UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
Melissa Holyoak
Mark R. Meador

In the Matter of **EnCap Investments L.P.,** **a limited partnership,** **EnCap Energy Capital Fund XI, L.P.,** **a limited partnership,** **Verdun Oil Company II LLC,** **a limited liability company,** **XCL Resources Holdings, LLC,** **a limited liability company,** **EP Energy Corporation,** **a corporation, and** **EP Energy LLC,** **a limited liability company.**	**DOCKET NO. C-4760** **REDACTED PUBLIC VERSION**

ORDER REOPENING AND MODIFYING DECISION AND ORDER

Respondents EnCap Investments L.P., EnCap Energy Capital Fund XI, L.P., Verdun Oil Company II LLC ("Verdun"), XCL Resources Holdings, LLC ("XCL"), and EP Energy LLC ("EP Energy") filed a petition on March 7, 2025 ("Petition") seeking to remove a prior-approval provision that the Commission imposed in a 2022 Decision and Order ("Order").[1] That provision requires them to obtain prior Commission approval before making certain acquisitions in the seven Utah counties that comprise the Uinta Basin.[2] Because Respondents have since exited the geographic market, they argue that the prior-approval provision is no longer necessary to protect competition.[3]

[1] Decision and Order, *In the Matter of EnCap Investments L.P.*, Matter No. 2110158 (Sept. 13, 2022). "EnCap" as used here includes EnCap Energy Capital Fund XI, L.P, its subsidiaries Verdun and XCL, and its general partner EnCap Investments L.P.
[2] *Id*. at 19.
[3] Petition at 3–4.

For the reasons discussed below, the Commission will grant in part and deny in part Respondents' Petition. The Commission finds that the Petition makes a satisfactory showing that the Order should be reopened and modified, but it has determined to grant a modification more limited than the one requested by Respondents. Instead of dispensing with the prior-approval provision entirely, the Commission modifies the Order to remove the obligation to obtain prior approval for any reentry acquisition into the market by Respondents and to thereafter replace the prior-approval requirement with a prior-notice requirement.

I. BACKGROUND

The Commission issued a complaint in this matter on March 25, 2022, alleging that the proposed acquisition of EP Energy by EnCap would violate Section 7 of the Clayton Act[4] and Section 5 of the Federal Trade Commission Act ("FTC Act").[5] The Complaint asserted that the acquisition would harm competition in the market for the development, production, and sale of Uinta Basin waxy crude to Salt Lake City area refiners (the "Relevant Market").[6]

According to the Complaint, Uinta Basin waxy crude is a relatively light crude oil with low levels of sulfur and other undesirable impurities.[7] It is classified as either yellow or black.[8] Compared to other crude oil, Uinta Basin waxy crude requires less processing to make transportation fuels and other petroleum-based products.[9] Its high paraffin wax content also suits it for the production of wax products.[10] Almost all sales of Uinta Basin waxy crude to Salt Lake City refineries occur in the Uinta Basin.[11] Salt Lake City area refiners have optimized their refineries to run Uinta Basin yellow and black waxy crudes.[12] Although other crudes are available to Salt Lake City area refiners, those crudes will not sufficiently constrain the price of Uinta Basin waxy crude.[13]

The Complaint alleged that, at the time, four producers accounted for over eighty percent of all Uinta Basin waxy crude production: EP Energy, EnCap's subsidiary XCL, Ovintiv, and Uinta Wax/Finley Resources.[14] EnCap's subsidiary XCL projected internally that the acquisition of EP Energy would increase its market share from 14 percent to between 30 to 40 percent.[15] The acquisition would eliminate substantial head-to-head competition between EnCap and EP Energy, according to the Complaint, thereby enabling EnCap to cut production and raise prices unilaterally in the Relevant Market.[16] The Complaint also alleged that the acquisition would

