ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of Kinder Morgan, Inc., File No. 121-0014, Docket No. C-4355

I. Introduction

The Federal Trade Commission (the "Commission"), subject to its final approval, has accepted for public comment an Agreement Containing Consent Orders (Consent Agreement) with Kinder Morgan, Inc. ("KMI" or "Respondent") and El Paso Corporation ("El Paso"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that otherwise would likely result from Respondent's acquisition of El Paso. Under the terms of the agreement, Respondent will divest its own Rockies Express (REX), Kinder Morgan Interstate Gas Transmission, and Trailblazer pipelines, as well as associated processing and storage capacity.

On October 16, 2011, KMI announced that it had entered into a definitive agreement whereby KMI will acquire all of the outstanding shares of El Paso for approximately $38 billion, including the assumption of $17 billion in debt (the "Acquisition"). The Acquisition would combine the nation's largest two natural gas pipeline owners. Separately from any Commission action, El Paso will sell its exploration and production ("E&P") assets to another company, delivering its midstream components and the proceeds from the E&P sale to KMI.

Without some form of relief, the Acquisition is likely to result in anticompetitive effects in areas in the Rocky Mountains where the combination of the KMI pipelines and the El Paso pipelines threatens to lessen competition substantially in pipeline transportation. The Acquisition is also likely to result in anticompetitive effects in other markets related to pipelines: gas processing and "no-notice" service. The proposed Consent Agreement effectively remedies these possible anticompetitive effects by requiring KMI to divest three of its natural gas pipelines and two natural gas processing plants.

II. The Parties

A. Kinder Morgan, Inc.

KMI is a publicly traded corporation principally engaged in midstream petroleum and natural gas services. KMI is the general partner in the master-limited partnership ("MLP") Kinder Morgan Energy Partners (KMEP) (collectively, "Kinder Morgan"). KMEP owns over 38,000 miles of pipelines and 180 terminals in North America for the transportation and storage of natural gas, refined petroleum products, crude oil, and carbon dioxide.

B. El Paso Corporation

El Paso is a publically traded corporation principally engaged in natural gas transportation, natural gas gathering and processing, and E&P. El Paso is the general partner in the MLP, El Paso Pipeline Partners (EPPP), into which El Paso placed some of its pipelines. Between El Paso and EPPP, El Paso owns or has interests in over 43,000 miles of natural gas pipelines and gathering systems.

III. Market Structure and Competitive Effects in Pipeline Transportation

Natural gas pipelines provide the critical connection between natural gas wells, which produce natural gas, and consumers who use natural gas to generate heat and power. Pipeline transportation is the only economical means to transport natural gas between the producers and consumers. Pipelines that cross state lines are regulated by the Federal Energy Regulatory Commission ("FERC"). FERC regulates maximum-allowable interstate natural gas pipeline transportation fees, but does not eliminate competition between pipelines. So long as the pipelines comply with their tariffs, they are otherwise free to compete by offering prices below their maximum tariff rate, as well as competing on other terms of service.

The competitive overlaps between Kinder Morgan and El Paso in pipeline transportation are in the Rocky Mountain gas production areas in and around Wyoming, Colorado, and Utah. Kinder Morgan and El Paso pipelines dominate the transportation options for five production areas in the Rockies: (1) the Denver/Julesburg/Niobrara Production Basin; (2) the Powder River Production Basin; (3) the Wind River Production Basin; (4) the Western Wyoming Production areas including the Green River Production Basin, the Red Desert Production Basin, and the Washakie Production Basins; and (5) the Piceance Production Basin. Each of these production areas is a relevant geographic market for the transportation of natural gas.

Production areas are connected to more than one pipeline and some pipelines connect to more than one production area. Some pipelines do not connect directly to the basins but interconnect with the pipelines leaving the basins and are necessary to get natural gas from the basins to consuming markets. There are four Kinder Morgan pipelines that serve the basins and interconnections in the Rockies and four El Paso pipelines that serve those same basins and interconnections.

In each of these relevant geographic markets, the pipeline transportation of natural gas is highly concentrated. The Acquisition would significantly increase concentration and eliminate direct competition between the pipelines owned by the two companies, leading to higher prices for pipeline transportation of natural gas to the detriment of producers and consumers of natural gas.

One consumption area in the Rockies is also a relevant geographic market. The Colorado Front Range, which runs from Fort Collins, Colorado in the north to Pueblo, Colorado in the south, contains the major population centers in the Rockies. It overlaps the Denver/ Julesburg/Niobrara Production Basin but requires substantial additional natural gas from the other production areas in the Rockies, particularly in the winter. The pipeline transportation of natural gas into this market from the other production areas is highly concentrated. The Acquisition would significantly increase concentration and eliminate direct and potential competition between the pipelines owned by the two companies, leading to higher prices for pipeline transportation of natural gas to the detriment of consumers of natural gas along the Colorado Front Range.

IV. Other Markets Impacted by the Proposed Acquisition

Two other markets, the processing of natural gas and the provision of no-notice pipeline transportation services, would also be impacted by the Acquisition. Both services are related to the pipeline transportation of natural gas.

