with interstate gas transported on Mich Con's system constitutes a basis for finding that the FERC may preempt the Commission's exercise of jurisdiction in this proceeding.[14]

Finally, the Commission rejects ANR's arguments that determination of the Commission's jurisdiction must await identification of the second-tier customers of the proposed storage field. The Commission finds that the existing record is sufficient for determination of the jurisdictional question. Applicants and the Staff have presented credible witnesses and exhibits that establish the identities of the first-tier customers and that the initial use of the

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[14]It was also held in Emerald Coal & Coke Co. v Equitable Gas Co., 378 Pa 591,107 A2d 734 (1954), that facilities for the storage of natural gas for local distribution were subject to local regulation and control and were not subject to federal regulation even though the gas company was engaged in interstate commerce by virtue of its transportation of gas to the storage field.

storage will be wholly intrastate, which correspond with the facts underlying the decision in Case No. U-9369. Based on such circumstances, the Commission has jurisdiction pursuant to Act 238. Accordingly, the exceptions raised by ANR regarding the Commission's jurisdiction are rejected.

Notice

Another group of ANR's exceptions is devoted to arguments that the notice pursuant to which this proceeding was conducted was inadequate. ANR argues that, whereas the notice in Case No. U-9369 was provided to Michigan local distribution companies and their customers, the notice in this proceeding was not. Instead, a notice was mailed to each landowner from whom the Applicants had not yet acquired property rights in the proposed storage field and to all cities, villages, townships, and counties that were included within the proposed storage field boundary. Further, ANR acknowledges that a notice was published in the Michigan Oil and Gas News, a trade publication serving the oil and gas industry, and The Macomb Daily, a newspaper of general circulation in Macomb County.

Arguing that MCL 24.271 requires that parties be given reasonable notice of the proceeding, including the time and nature of the hearing, ANR insists that the notice was inadequate and that Applicants should be directed to provide further notice. In a similar argument, ANR contends that the ALJ erred in failing to require Applicants to publish a separate notice of the April 25, 1994 amendment to the application. In addition, ANR insists that the notice was defective pursuant to MCL 460.6a(1) because it did not contain any description of the rates to be charged for storage services and because it failed to comply with the requirements of MCL 460.301 with regard to the issuance and sale of securities.

Applicants and the Staff urge the Commission to reject ANR's exceptions on the notice issue. According to the Applicants, ANR does not have standing to assert inadequacy of notice as a bar to the processing of the application. Applicants point out that ANR received actual notice of the hearing and did not assert that it failed to receive due notice of any issue raised at the hearing. Rather, Applicants argue that ANR's complaints relate to the inadequacy of notice to other parties. Moreover, Applicants maintain that the notice of hearing was prepared by the Commission's Executive Secretary and published pursuant to her explicit instructions. Finally, Applicants insist that ANR's reliance on MCL 460.6a(1) is misplaced because this case does not involve a proceeding by a gas or electric utility to increase rates or charges or to alter, change, or amend any rate or rate schedule.

The Staff points out that ANR never objected to the adequacy of the notice at the initial prehearing conference. Further, the Staff maintains that the notice was reasonably designed and published in order to inform all affected members of the public. The Staff also argues that the Act 9 application did not require a separate notice because the original notice was broad enough to encompass the amendment. Finally, the Staff insists that the notice regarding the proposed rates and securities issuance was adequate.

The Commission finds that ANR has no standing to assert a claim regarding the adequacy of notice on behalf of third parties. Further, with regard to its own claims regarding the adequacy of the original notice, the Commission finds that they were waived by ANR's failure to object to the notice during the prehearing conference. Moreover, after reviewing the notice in the context of the application and the subsequent proceedings, the Commission is persuaded that the notice was adequate.

It is well settled that a notice is adequate if it is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. [Mullane v Central Hanover Bank and Trust Company, 393 US 306, 314 (1950).] The notice published in this case, which was prepared by the Commission's Executive Secretary, was sent to all affected landholders, cities, incorporated villages, townships, and counties within the boundaries of the proposed storage field and was published in a statewide trade publication as well as a newspaper of general circulation in the affected area. The notice clearly indicates that the proceeding involves the transportation and storage of gas and the sale of securities to finance those operations. The potential first-tier storage customers were identified and the site of the storage field was specified. Additionally, the notice clearly indicated that the application requested authority to issue and sell $130 million in securities to finance operation of the storage field.