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[4] 15 U.S.C. § 18.
[5] *Id.* § 45.
[6] Complaint, *In the Matter of EnCap Investments L.P.*, Matter No. 2110158, ¶ 24 (Mar. 25, 2022) ("Complaint").
[7] *Id.* ¶ 17.
[8] *Id.* ¶ 16.
[9] *Id.* ¶ 17.
[10] *Ibid.*
[11] *Id.* ¶ 19.
[12] *Id.* ¶ 18.
[13] *Ibid.*
[14] *Id.* ¶ 22.
[15] *Id.* ¶ 25.
[16] *Id.* ¶ 24.

reduce the number of significant competitors in the Relevant Market from four to three, creating a likelihood of coordinated interaction between the remaining producers.[17]

To settle the Complaint's allegations, Respondents consented to an order that, among other things, required EnCap to divest EP Energy's Uinta Basin assets and for ten years to obtain prior approval from the Commission before making certain acquisitions in the Uinta Basin.[18] The Commission demanded the prior-approval provision pursuant to its 2021 policy statement requiring the inclusion of prior-approval provisions in divestiture orders.[19] Before 2021, the Commission's longstanding policy was to impose prior-approval provisions only in narrow circumstances.[20]

The prior-approval provision imposed on EnCap in the draft order drew strong public opposition: more than a dozen public comments warned that it would damage competition and stifle economic growth in the Uinta Basin region.[21] But in spite of these warnings, the Commission maintained the prior-approval provision when it approved the Order on September 13, 2022.[22]

Respondents submitted one transaction to the Commission for prior approval since the Order became final: a proposal by XCL to acquire Altamont Energy, LLC ("Altamont"), a producer of Uinta Basin waxy crude described as a "a small operator with no active rigs and no material growth plans it can achieve without access to capital."[23] XCL and Altamont first approached Commission staff about the acquisition on November 5, 2023, and staff began their investigation that same month.[24] Following the parties' execution of a purchase and sale agreement on January 16, 2024, they filed their petition for prior approval on February 27,

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[17] *Ibid*.

[18] Proposed Decision and Order, *In the Matter of EnCap Investments L.P.*, Matter No. 2110158, at 19 (Mar. 25, 2022).

[19] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021) ("2021 Policy Statement").

[20] See Press Release, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

[21] E.g. Comment by Utah Royalty Owners Ass'n, Docket FTC-2022-0024 (Apr. 23, 2022), https://www.regulations.gov/comment/FTC-2022-0024-0003 (eliminating prior approval "will foster fair competition, increase future Basin investments and allow our mineral and landowners to enjoy their private property assets to the fullest.").

[22] Order at 19. Although the Commission's vote was unanimous, Commissioners Phillips and Wilson expressed their opposition to the routine imposition of prior-approval provisions through the consent order process. In approving a draft consent order in another matter around the same time, the two Commissioners cautioned that, while the use of prior-approval provisions "does not always benefit competition or consumers," they would not "oppose[] consents on the grounds that they include provisions that are unnecessary and counterproductive." Statement of Comm'rs Noah J. Phillips and Christine S. Wilson, *In the Matter of Buckeye Partners, L.P.*, Matter No. 2110144, at 1 and n. 1 (June 2, 2024). In so doing, they observed that "the Commission received dozens of submissions highlighting the many harms that the EnCap/EP Energy prior-approval provision may impose," and that "[t]hese comments are especially concerning in today's environment of high gas prices and record inflation." *Id*. at 3–4.

[23] Petition for Prior Approval of XCL Resources Holdings, LLC's Proposed Acquisition of Altamont Energy, LLC, *In the Matter of EnCap Investments L.P.*, Matter No. 2110158, at 4 (Mar. 15, 2024) ("Altamont Petition").

[24] *Id*. at 2.