Natural gas must meet certain standards before an interstate pipeline can accept it. In some areas, natural gas contains heavy hydrocarbons, commonly referred to as natural gas liquids or NGLs. Interstate pipelines have a limit on how much NGLs natural gas can contain and be transported on a pipeline. Gas that contains excessive amounts of NGLs must be treated at a gas processing plant to remove those liquids before it can be transported on interstate pipelines. Currently, the high value of NGLs, relative to the natural gas, would cause the gas to be processed regardless of the specifications of the pipelines. There is no substitute for gas processing to remove the NGLs. The relevant geographic market for processing gas is in the Wind River Production Basin and surrounding areas. For some wells in areas around that basin, only El Paso and Kinder Morgan have processing plants to treat gas before it goes onto interstate pipelines. The Acquisition would eliminate direct competition between the processing plants owned by the two companies, leading to higher prices for gas processing to the detriment of producers of natural gas.

No-notice service is also a relevant market. Interstate pipelines typically require advance notice before a customer transports gas on a pipeline. Some customers' demand for natural gas fluctuates so much that the customers cannot give the required notice to the pipeline and still obtain the natural gas that they need. No-notice service is the term that refers to gas transportation where the customer is not obligated to provide advance notice before shipping gas. Utility customers whose natural gas demand can shift suddenly due to changes in the weather often require no-notice service. No-notice service is provided by pipelines at a premium price. It is not economical for each utility that has need for no-notice service to build sufficient storage to meet all of its peak needs through building its own storage facility. Many utilities are dependent on pipeline companies to provide no-notice service utilizing pipeline owned or third party storage. The relevant geographic market for no-notice service is the Colorado Front Range. Only those pipelines that currently serve this area can offer no-notice service. Currently only El Paso offers no-notice service in that area, but Kinder Morgan is a likely potential entrant into the market. The acquisition by Kinder Morgan of El Paso would eliminate potential competition for no-notice service to the detriment of utility customers.

V. The Proposed Agreement Containing Consent Orders

Under the Proposed Agreement Containing Consent Orders (the "Consent Order") Kinder Morgan has 180 days from the closing date of its acquisition of El Paso to completely divest three KMI pipelines and two processing plants in the Rockies. The fourth KMI pipeline, the TransColorado, does not raise competitive concerns because its competition with El Paso is limited and there are viable alternatives for transporting natural gas from the San Juan Basin. Accordingly, the TransColorado was not included in the divested assets. These divestitures maintain the competitive status quo ante in the Rockies. Pursuant to the Consent Order, Kinder Morgan may complete its acquisition of El Paso, while the divestiture of pipelines and processing plants already owned by Kinder Morgan will maintain the level of competition that already existed. The Order to Hold Separate and Maintain Assets (discussed in the next section) will protect the competitive status quo until Kinder Morgan successfully finds a buyer for the assets to be divested.

The Consent Order requires Kinder Morgan to provide transitional assistance and support services to the buyer of the divested services. Kinder Morgan must also license any key software and intellectual property to the buyer. The Consent Order allows the buyer to recruit Kinder Morgan employees who work on the divested assets. For a period of two years, Kinder Morgan may not solicit employees that accept employment offers from the buyer to rejoin Kinder Morgan. The Consent Order also limits Kinder Morgan's access to, and use of, confidential business information pertaining to the divestiture assets.

If Kinder Morgan fails to fully divest the assets within the 180-day time period, the Order grants the Commission power to appoint a divestiture trustee to complete the divestiture. The Consent Order also governs the divestiture trustee's duties, privileges, and powers.

The Consent Order requires Kinder Morgan, or the divestiture trustee, if appointed, to file periodic reports detailing efforts to divest the assets and the status of that undertaking. Commission representatives may gain reasonable access to Kinder Morgan's business records related to compliance with the consent agreement. The Consent Order terminates when all requirements of the divestiture order outlined in Paragraphs II and IV of the Consent Order are satisfied.

VI. The Order To Hold Separate and Maintain Assets

The Order to Hold Separate and Maintain Assets ("Hold Separate Order") requires KMI to separate out the divestiture assets from its remaining businesses and assets. Pursuant to the Hold Separate Order, Kinder Morgan will not exercise any control or influence over the divestiture assets while seeking a buyer. The Hold Separate Order seeks to preserve the divestiture assets as viable, competitive, ongoing businesses, and it assures that Kinder Morgan does not access the confidential business information belonging to those businesses.

The Hold Separate Order also empowers the Commission to appoint a hold separate trustee to monitor the divestiture assets and requires the Respondent to appoint a hold separate manager, subject to approval of the hold separate trustee in concurrence with Commission staff, to manage day-to-day operations. The Hold Separate Order outlines the rights, duties, and responsibilities of both the trustee and the manager, including access to business records, hiring necessary consultants and attorneys, and any other thing reasonably necessary to carry out their duties. The hold separate manager reports to the hold separate trustee and not to Kinder Morgan.

The Hold Separate Order prohibits Kinder Morgan from interfering with the hold separate trustee and requires it to indemnify the trustee. The Hold Separate Order requires Kinder Morgan to provide certain support services and financial assistance to the divestiture assets to ensure they operate as they did before the merger.

The hold separate trustee must submit periodic reports to the Commission concerning compliance with the Hold Separate Order. The Commission may appoint a different hold separate trustee if the original trustee fails to carry out his duties. The hold separate manager has authority to hire staff, maintain the assets, continue on-going capital projects, and ensure employees of the divestiture assets are not involved in Kinder Morgan’s other businesses.

The Hold Separate Order terminates either (1) one day after the divestiture is completed or (2) three business days after the Commission withdraws acceptance of the consent agreement.

VII. Opportunity For Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission has also issued its Complaint in this matter. Comments received during this comment period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement’s proposed Order.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order to aid the Commission in its determination of whether it should make final the proposed Order contained in the Agreement. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.