Given all of the circumstances, the Commission finds that ANR has no right to complain that the notice was inadequate in any regard. ANR had actual notice of the proceeding, was able to intervene in a timely manner, and failed to object to the adequacy of the notice at the initial prehearing conference. Because the Commission is persuaded that the notice published in this proceeding comports with the requirement of due process and all applicable statutory notice requirements, the Commission concludes that ANR's exceptions regarding notice should be rejected.

Necessity

ANR also argues that the ALJ's finding that Applicants and the Staff have shown a need for the proposed storage field is erroneous. Rather, ANR insists that the record does not support the ALJ's finding. According to ANR, Applicants' testimony regarding recent develop-

ments that have led to a generalized demand for additional storage capacity throughout the United States does not establish that there is a need for this particular storage field. Further, ANR discounts testimony by the Staff that additional storage capacity in Michigan is necessary to ensure that Michigan's new gas-fired electric generation requirements will be met in the future. Citing the Staff's inability to identify or quantify a need for storage services in Michigan, ANR maintains that the testimony of Joseph L. Yestrepsky, the Director of Project Planning for ANR Pipeline, establishes that any incremental growth in demand for intrastate storage services could be met through existing excess storage capacity.

Because TCPL and St. Clair, which combined will market 60% of the capacity of the proposed storage field, have neither identified or finalized agreements with any second-tier customers, ANR argues that Applicants have failed to present evidence that a market exists for a substantial amount of the capacity of the proposed storage field. ANR maintains that Applicants should be forced to present evidence that they have firm commitments from identifiable second-tier customers who will use a substantial portion of the capacity of the proposed storage field before the Commission makes it possible for Applicants to use the authority in Act 238 to condemn private property or to cause the environmental damage described in the environmental impact reports submitted by Applicants.

In response, Applicants contend that ANR's arguments are devoid of any meaningful citation of authority and ignore the evolving nature of the natural gas marketplace in the aftermath of FERC Order No. 636. Applicants urge the Commission to apply the liberal construction of "necessity" adopted by the Michigan Supreme Court in Commissioner of Parks v Molesta, 91 Mich 149 (1892). Indeed, Applicants argue that they should not be obligated to establish that the proposed storage field is indispensable, but only that it is convenient and

useful. Applicants insist that the record establishes that the proposed storage field, gathering lines, and transmission pipeline will meet a public need and will serve an essential public purpose through the enhancement of the furnishing of natural gas to end-users located in Michigan. Finally, Applicants point out that ANR's concern that the power of eminent domain might be abused is misplaced. Citing the unique provisions of Michigan's eminent domain statute, MCL 213.51 et seq., Applicants stress that any property owner may file an action to seek a determination regarding the public necessity for the acquisition of his or her property.

The Staff maintains that the record contains irrefutable evidence of a large and growing demand for gas storage services. According to the Staff, approval of this application will help lower the cost of gas to ratepayers and will improve the reliability of supply. Finally, the Staff notes that the proposed storage field is subject to contractual commitments that demonstrate market demand for the addition of new storage capacity.

The Michigan Constitution provides that private property shall not be taken for public use without just compensation as provided by law.[15] Through passage of MCL 486.252, the Legislature empowered private companies affected with the public interest to exercise the power of eminent domain under certain circumstances. A statutory prerequisite to the exercise of eminent domain by a private organization is the issuance of a certificate of public convenience and necessity by the Commission.

The statute that gives the Commission jurisdiction to issue a certificate of public convenience and necessity for the operation of a gas storage field obligates the Commission to review both the present and future need for such a facility. Although the statute does not explicitly indicate as much, case law requires that in order for a taking to qualify as being in

[15]Article 1, Section 2.

furtherance of a public purpose, there must be some identifiable benefit to the citizens of Michigan. Indeed, in Trombley v Humphrey, 23 Mich 471 (1971), the Michigan Supreme Court rejected an exercise of eminent domain by the State of Michigan, not for any purpose of its own, but in order to further a federal government purpose. In so doing, the Court noted that there can be no necessity for the exercise of the right of eminent domain if no state purpose is furthered. However, in Detroit International Bridge Company v American Seed Company, 249 Mich 289 (1930), the Court approved the state's exercise of eminent domain to further construction of a bridge over the Detroit River to link the state's highway system to Canada. Although acknowledging that construction of an international bridge would further interstate and foreign commerce, the Court concluded that the project was so plainly in furtherance of both state and national interests as to authorize condemnation of lands for it by either government.