2024.[25] The Commission published the petition in the federal register for a thirty-day public comment period on March 15, 2024, as mandated by the Commission's rules.[26] The petition received four substantive comments, all of which supported granting the petition.[27] Altamont's alleged share of Uinta Basin waxy crude production was four percent.[28] Despite the acquisition's minimal impact on competition, the Commission did not grant prior approval until July 15, 2024—nearly eight months after the Commission began its investigation.[29]

In October 2024, XCL sold all of its Uinta Basin assets for over $2.5 billion to SM Energy Company and Northern Oil and Gas, Inc.[30] Neither of the acquiring companies was present in the Uinta Basin at the time. Respondents exited the Uinta Basin waxy crude market as a result of XCL's sale, and no longer operate any assets in the Uinta Basin.[31]

The same month that Respondents exited the market, they allegedly attempted to reenter by acquiring the Uinta Basin assets of [redacted].[32] But the seller allegedly selected a different buyer due to the uncertainty associated with the prior-approval provision.[33]

On March 7, 2025, Respondents petitioned the Commission under Section 5(b) of the FTC Act and Commission Rule 2.51 to reopen and modify the Order to eliminate the prior-approval requirement contained in Section X of the Order.[34]

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[25] Petition Ex. 6, Decl. of Nicholas Barham in Support of Petition, ¶ 9 ("Barham Decl.").

[26] Petition for Prior Approval of XCL Resources Holdings, LLC's Proposed Acquisition of Altamont Energy, LLC, 89 Fed. Reg. 18939 (Mar. 15, 2024); 16 C.F.R. § 2.41(f)(2) (requiring thirty-day public comment period).

[27] Public comments on the Altamont Petition may be viewed on Regulations.gov in Docket No. FTC-2024-0023, https://www.regulations.gov/docket/FTC-2024-0023/comments.

[28] Altamont Petition at 12 (derived from HHI figures).

[29] Barham Decl. ¶ 10.

[30] Press Release, SM Energy Announces Closing of Uinta Acquisitions – Significantly Expanding Its Top-Tier Portfolio (Oct. 2, 2024), https://www.sm-energy.com/investors/news-events/press-releases/detail/338/sm-energy-announces-closing-of-uinta-acquisitions---significantly-expanding-its-top-tier-portfolio (last accessed June 28, 2025); Press Release, NOG Closes Uinta Basin Acquisition (July 7, 2025), https://www.northernoil.com/investor-relations/investor-news/news-details/2024/NOG-Closes-Uinta-Basin-Acquisition/default.aspx (last accessed July 7, 2025).

[31] Petition at 3, 12. [redacted] *Id.* at 4 n.3.

[32] *Id.* at 21.

[33] *Ibid.*

[34] Section X of the Order requires Respondents to obtain prior Commission approval before acquiring: (a) "Any ownership, leasehold, stock, share capital, equity, or other interest in any Relevant Area Producer that has produced or sold, on average over the six months prior to the acquisition, more than 2,000 barrels per day of waxy crude in the Relevant Area"; or (b) "Any ownership or leasehold interest in lands located in the Relevant Area (including through swap or trade transaction) where the transaction (or sum of transactions with the same counterparty during any 180-day period, inclusive of transactions involving that counterparty's parents, subsidiaries, partnerships, joint ventures or affiliates) results in an increase (or net increase, in the case of an acreage swap) in Respondent's land interests in the Relevant Area of more than 1,280 acres." Order at 19.

II. RESPONDENTS' PETITION

Respondents argue that changed conditions of fact require modification of the Order. They state that XCL sold its Uinta Basin assets in October 2024 and, as a result, Respondents no longer operate any oil- or gas-producing assets in the area covered by the Order.[35] Respondents also assert that competition in the relevant area has intensified, undermining the factual predicate for the Order.[36]

Respondents additionally claim that the public interest requires the Order's modification. They argue that the prior-approval process puts the onus on Respondents to justify their transactions, "stack[s] the deck" against them vis-à-vis their competitors, and imposes significant delays.[37] Respondents note that after submitting an application for prior approval, a party must wait for the Commission to post the application for public comment, wait for the thirty-day public comment period to end, and wait indefinitely for the Commission to decide whether to grant the petition.[38] Respondents assert that sellers are hesitant to enter a sale process in which a government agency controls the closing date.[39] Respondents state that the prior-approval requirement has already injured them during the Altamont acquisition, during which they [redacted] during the months-long prior-approval process.[40] Respondents further allege that in another transaction, they lost out to a different buyer due to the uncertainty of prior approvals.[41] Finally, Respondents criticize the Commission's prior-approval policy, arguing that it does not serve the public interest and should not remain in force.[42]

The Commission placed the Petition on the Public Record for a thirty-day comment period. The Petition received three comments, only one of which addressed the prior-approval provision.[43] The petition is now ripe for disposition by the Commission.

