

## Interlocutory Orders, Etc.

Record, and (2) to the last sentence of the first page of the JCI Motion, which includes the same phrase; and

**IT IS FURTHER ORDERED THAT** *in camera* treatment for the above materials will expire at 12:01 a.m. Eastern Daylight Time on June 1, 2014.

By the Commission.

EL PASO ENERGY CORPORATION AND THE COASTAL  
CORPORATION

*Docket No. C-3996. Order, October 4, 2010*

Order modifying consent order requiring El Paso Energy Corporation (“El Paso”) to establish a \$40 million development fund for use by Williams Field Services (“Williams”) in connection with the divestiture of two natural gas pipelines to Williams. As circumstances surrounding the divestiture have changed and as Williams has not needed to use any portion of the fund within the last 9 years, the Commission modified the order to set aside the development fund requirement and return any unused funds to El Paso.

ORDER REOPENING AND MODIFYING ORDER

On June 28, 2010, El Paso Energy Corporation (“El Paso”) filed a Petition of El Paso Corporation to Reopen and Modify (“Petition”), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice, 16 C.F.R. § 2.51, asking that the Commission reopen and modify the consent order in Docket No. C-3996 (“Order”) issued by the Commission on March 19, 2001. The Order requires El Paso, among other things, to establish a \$40 million development fund (to remain in effect for 20 years) in connection with the divestiture to Williams Field Services (“Williams”) of two natural gas pipelines in the central Gulf of Mexico.

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In its Petition, El Paso asks that the Commission reopen the Order and set aside the development fund requirement to allow El Paso to recover any money remaining in the fund. El Paso asserts that its sale of the ANR natural gas pipeline, along with a shift in natural gas production and exploration from the Gulf of Mexico to on-shore reserves, eliminates the need for the development fund. El Paso submits that these circumstances constitute changed conditions of fact sufficient to warrant reopening and modifying the Order to set aside the development fund requirement. El Paso also claims that the proposed Order modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the Petition.

## BACKGROUND

On January 17, 2000, El Paso entered into an agreement to acquire The Coastal Corporation (“Coastal”). Both El Paso and Coastal owned natural gas pipelines in a number of locations in the United States, which raised competitive concerns. One such area was a central portion of the Gulf of Mexico where El Paso owned several pipelines and Coastal owned the ANR pipeline, which is a major natural gas pipeline in the relevant area. On March 19, 2001, the Commission issued an Order (with El Paso’s consent) to resolve its concerns, including a requirement that El Paso divest the Green Canyon and Tarpon pipelines and related assets to Williams.

In connection with these divestitures, Paragraph V.D. of the Order also required El Paso to establish a \$40 million development fund, to remain in effect for a twenty-year period.<sup>1</sup> The purpose of the development fund was to encourage expansions of the Green Canyon and Tarpon pipelines and thereby expand the reach of Williams into “an area of competitive concern and to compete against the Respondents in that area.”<sup>2</sup> The Order set forth specific conditions, including geographic location, that would permit Williams to access the fund. The Order also provided that any money remaining in the fund after twenty years would be returned to El Paso.

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<sup>1</sup> The funds are being held in an escrow account, pursuant to the Order.

<sup>2</sup> Analysis of the Complaint and Proposed Consent Orders to Aid Public Comment, p. 7 (Jan. 29, 2001).

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After the Commission accepted the consent agreement for public comment, El Paso consummated its merger with Coastal, divested the Green Canyon and Tarpon pipelines to Williams in January 2001, and established the development fund. Since establishment of the fund, Williams has not found an opportunity to use any of the money for construction projects that comply with the Order's conditions.

In 2007, El Paso sold the ANR pipeline to Trans-Canada, Inc. ("TransCanada"). The sale to TransCanada introduced a new competitor into the market and restored ANR to its pre-merger status as an alternative to El Paso, but this time under the ownership of TransCanada instead of Coastal.

As explained in the Petition, in addition to El Paso's sale of ANR to TransCanada, there have been other developments in the Central Gulf area since 2001. To a great extent, the focus of natural gas exploration and discovery has shifted away from the Gulf of Mexico to other areas of the country. In particular, natural gas exploration over the last few years has focused on lower-cost on-shore shale production. The number of producing gas wells in the Gulf dropped by over 50 percent from 2001 to 2008, while at the same time the number of such wells in the United States increased overall by about 28 percent.<sup>3</sup> In the specific geographic area for which the development fund is available, production dropped by about 76 percent from 2000 to 2009.<sup>4</sup> Exploration activities also have shifted away from the Gulf. The number of rigs drilling for gas has declined from 105 in 2000 to 25 in early 2010.<sup>5</sup>

El Paso incorporated the Order's development fund requirement into the purchase agreement with Williams when it sold the Green Canyon and Tarpon pipelines. Because termination of the fund would result in El Paso breaching the agreement, El Paso has negotiated a settlement with Williams. In exchange for giving up the development fund, Williams will

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<sup>3</sup> Petition at 16.