The testimony clearly establishes that, at least initially, the proposed storage field will be used for the storage of gas that is to be both produced and consumed within this state. Further, despite an indication that at least a portion of the proposed storage field will be used to store gas transported in interstate and foreign commerce, there is no evidence to suggest that such activities will necessarily preclude the storage and transportation of intrastate gas in the future.

The standard for the Commission's determination whether to grant Applicants' request for a certificate of public convenience and necessity for the proposed storage field is stated in Act 238 as follows:

> "Before any certificate is granted, the Commission shall examine and inquire into the necessity of the natural gas storage field and determine that the natural gas storage field will serve the present or future public convenience and

necessity, and that the field is safe for development and operation of gas storage."

An almost identical standard applies to an application for a certificate of public convenience and necessity for the construction and operation of gathering systems and transmission lines pursuant to Section 9 of 1929 PA 9, as amended, MCL 483.109:

> ". . . and it shall be the duty of the commission to examine and inquire into the necessity and practicability of such transmission line or lines and to determine that such line or lines will when constructed and in operation serve the convenience and necessities of the public . . .".

The rationale of Applicants and the Staff regarding an increase in demand for storage services in Michigan and elsewhere is supported by the record. The Commission finds that the testimony of Rai P. Bhargava, the Chairman and Chief Executive Officer of Washington 10 Storage Corporation, regarding the increase in demand for natural gas in the face of stable domestic production and the narrowing of the gap between actual production and production capacity supports Applicants' position that demand will increase for storage services. Michigan, which is blessed with an abundance of Silurian-Niagaran reefs that are capable of being economically converted into storage facilities, is well-positioned to benefit from this increase in demand. Our state already leads the nation in storage capacity. Adding additional capacity in response to the increase of demand will enhance competition in the storage market.

The Commission finds that the proposed storage field will serve the public convenience and necessity by providing more reliable and economic gas service to the citizens of Michigan. CoEnergy, the largest marketer of natural gas in Michigan, intends to use its share of the proposed storage field to market gas to Michigan end-users. By allowing Michigan customers to become less dependent on gas supplies from other regions of the country or Canada during periods when demand and price are their highest, the overall cost of gas should be reduced.

While it is difficult to quantify precisely the percentage of the proposed storage field capacity that will ultimately be used to directly serve markets in Michigan, the record supports the conclusion that a significant portion of the capacity will be devoted to customers in Michigan.

Finally, the Commission is not persuaded by ANR's concern that Applicants should not be empowered to exercise eminent domain absent the existence of binding contracts covering 100% of the storage capacity by second-tier customers. ANR's arguments ignore the fact that CoEnergy, St. Clair, and TCPL have entered into gas storage agreements that cover the entire working storage capacity of the proposed field. Further, due to the extensive work necessary to convert the reservoir into a storage field, there is ample time for CoEnergy, St. Clair, and TCPL to find second-tier customers for their storage services. Moreover, because Applicants will be at risk for the costs of the facilities in the event that they are underutilized, requiring them to submit the market demand evidence described by ANR is unnecessary.

Heightened Scrutiny

In its 12th exception, ANR insists that the Commission should measure whether the proposed purpose of the storage field is sufficiently public to warrant a grant of condemnation

authority to Applicants in light of the "heightened scrutiny" test established by the Michigan Supreme Court in Poletown Neighborhood Council v Detroit, 410 Mich 616 (1981).[16]

ANR argues that Applicants do not intend to store gas for the public generally or for any public utility or natural gas company. Rather, according to ANR, Applicants intend to store gas only for three affiliates that will repackage and resell the storage services without regulatory oversight by the Commission. Under the circumstances, ANR insists that the Commission should apply the heightened scrutiny test set forth in the Poletown decision and deny Applicants' request for a certificate of public convenience and necessity.