III. STANDARDS FOR REOPENING AND MODIFICATION

Section 5(b) of the FTC Act requires the Commission to reopen an order to consider whether it should be modified if the petitioner "makes a satisfactory showing that changed conditions of law or fact" so require.[44] A petitioner satisfies this standard if it identifies

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[35] Petition at 3, 12.
[36] *Id*. at 15–17.
[37] *Id*. at 18–19.
[38] *Id*. at 18.
[39] *Id*. at 19.
[40] *Id*. at 20; Barham Decl. ¶ 11.
[41] Petition at 20.
[42] *Id*. at 20–23.
[43] Comment by MC Oil and Gas, LLC, Docket FTC-2025-0027 (Apr. 1, 2025), https://www.regulations.gov/comment/FTC-2025-0027-0003 ("Encap/XCL is the only Oil and Gas entity in the country with prior approval restrictions, it is unfair and anti-competitive for them to remain singled out for additional regulatory burden."). The public comments on the Petition may be viewed on Regulations.gov in Docket No. FTC-2025-0027, https://www.regulations.gov/docket/FTC-2025-0027/comments.
[44] 15 U.S.C. § 45(b).

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.[45]

Section 5(b) also provides that the Commission may reopen and modify an order even in the absence of changed circumstances when the Commission determines that the public interest so requires.[46] Before the Commission determines whether to reopen an order, the petitioner must make an initial, prima facie "satisfactory showing" of how the modification would serve the public interest.[47]

A petition to reopen and modify must be supported by evidence that is credible and reliable.[48] The petition may not be merely conclusory.[49] It must set forth specific facts demonstrating in detail (1) the nature of the changed conditions and the reasons why they require the requested modification, or (2) the reasons why the public interest would be served by the modification.[50] The petitioner must demonstrate, for example, that the purposes of the order could be achieved more efficiently or effectively with a modification; that the order in whole or part is no longer necessary; or that granting the petition would clearly serve the public interest.[51] The petitioner must include in the petition all information and material that the petitioner wishes the Commission to consider.[52]

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 the reasons for and against modification.[53] In no instance does a decision to reopen an order oblige the Commission to modify it, and the burden remains on the petitioner in all cases to demonstrate why the order should be reopened and modified.[54] The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[55]

IV. ANALYSIS

A. Respondents' Exit from the Market Justifies Reopening the Order

We turn first to the question of whether Respondents have made a sufficient showing that a change of fact requires reopening the Order. When the Commission entered the Order, Respondents were one of four significant players in the Uinta Basin.[56] Their proposed

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[45] Order Reopening and Modifying Order, *In the Matter of Seven & i Holdings Co.*, Matter No. 2010108, at 2 (Jan. 24, 2023) ("Seven & i Holdings Order").
[46] *Id*.
[47] 16 C.F.R. § 2.51(b); Seven & i Holdings Order at 2.
[48] Seven & i Holdings Order at 2; Order Reopening and Modifying Order, *In the Matter of DTE Energy Co.*, Matter No. 1910068, at 2 (Nov. 23, 2021).
[49] Seven & i Holdings Order at 2.
[50] 16 C.F.R. § 2.51(b).
[51] Seven & i Holdings Order at 2.
[52] 16 C.F.R. § 2.51(b)(2).
[53] Seven & i Holdings Order at 3.
[54] *Ibid*.; see also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376–77 (9th Cir. 1992) (reopening and modification are independent determinations).
[55] Seven & i Holdings Order at 3.
[56] Complaint ¶ 24.

acquisition would have reduced the number of significant competitors in the region from four to three, and by their own internal estimates, grown their market share from 14 percent to 30 to 40 percent or higher.[57] The stated remedial goal of the Order's prior-approval provision at the time was to prevent further harm to competition by a company that had demonstrated a willingness to pursue anticompetitive acquisitions.

