Interlocutory Orders, Etc.

KINDER MORGAN, INC.

Docket No. C-4355. Order, October 28, 2013

Commission letter and order modifying the Commission's final order to permit respondent to extend a transition services agreement with the acquirer of the divested assets.

LETTER ORDER APPROVING TRANSITION SERVICES AGREEMENT

Laura A. Wilkinson, Esq.
Weil, Gotshal & Manges LLP

Dear Ms. Wilkinson:

This letter responds to the Request for Prior Approval and to Reopen Proceedings and Modify the Decision and Order ("Request") filed by Kinder Morgan, Inc. ("Kinder Morgan"), on August 7, 2013. The Request was placed on the public record for comments until September 13, 2013, and no comments were received. In its Order Reopening and Modifying Order, issued on October 28, 2013, the Commission has determined to reopen the Decision and Order ("Order") in this matter and modify it as requested by Kinder Morgan.

Kinder Morgan has also requested that, pursuant to Section 2.41 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41 (2013), the Commission approve the modification to the Transitions Services Agreement ("TSA Modification") described in the Request. After consideration of the TSA Modification as set forth in the Request and supplemental documents, as well as other available information, and consistent with the Order as modified by the Order Reopening and Modifying Order, the Commission has determined to approve the TSA Modification. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Kinder Morgan's Request, and has assumed them to be accurate and complete.

By direction of the Commission, Chairwoman Ramirez not participating, and Commissioner Wright abstaining.

ORDER REOPENING AND MODIFYING ORDER

On August 7, 2013, Kinder Morgan, Inc. ("Kinder Morgan") filed a 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 the Commission to reopen and modify the consent order in Docket No. C-4355 ("Order") issued by the Commission on June 6, 2012.

The Order requires Kinder Morgan, in connection with the divestiture of certain natural gas pipeline and related assets, to provide transitional assistance to the acquirer of the assets for a period not to exceed nine months. Kinder Morgan divested the required assets to Tallgrass Energy Partners LP ("Tallgrass") on November 21, 2012, and entered into an agreement to provide transitional assistance to Tallgrass. In its petition, Kinder Morgan, for itself and Tallgrass, asks that the Commission reopen the Order and extend the time period allowed for the transitional assistance from nine to fourteen months with an option by the acquirer to extend the period for five additional one-month periods (subject to approval by the Commission).

Kinder Morgan bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. Kinder Morgan also claims that the proposed modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the petition.

Background

On October 16, 2011, Kinder Morgan entered into an agreement to acquire El Paso Corporation ("El Paso"). Both Kinder Morgan and El Paso owned natural gas pipelines in the Rocky Mountain region of Wyoming and Colorado that raised competitive concerns for the Commission. To resolve its concerns, the Commission issued the Order on June 6, 2012, requiring Kinder Morgan to divest certain natural gas pipelines and related assets.

Paragraph II.D. of the Commission's Order also requires Kinder Morgan to provide certain transition services to the

acquirer of the divested assets for a period "not to exceed nine (9) months" from the date of divestiture. Transitional assistance includes administrative and technical assistance relating to the operation of natural gas pipeline systems and pipeline business. Such assistance allows time for a purchaser to transfer highly automated systems that control pipelines and is common, even necessary, when pipeline assets are sold.

At the same time that Kinder Morgan completed the sale of the pipeline assets to Tallgrass, it also entered into a Transition Services Agreement ("TSA") with Tallgrass that commenced on November 21, 2012, and terminated on August 13, 2013. Before termination of the agreement, however, at the request of Tallgrass, Kinder Morgan and Tallgrass agreed to extend the time period by five months with an option by Tallgrass to extend the time further for up to five successive one-month periods, for a potential total of a ten-month extension (subject to approval by the Commission).

The TSA obligates Kinder Morgan to provide services and software support to Tallgrass in twenty-two distinct categories, and as of the date of the petition, transitional services were no longer needed for approximately twelve of those categories. If Kinder Morgan is not allowed to extend the time period for providing the transitional assistance, Tallgrass will be unable to operate the assets and properly conduct its business. As a result, Tallgrass would be unable to effectively compete and so the requested extension would benefit consumers as well as Tallgrass.