In response, Applicants contend that the Legislature has determined that the furnishing of natural gas to end-users in Michigan meets a public need and serves an essential public purpose. Citing Act 238 and Act 9, Applicants insist that the Legislature has clearly identified the public interest in the development of gas storage fields and associated transmission facilities.

The Commission finds that its analysis of whether the proposed storage field will serve the present or future public convenience and necessity is not controlled by the heightened scrutiny test. The Poletown case concerned an attempt by a public agency to condemn property for the use of a private company that did not have condemnation authority. In contrast, Act 238 specifically authorizes corporations formed for the purpose of storing and transmitting natural gas on behalf of the public generally to exercise the power of eminent domain. That

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[16]The Michigan Supreme Court explained the heightened scrutiny test as follows: "Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature." (Poletown, supra, at 459-460.)

Applicants will directly serve only three customers does not preclude a finding that the public will be served. In Dome Pipeline Corporation v Public Service Commission, 176 Mich App 227 (1989), it was recognized that a majority of courts have held that sales to even a very few selected customers constitute service to the public. Indeed, in Dome, service rendered to a single customer was deemed to constitute a sale to the public. In light of the Dome case and because the Commission is persuaded that the Poletown case is distinguishable, ANR's request that the Commission follow the heightened scrutiny test is rejected.

Securities

Applicants maintain that the capital expenditures for acquisition of property and construction of facilities to convert the Washington 10 reservoir into a storage facility will total approximately $122 million. Applicants request authority to finance up to $130 million through the issuance or sale of securities, including stock, bonds, notes, guarantees, long-term debt, and long-term financing arrangements, whether secured or unsecured. According to Applicants, the funds derived from the issuance of the securities will be applied to lawful purposes, and the issuance and the amount of the securities are essential to the success of the project.

The ALJ recommended approval of the issuance of up to $130 million of securities to cover the capital costs of the project. No exception was raised regarding the ALJ's recommendation.[17] Accordingly, the Commission is persuaded that Applicants' request to issue and sell up to $130 million of securities should be approved.

[17]ANR's 10th exception, which the Commission has rejected, was limited to whether proper notice had been given regarding Applicants' request to issue and sell securities. ANR, which had actual notice of Applicants' request to issue and sell securities, did not otherwise object to approval of that portion of the application.

Motion to Dismiss

On March 4, 1994, ANR filed a motion seeking dismissal of the application. In the motion, ANR argued that the Commission lacks jurisdiction to grant Washington 10 Storage Partnership a certificate of public convenience and necessity because Act 238 only authorizes corporations, not partnerships, to be recipients of such certificates. Accordingly, ANR insisted that the application filed by Washington 10 Storage Partnership should be dismissed. Further, although Washington 10 Storage Corporation was incorporated pursuant to Act 238, ANR insisted that dismissal of the application with regard to Washington 10 Storage Corporation was appropriate because Washington 10 Storage Corporation could not be considered the real party in interest for acquisition of property rights and interests in the storage field. According to ANR, Washington 10 Storage Partnership has already contracted to commit all of the storage capacity in the proposed field to CoEnergy, TCPL, and St. Clair. Because there is no proof that Washington 10 Storage Corporation had either contracts with an entity for storage capacity or that it could establish any other need to acquire property interests in the proposed storage field, ANR argued that the Commission has no basis upon which to issue a certificate of public convenience and necessity to Washington 10 Storage Corporation.

On March 7, 1994, the motion to dismiss was orally argued before the ALJ, who took it under advisement in order to allow the parties to address the issue in their briefs. However, the issue was not addressed in the PFD.

In its 13th exception, which references the reasoning set forth in its motion and oral argument, ANR insists that its motion to dismiss should have been granted.

In response, Applicants acknowledge that they have been unable to find a case directly on point. However, Applicants argue that Indiana & Michigan Electric Company v Miller,

19 Mich App 16 (1969), indicates generally that condemnation statutes should be construed so as to effectuate their purpose and not to defeat the legislative intent or to lead to absurd results. Arguing that there is no rational basis in today's society or economy for restricting the powers granted by Act 238 to corporations only, Applicants insist that the construction of Act 238 requested by ANR would lead to an absurd result. Further, they insist that the Commission's focus should be on whether to certify the storage field and that a court should determine whether a partnership may be authorized to exercise the power of eminent domain.