But this dynamic has changed. The Petition establishes that Respondents exited the Relevant Market when XCL sold its operations in 2024.[58] It no longer operates any assets in the Uinta Basin.[59] Any acquisition by Respondents to reenter the Relevant Market will not affect the market's competitive conditions; it would merely swap one owner of the assets for another. The Order's prior-approval provision serves no remedial purpose with respect to any reentry acquisition by Respondents into the Relevant Market. Any need for the prior-approval provision as it is currently written no longer exists, which justifies reopening the Order.[60]

B. Respondents' Exit from the Market Justifies Modifying the Order

Having made this finding, we must next consider whether the Order should be modified and, if so, how.[61] While we agree with Respondents that the prior-approval provision should be rescinded, we nonetheless conclude, in light of Respondents' conduct and demonstrated intent reflected in their internal documents that gave rise to the Order, a prior-notice provision would be appropriate should Respondents decide to reenter the market.

Accordingly, the Commission will modify the Order by (1) removing the prior-approval requirement in Section X with respect to a reentry transaction, and (2) replacing it with a prior-notice provision for any transaction in the Relevant Market after their reentry. This modification strikes an appropriate balance between the burdens of compliance and the need for the Commission to monitor Respondents' acquisitions in the Uinta Basin area given Respondents' previous conduct.

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[57] *Id*. ¶¶ 24–25.

[58] Petition at 3–4; Barham Decl. ¶ 12; Petition Ex. 7, Declaration of Bryan Stahl in Support of Petition, ¶ 8 ("Stahl Decl.").

[59] Petition at 3–4; Stahl Dec. ¶ 8.

[60] See Modifying Order in Regard to Alleged Violation of Sec. 7 of the Clayton Act and Sec. 5 of the Federal Trade Commission Act, *In the Matter of KKR Associates, L.P.*, 116 F.T.C. 335, 340 (May 13, 1993) (applying similar analysis) ("KKR Order"). Respondents also claim that the Relevant Market has become more competitive since the Order was issued, and that these competition changes independently require reopening the Order. Petition at 15–17. But the Petition does not demonstrate sufficiently that market concentration has changed meaningfully since the Order was issued. Nor does the Petition demonstrate that the importance of head-to-head competition among the top producers in the market has dissipated, or that future consolidation involving those producers would be unlikely to lead to anticompetitive results through unilateral actions or coordinated actions.

[61] KKR Order, 116 F.T.C. at 340; see 16 C.F.R. § 2.51(d) (In ruling on the request, "the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue an order to show cause pursuant to § 3.72, or take such other action as is appropriate[.]").

1. Respondents' Exit from the Relevant Market Eliminates the Need for a Prior-Approval Requirement

A prior-approval requirement is an extraordinary remedy because it reverses the ordinary operation of the antitrust laws. The U.S. antitrust enforcement agencies do not approve transactions. If a transaction's size is below the reporting thresholds imposed by the Hart-Scott-Rodino (HSR) Act, then the merging parties may consummate their merger on their own timelines without informing the agencies.[62] If a transaction exceeds the reporting thresholds, then the merging parties must provide information to the agencies and afford the agencies time to review that information.[63] But when those statutory clocks have run, the parties are free to close. If the agencies conclude that the transaction would be anticompetitive, they may ask a district court to enjoin consummation of the merger.[64] But the agencies must prove that the effect of the transaction "may be substantially to lessen competition, or to tend to create a monopoly."[65] If the agencies cannot carry this burden to the satisfaction of a district court, then the parties may consummate their deal.