Standard to Reopen and Modify

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.[1] 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

[1] *See Supplementary Information*, *Amendment to* 16 CFR 2.51(b), ("Amendment"), 65 Fed. Reg. 50636, August 21, 2000.

need for the order or make continued application of it inequitable or harmful to competition.[2]

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.[3] In the case of "public interest" requests, FTC Rule of Practice 2.51(b) requires an initial "satisfactory showing" of how the modification would serve the public interest before the Commission determines whether to reopen an order.

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 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.[4] This showing requires the requester 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 requester 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

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[2] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket 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).

[3] Hart Letter at 5; 16 C.F.R. § 2.51.

[4] 16 C.F.R. § 2.51.

an order oblige the Commission to modify it,[5] and the burden remains on the requester 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.[6] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[7]

The Public Interest Warrants Reopening and Modifying the Order

The Commission has determined that (i) the public interest requires that the Order be reopened and (ii) the Order should be modified to extend the time period allowed for Kinder Morgan to provide transitional assistance to the acquirer of the divested assets.[8] The purpose of the Order is to maintain competition in the market for transportation of natural gas in geographic markets located in Wyoming and Colorado. Without the continuing transitional assistance, Tallgrass will not be able to properly conduct the business acquired from Kinder Morgan and its ability to effectively compete in these markets will be materially diminished.

Providing an acquirer with necessary transitional assistance is an important component of the divestiture itself. In its orders, the Commission often requires respondents to provide transitional assistance to allow time for an acquirer to transfer or develop the assets necessary to operate the divested business. Because of concerns about "ongoing entanglements" among competitors, however, the Commission also seeks to limit the length of time

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[5] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[6] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[7] 16 C.F.R. § 2.51(b).

[8] Kinder Morgan has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that Kinder Morgan has demonstrated the public interest supports the modification, the Commission need not consider whether conditions of fact have indeed changed since it issued the Order.

that transitional assistance is provided. In this instance, the Commission does not believe that extending the time period as requested by both Kinder Morgan and Tallgrass will raise a concern about ongoing entanglements or otherwise frustrate achieving the remedial purposes of the Order.

Conclusion

For the reasons explained above, the Commission has determined to reopen and modify Paragraph II.D. of the Order. Accordingly,

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

IT IS FURTHER ORDERED that Paragraph II.D. of the Order be revised to read:

> At the request of the Acquirer, pursuant to an agreement that receives the prior approval of the Commission, Respondent shall, for a period not to exceed nineteen (19) months from the date Respondent divests the KM Pipeline Assets, or as otherwise approved by the Commission, provide Transitional Assistance to the Acquirer: . . .

By the Commission, Chairwoman Ramirez not participating, and Commissioner Wright abstaining.

Interlocutory Orders, Etc.

PINNACLE ENTERTAINMENT, INC.

Docket No. D-9355. Order, November 20, 2013

Order approving Pinnacle Entertainment, Inc.'s divestiture of all assets associated with Ameristar Casinos, Inc.'s casino and hotel project under construction in Lake Charles, Louisiana to GNLC Holdings, Inc.

LETTER ORDER APPROVING APPLICATION FOR APPROVAL OF DIVESTITURE OF THE AMERISTAR LOUISIANA ASSETS

Jonathan S. Gowdy, Esquire
Morrison & Foerster LLP

Dear Mr. Gowdy:

This letter responds to the Application for Approval of Divestiture of the Ameristar Louisiana Assets ("Ameristar Louisiana Application") filed by Pinnacle Entertainment, Inc. on August 30, 2013. The Ameristar Louisiana Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Pinnacle's proposed divestiture of the Ameristar Louisiana Assets to GNLC Holdings, Inc., the parent company of Landry's, Inc. The Application was placed on the public record for comments until November 12, 2013, and no comments were received.

After consideration of the proposed divestiture as set forth in Pinnacle's Ameristar Louisiana Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Pinnacle's Ameristar Louisiana Application and has assumed them to be accurate and complete.

By direction of the Commission.