<sup>4</sup> *Id.* at 16-17.

<sup>5</sup> *Id.* at 19.

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receive a payment from El Paso as well as other non-monetary consideration.<sup>6</sup>

## STANDARDS FOR REOPENING AND MODIFYING

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.<sup>7</sup> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.<sup>8</sup>

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>9</sup> In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the petitioner make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory

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<sup>6</sup> We need not spell out the details of the settlement for purposes of this Order, thereby allowing us to publish a single public version of this Order without redaction.

<sup>7</sup> See Supplementary Information, Amendment to 16 CFR 2.51(b), announced Aug. 15, 2001, (“Amendment”).

<sup>8</sup> S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Dkt. No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

<sup>9</sup> Hart Letter at 5; 16 C.F.R. § 2.51.

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showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.<sup>10</sup> This showing requires the petitioner to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the petitioner has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,<sup>11</sup> and the burden remains on the petitioner in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.<sup>12</sup> All information and material that the petitioner wishes the Commission to consider shall be contained in the request at the time of filing.<sup>13</sup>

#### CHANGED CIRCUMSTANCES OF FACT WARRANT MODIFICATION OF THE ORDER

The Commission has determined that (i) changed circumstances in the central Gulf of Mexico require that the Order be reopened; and (ii) in light of these changed circumstances, the order should be modified to set aside the development fund requirement imposed by Paragraph V.D.

The Commission previously has modified orders to eliminate a divestiture requirement when a respondent subsequently sold off

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<sup>10</sup> 16 C.F.R. § 2.51.

<sup>11</sup> See *Louisiana-Pacific Corp.*, 967 F.2d at 1376-77 (reopening and modification are independent determinations).

<sup>12</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

<sup>13</sup> 16 C.F.R. § 2.51(b).

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one of the “offending assets” that prompted the divestiture in the first place.<sup>14</sup> In this instance, El Paso’s acquisition of ANR from Coastal gave rise to the Green Canyon and Tarpon divestitures and the establishment of the development fund. El Paso’s 2007 sale of ANR to TransCanada introduced a new competitor to take the place of Coastal, and seemingly would eliminate any concern if El Paso were to be relieved of its development fund obligation.

In previous matters, however, the respondents have sold the offending assets and petitioned the Commission to reopen and modify the order within a time period much shorter than the almost ten years that have passed in this matter. Because market conditions may have changed or other considerations may have become relevant since the Commission issued its Order, it is appropriate to consider whether elimination of the development fund would affect competition in the relevant market today. If removal of the development fund would substantially lessen competition today, then an argument might exist for denying El Paso’s Petition notwithstanding the sale of ANR.

Whether competition might be substantially reduced in the market today if the Commission terminated El Paso’s fund obligation depends on the likelihood that the fund would ever be used by Williams.<sup>15</sup> We do not believe that removing the fund obligation would reduce significantly Williams’ reach in the development area and thereby potentially reduce competition. To date, Williams has not found any opportunities to draw on the fund. The recent focus on shale natural gas development has led to a decline in the exploitation of offshore natural gas reserves. Natural gas production and exploration in the Central Gulf area has dropped dramatically (with both activities declining by approximately 76 percent) since the fund was established. Declining production and exploration thus supports the conclusion that Williams is unlikely to use the development fund before the Order expires in another ten years. El Paso’s settlement with

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<sup>14</sup> See *In the Matter of Midcon Corporation*, Dkt. No. 9198, Order Modifying Order, 111 F.T.C. 100 (Feb. 6, 1986); *In the Matter of Entergy Corporation*, Dkt. No. C-3998, 140 F.T.C. 1125, Order Reopening and Setting Aside Order (July 1, 2005).

<sup>15</sup> The development fund is contingent – available to Williams only for specific uses, and only until 2021.

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Williams is consistent with this conclusion. The negotiated settlement amount is not a substantial percentage of the total, which suggests that Williams itself thinks it is unlikely to use a substantial portion of the fund. Considering that the fund has never been used, and market conditions suggest expansion is unlikely, modifying the Order would allow El Paso simply to get back (after its settlement with Williams) what is expected to remain when the Order terminates.<sup>16</sup>

## CONCLUSION

For the reasons explained above, the Commission has determined to reopen and modify the Order to set aside the development fund required by Paragraph V.D. of the Order. Therefore, the Order will be modified to set aside the development fund requirement and to set aside the related definitions.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that Paragraphs I.F., I.I., I.YY., and V.D. of the Order be, and hereby are, set aside as of the effective date of this order.

By the Commission.

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<sup>16</sup> El Paso also claims that reopening and modifying the Order is in the public interest. Having determined to grant El Paso's Petition due to changed conditions, the Commission need not decide the separate public interest question.