Prior approval then has been described as the Commission's attempt to establish premerger review on an ad hoc basis in the absence of any statutory program.[66] Congress certainly could have imposed a prior-approval regime. Other countries have.[67] But Congress instead chose to require the enforcement agencies to prove that a deal is anticompetitive in order to block it, rather than requiring merging parties to demonstrate their deal is procompetitive. We must keep Congress's choice in mind as we consider prior-approval provisions.

The Commission has over the past several decades, however, developed a practice of imposing prior-approval requirements in some merger settlements, including in the Order that Petitioners seek to modify.[68] We recognize that prior-approval requirements may be warranted in some circumstances to address new challenges confronting the Commission.[69]

Here, the facts demonstrate that prior-approval is unwarranted. Because Respondents exited the Uinta Basin, their next acquisition will not affect competition in the Relevant Market; it merely will swap Respondents for a current market participant.[70] Respondents' exit serves as

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[62] 15 U.S.C. § 18a(a) (requiring notification for all acquisitions except those that fall below the reporting thresholds or otherwise are exempt).
[63] *Ibid*.
[64] 15 U.S.C. § 18a(f).
[65] *Id*. § 18.
[66] Dissenting Statement of Comm'r Noah J. Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases, at 2 (July 21, 2021).
[67] For transactions exceeding specified notification thresholds, some jurisdictions, including the European Union, Australia, and Brazil, require prior approval. See Council Regulation (EC) No 139/2004, art. 7(1), 2004 O.J. (L 24) 10 (European Union); Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (Australia); and Article 88 Law No. 12.529/2011 Brazilian System for Protection of Competition (Brazil).
[68] Order at 19; see also Decision and Order, *In the Matter of Tractor Supply Co. and Orscheln Farm and Home LLC*, Matter No. 2110083, at 19–20 (Dec. 9, 2022); Decision and Order, *In the Matter of DaVita Inc. and Total Renal Care, Inc.*, Matter No. 1110103, at 21–22 (Jan. 12, 2022).
[69] See Decision and Order, *In the Matter of Welsh, Carson, Anderson & Stowe XI, L.P.*, FTC Matter No. 2010031, at 6–7 (May 20, 2025) (prohibiting the future acquisition of anesthesia practices "[w]ithout prior approval of the Commission using the approval process outlined in 16 C.F.R. § 2.41(f)").
[70] *Supra* Part IV.A.

an independent basis for eliminating the prior-approval provision, so we need not address Respondents' remaining arguments in support of this rescission.[71]

2. A Prior-Notice Requirement Is Necessary to Protect Competition in the Relevant Market

Although the change in circumstances since the Commission entered the Order merits the removal of the prior-approval provision, we must consider the conduct that gave rise to the Order and ensure that what remains will protect competition in the Uinta Basin. Accordingly, we modify the order to replace the prior-approval requirement with a prior-notice requirement.

The Commission's prior-notice provisions are designed to impose "HSR-like premerger notification and waiting periods" to otherwise unreportable transactions.[72] They do so by requiring the party subject to the requirement to notify the Commission of any covered acquisition by submitting the same HSR form used for reportable transactions.[73] In practice, this typically means that the acquiring company, but not the target, must submit the form. The notifying party may also submit voluntarily any other information that it believes will be helpful for the Commission's review.

Upon being notified of a covered acquisition, the Commission has thirty days to issue a written request for additional information, i.e. the functional equivalent of a second request.[74] Should the Commission do so, the party requesting prior notice must comply with the request and then wait thirty days before consummating the transaction.[75] As in the HSR process, the notifying party may request early termination of the initial waiting period as well as the additional review period. The ultimate effect of a prior-notice provision is to give the Commission sufficient time to investigate a proposed transaction that would otherwise be unreportable and, if necessary, sue to block it in court.