Applicants indicate that it has always been their intention, given the language of Act 238, that Washington 10 Storage Corporation will be the entity that commences eminent domain proceedings, if they are necessary. Applicants explain that they also intended to transfer, lease, or otherwise assign all property interests acquired by Washington 10 Storage Corporation to Washington 10 Storage Partnership in order to avoid double taxation, which would increase the cost of the project. Further, because Washington 10 Storage Corporation will be wholly-owned by Washington 10 Storage Partnership, Applicants believe that they should be considered a single entity for the purpose of Act 238 condemnation authority. However, recognizing the possibility that the Commission might not accept their analysis, on March 16, 1994, Applicants executed an assignment agreement between themselves, which was received into evidence as Exhibit A-96. The assignment agreement, which is expressly conditioned upon the issuance of an order in this proceeding finding that (a) the Commission cannot grant a certificate of public convenience and necessity to Washington 10 Storage Partnership and (b) that the Commission can grant a certificate of public convenience and necessity to Washington 10 Storage Corporation only if the storage agreements between Washington 10 Storage Partnership and CoEnergy, St. Clair, and TCPL are assigned to Washington 10 Storage Cor-

poration, transfers all of the rights and delegates all of the obligations under the storage agreements to Washington 10 Storage Corporation.

In responding to ANR's motion to dismiss, the Commission notes that Act 238 applies only to the formation of corporations. Further, while there are no cases directly on point, the Commission is persuaded that principles of statutory construction require rejection of Applicants' position that Act 238 should be construed as conferring the right to exercise the power of eminent domain not only to corporations, but also to partnerships.

MCL 8.3(a) is a statutory rule of construction that requires that technical words shall be construed and understood according to their particular and appropriate meaning. While corporations and partnerships may operate similar business activities, these separate business structures are not interchangeable. Indeed, the Michigan Supreme Court has repeatedly rejected arguments that partnerships should be regarded as being equivalent to corporations for application of various statutes. For example, in Attorney General v McVichie, 138 Mich 387 (1904), it was held that a partnership should not be treated like corporations are treated under a statute passed to protect minority shareholders. Likewise, in Whitney Realty Co v Secretary of State, 220 Mich 234 (1922), it was held that an act related to corporations did not include partnerships. Moreover, the Commission notes that eminent domain is a harsh remedy necessitating a strict construction of and compliance with eminent domain statutes. [State Highway Commissioner v Jones, 4 Mich App 420 (1966).] It is also the law of this state that the right to exercise the power of eminent domain must be expressly set forth in a statute and should not be implied. [In re Petition of Detroit, Grand Haven & Milwaukee Railway Co., 248 Mich 28 (1929); The Chesapeake & Ohio Railway Company v Herzberg, 15 Mich App 271 (1968).]

Although concluding that the power of eminent domain in Act 238 may only be properly exercised by Washington 10 Storage Corporation, the Commission finds that the March 16, 1994 assignment agreement eliminates all obstacles to the granting of a certificate of public convenience and necessity to Washington 10 Storage Corporation. Accordingly, the Commission is persuaded that the ALJ did not commit error by failing to grant ANR's motion to dismiss.

Market-Based Rates

In their exceptions, Applicants and the Staff argue that the Commission should approve market-based rates for the proposed storage field. Applicants maintain that, in rejecting market-based rates, the ALJ placed too much emphasis on the need for Applicants to demonstrate their lack of significant market power. In reaching his decision, the ALJ was guided by the FERC's observations in Docket No. PR94-9-00, which involved a request by Mich Con for FERC approval of market-based rates for interstate storage services comparable to the market-based rates for intrastate service approved by the Commission's October 28, 1993 order in Cases Nos. U-10149 and U-10150. Mich Con's request to use market-based intrastate storage rates for interstate storage service performed pursuant to Section 311 of the NGPA was denied by the FERC because the FERC's regulations would not permit the utility to deviate from cost-of-service based rates in the absence of proof that the utility was unable to exercise significant market power. Although recognizing that the FERC's ruling in Docket No. PR94-9-00 is not binding on the Commission, the ALJ adopted the FERC's rationale as a sound and reasonable policy.

Applicants argue that adoption of the FERC's rationale contradicts the Commission's previous approvals of market-based storage rates as evidenced by the October 28, 1993 order

in Cases Nos. U-10149 and U-10150. Further, Applicants point out that the record is replete with testimony regarding the sufficiency of existing competition in the market for storage services in Michigan. According to Applicants, existing market forces are an effective substitute for cost-based rate regulation. Citing the testimony of Mr. Bhargava and William K. Bokram, an Interstate Pipeline Specialist in the Commission's Gas Division, Applicants argue that the proposed storage field will be in direct competition with other companies providing storage services, including companies affiliated with ANR. Indeed, Applicants insist that even ANR's witness Yestrepsky indicated that customers in Michigan have access to ample storage at reasonable prices and that some companies have excess storage capacity.

Finally, Applicants contend that the $1.00 per Mcf maximum storage rate set forth in their proposed tariff, admitted as Exhibit A-3, represents the upper end of the competitive rates currently available for storage in Michigan. Applicants' position is based on the Commission's description in the October 28, 1993 order in Cases Nos. U-10149 and U-10150 of the range of storage rates being charged in Michigan, which range from a low of $0.40 per Mcf to a high of $0.93 per Mcf. However, Applicants suggest that, if for any reason the Commission has concerns about the maximum rate contained in the proposed tariff, the Commission should still approve market-based storage rates, but with a lower maximum.

The Staff maintains that consideration of the FERC's standard for approving a lack of market power is not essential to the Commission's determination in this proceeding. The Staff emphasizes that storage in Michigan is controlled by many different companies, including four local distribution utilities, two interstate pipelines, and several other storage and marketing companies. According to the Staff, there is sufficient competition to dilute market power.

Further, the Staff maintains that the development of additional storage projects will increase competition.

In response, ANR agrees with the ALJ's determination that the Commission should apply the FERC's rationale from Docket No. PR94-9-00 and require Applicants to establish their inability to exercise significant market power before market-based rates are approved for intrastate storage service. ANR insists that in order to use market-based rates, Applicants must demonstrate that there are sufficient quantities of good alternatives to render a price increase by Applicants unprofitable. Further, ANR states that some of the indicators of Applicants' market power would include their market share and the ability of competitors to enter the market. Arguing that Applicants and their affiliates control approximately 25% of the storage capacity in Michigan, ANR suggests that it would be unwise for the Commission to unleash them to dominate the intrastate storage market in the absence of the comprehensive study of market power suggested by the ALJ.

The Commission finds that the exceptions raised by Applicants and the Staff are well taken. In Cases Nos. U-10149 and U-10150, the Staff proposed that Mich Con begin offering market-based contract storage service at a price not to exceed $1.50 per Mcf. In support of this proposed rate, the Staff noted that (1) ANR recently signed a long-term contract to purchase the entire storage capacity of the Blue Lake storage field at a maximum rate of $0.64 per Mcf, (2) the proposed storage rates included in FERC Order No. 636 compliance filings recently submitted by ANR and Panhandle Eastern Pipeline Company were $0.7848 and $0.932 per Mcf, respectively, and (3) available storage in the Cold Springs 1 storage field is currently being marketed at $0.83 per Mcf. (October 28, 1993 order, Cases Nos. U-10149 and U-10150, p. 34.) Included in the Staff's proposal was an estimate that Mich Con would

sell all 17.4 Bcf of its excess storage capacity at an average rate of $0.80 per Mcf, which would have meant the inclusion of $13.9 million in gas storage revenues for the purpose of computing Mich Con's revenue requirement. Although the Commission rejected the Staff's estimate of Mich Con's gas storage revenues, it ultimately approved the Staff's proposal regarding Mich Con's commencement of market-based rates for contract storage service. Subsequently, the Commission reaffirmed its preference for market-based rates for gas storage service in its May 19, 1994 order approving the settlement agreement in Case No. U-10602, which authorized Lee 8 Storage Partnership to charge a market-based storage rate within a flexible range of $0.25 to $1.75 per Mcf.

For over ten years, state and federal regulators have been shifting the regulatory structure of the natural gas industry away from a traditional cost-of-service monopoly model towards a competitive market model. Wellhead price controls have been eliminated, and pipeline and local distribution company services are being unbundled. In part, these changes are grounded on the understanding that competition in the marketplace produces price signals that optimize the allocation of resources. The Commission is persuaded that market-based pricing in the intrastate market for storage services is a reasonable methodology for encouraging the cost-effective development of new storage fields. Indeed, the Commission finds that market-based rates provide greater incentives for the conversion of reservoirs into storage facilities than cost-based rates. Market-based pricing for storage services should also be more effective in discouraging the conversion of reservoirs into storage fields either out of economic order or in times of oversupply.

The ALJ, although recognizing that the FERC's ruling in Docket No. PR94-9-00 was not binding on the Commission, nevertheless recommended adoption of the FERC's rationale.

The Commission disagrees. The FERC's decision in PR94-9-00 was controlled by federal regulations that limited Mich Con to three options for the establishment of rates. An examination of the FERC's decision reveals that the FERC denied Mich Con's request to elect to use its state-approved market-based storage rate for its Section 311 storage service because the applicable federal regulations were designed to ensure that all Section 311 rates would be established on a cost basis in the event that such a determination had been made at the state level. It was not. Accordingly, pursuant to the FERC's regulations, Mich Con's request for approval of market-based rates could not be granted in the absence of a factual record.

Unlike the FERC, the Commission has a complete record that supports a finding that market-based rates are appropriate. Michigan's storage market is maturing and is composed of a variety of providers, some of which have excess supply. The record also demonstrates that Michigan is advantaged by the abundance of Silurian-Niagaran reefs that may be converted into storage fields, which means that competitors can more easily enter the market. Indeed, Michigan's leadership in storage capacity has enhanced service reliability and reduced the cost of gas for its residents and businesses. Accordingly, in light of the existing record and given the significant differences between the intrastate storage market regulated by the Commission and the interstate market regulated by the FERC, the Commission is persuaded that adoption of the FERC's criteria for approval of market-based rates is unnecessary. Rather, the Commission finds that the record in this proceeding supports approval of the market-based storage rate supported by Applicants and the Staff.

Cost-Based Rates

In its second exception, Applicants urge the Commission also to approve cost-of-service based rates for storage and transportation services of up to $0.621 per Mcf and up to $0.025

per Mcf, respectively, notwithstanding approval of market-based rates for the same services. The apparent explanation for Applicants' request, which appears for the first time in its exceptions, is that the FERC's July 19, 1994 order in Docket No. PR94-9-00 alerted Applicants to the likelihood that absent a hearing at the FERC, the storage and transportation costs of service established in this proceeding would determine the maximum rates applicable to interstate services provided by Applicants pursuant to Section 311 of the NGPA.

In response, ANR opposes approval of the cost-of-service based tariffs. However, ANR's opposition to approval of these cost-based rates is grounded in its belief that inadequate notice was given to potential storage service customers and does not involve any claim that the requested cost-of-service based rates were erroneously calculated by Applicants.

The Commission finds that approval of Applicants' request for cost-of-service based rates in addition to market-based rates should be rejected. Although their storage and transportation costs of service are supported by the record, Applicants' request could produce confusion due to the existence of duplicate tariffs for similar services and was made too late for consideration by the Commission.

Production of Liquid Hydrocarbons

Staff witness Nida testified that the proposed storage field is expected to produce significant quantities of native liquid hydrocarbons for several years during withdrawal cycles. According to Mr. Nida, the Staff believes that current royalty owners should reap some benefit from the liquid hydrocarbon production.

The Commission is not persuaded that the certificate of public convenience and necessity should be expressly conditioned in response to Mr. Nida's concern. If a dispute arises with

regard to the adequacy of compensation for the production of native liquid hydrocarbons, affected parties can seek relief in a more appropriate forum.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1929 PA 238, as amended, MCL 486.251 et seq.; 1929 PA 9, as amended, MCL 483.101 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 165, MCL 483.151 et seq.; 1909 PA 144, as amended, MCL 460.301 et seq.; 1970 PA 127, MCL 691.1201 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, R 460.17101 et seq.

b. When constructed and operated in accordance with the testimony in this proceeding, the proposed gas storage field, gathering system, and pipeline will serve the present or future public convenience and necessity, will meet the requirements of the Michigan Gas Safety Code, and will not significantly affect the environment.

c. The present or future public convenience and necessity will require the acquisition by Applicants of property or property interests for use as a natural gas storage field in Section 35 of Bruce Township and Sections 2, 3, 10, 11, 14, and 15 of Washington Township, Macomb County, Michigan, as depicted on Exhibit A-34.

d. When constructed and operated in accordance with the testimony in this proceeding, the proposed gas storage field will be safe for development and operation of gas storage.

e. Washington 10 Storage Corporation should be authorized to implement a market-based storage service rate of up to $1.00 per Mcf as set forth on Attachment A to this order.

f. Washington 10 Storage Corporation should be authorized to implement a market-based transportation service rate of up to $0.025 per Mcf as set forth on Attachment B to this order.

g. The funds derived from the issuance and sale of securities proposed in the application are to be applied to lawful purposes, and the issuance is essential for the successful carrying out of those purposes.

THEREFORE, IT IS ORDERED that:

A. Certificates of public convenience and necessity are granted authorizing Washington 10 Storage Corporation to construct the proposed storage field, gathering system, and transmission pipeline.

B. Washington 10 Storage Corporation is authorized to implement a market-based storage service rate of up to $1.00 per thousand cubic feet as set forth on Attachment A to this order.

C. Washington 10 Storage Corporation is authorized to implement a market-based transportation service rate of up to $0.025 per thousand cubic feet as set forth on Attachment B to this order.

D. Washington 10 Storage Corporation shall, within 30 days, prepare and submit to the Commission for approval and filing tariff sheets incorporating the market-based rates authorized by this order.

E. Washington 10 Storage Corporation and Washington 10 Storage Partnership are authorized to issue and sell up to $130 million principal amount of securities, including stocks, bonds, notes, guarantees, long-term debt, and long-term financing arrangements, whether secured or insecured.

F. Washington 10 Storage Corporation and Washington 10 Storage Partnership shall file reports regarding the actual and proposed issuance and sale of any securities authorized by this order, setting forth the terms and conditions of each securities issuance, including net

proceeds to the corporation or the partnership. These reports shall be made by an officer of the corporation or partnership who has knowledge of the facts of those issuances and sales.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ Ronald E. Russell
Commissioner

/s/ John L. O'Donnell
Commissioner

By its action of December 16, 1994.

/s/ Dorothy Wideman
Its Executive Secretary

ATTACHMENT A

Rate Schedule No. 1

CONTRACT STORAGE RATE

Availability:

This rate schedule is available to all customers desiring firm or interruptible storage service to the extent that:

(a) the Company has determined that it has sufficient available and uncommitted storage capacity to perform the service requested by the customer; and

(b) the company and the customer have executed a storage agreement under this rate schedule.

Characteristics of Service:

As described in the storage agreement. Any rates, terms, and conditions not covered by this rate schedule shall be provided for in the storage agreement.

Rate:

Storage Rate:

The storage rate shall be a rate not to exceed a total of $1.00 per thousand cubic feet of gas, and may consist of a demand portion and a commodity portion, as provided in the storage agreement.

Fuel: Up to .72% of volumes delivered by the customer to the Company for storage, and up to .72% of volumes withdrawn from storage by the Company for the customer.

Penalty Charges:

The Company may charge the customer for deliveries to, or redeliveries from, storage in excess of the maximum volumes set forth in the storage agreement. The penalty rate shall not exceed the sum of $10.00 per thousand cubic feet of gas.

ATTACHMENT B

Rate Schedule

CONTRACT TRANSPORTATION RATE

Availability:

This rate schedule is available to all customers desiring firm or interruptible transportation service to the extend that:

(a) the Company has determined that it has sufficient available and uncommitted transportation capacity to perform the service requested by the customer; and

(b) the Company and the customer have executed a transportation agreement under this rate schedule.

Characteristics of Service:

As described in the transportation agreement. Any rates, terms, and conditions not covered by this rate schedule shall be provided for in the transportation agreement.

Rate:

Transportation Rate:

The transportation rate shall be a rate not to exceed $0.0250 per thousand cubic feet of gas for volumes transported for injection or withdrawal from storage.

Fuel: None [covered under storage rate schedule].

Penalty Charges:

None [covered under the storage rate schedule].