A prior-notice provision is necessary here because of Respondents' previous attempt, as corroborated by their ordinary course documents and other evidence uncovered during the Commission's investigation, to engage in an unlawful acquisition in the Relevant Market. As explained above, XCL's attempted acquisition of EP Energy, absent the divestiture of EP Energy's Uinta Basin assets, would have violated the Clayton Act by eliminating head-to-head competition between two direct competitors and increasing the likelihood of coordinated effects among the major producers remaining in the market.[76] At the time, XCL acknowledged the competitive concerns presented by the acquisition in its internal, high-level analysis and strategy documents. For example, according to an XCL deck used in a meeting attended by most of its

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[71] For the purposes of deciding this Petition, the Commission need not, and does not, take a view on how a successor-in-interest is bound by this consent order.

[72] Statement of Federal Trade Comm'n Policy Concerning Prior Approval and Prior Notice Provisions, 60 Fed. Reg. 39745, 39476 n. 4 (Aug. 3, 1995) ("1995 Policy Statement").

[73] E.g. Proposed Decision and Order, *In the Matter of Alimentation Couche-Tard Inc.*, Matter No. 2410111, at 19 (June 26, 2025) (requiring prior notice for any acquisition of a retail fuel outlet located near any of the outlets divested by the parties).

[74] See *ibid*.

[75] See *ibid*.

[76] Complaint ¶¶ 24–25.

board members, the acquisition of EP Energy would result in "Increasing Scale in our Basin – taking out 1 of 4 major producers, 40%+ of Wax Market, Driver's seat."[77]

The remedy we impose here is consistent with longstanding Commission practice. The Commission previously stated that prior-notice requirements are appropriate "where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[78] It is also consistent with Commission precedent.[79]

Although we think the changed circumstances here have eliminated the need for a prior-approval requirement, Respondents' previous conduct and stated intentions to make future acquisitions in the Relevant Market, as reflected in their ordinary course documents at the time of the Order, present a "credible risk" that Respondents may pursue unreportable, anticompetitive transactions after reentering.[80] In addition to the Commission's prior determination regarding the regional and highly concentrated nature of the Relevant Market, the HSR reportability threshold for acquisitions of carbon-based mineral reserves are higher than the typical HSR reportability thresholds.[81] Moreover, Respondents' petition does not meaningfully address or contradict the Commission's prior findings. Accordingly, these findings support instituting a prior-notice provision on Respondents for any subsequent transactions following future reentry into the Relevant Market.

Respondents argue that exiting the area covered by an order "eliminates the continuing need for the order's requirements."[82] The cases they cite to support this contention, however, are distinguishable and do not undermine the need for prior notice in this case. In *Duke Energy*,[83] *Koninklijke Ahold*,[84] and *DTE Energy*,[85] the Commission vacated prior-approval provisions after the petitioners represented that they had no intention to reenter the relevant market in addition to

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[77] *Id*. ¶ 25.

[78] 1995 Policy Statement at 39476.

[79] E.g. Decision and Order, *In the Matter of Arko Holdings Ltd.*, Matter No. 2010041, at 21–23 (Oct. 5, 2020); Decision and Order, *In the Matter of Tri Star Energy, LLC*, Matter No. 2010074, at 18–19 (Aug. 12, 2020); Decision and Order, *In the Matter of One Rock Capital Partners II, LP*, Matter No. 1910087, at 19–20 (Apr. 20, 2020); Decision and Order, *In the Matter of DTE Energy Co.*, Matter No. 1910068, at 4 (Nov. 21, 2019); Decision and Order, *In the Matter of Enbridge Inc. and Spectra Energy Corp.*, Matter No. 1610215, at 13 (Mar. 22, 2017).

[80] This risk is also further heightened by the Commission's determination earlier this year that Respondents engaged in "gun jumping" in violation of the reporting requirements of the HSR Act in connection with the acquisition that was subject to the Order. Press Release, Oil Companies to Pay Record FTC Gun-Jumping Fine for Antitrust Law Violation, (Jan. 7, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/oil-companies-pay-record-ftc-gun-jumping-fine-antitrust-law-violation.

[81] The HSR reportability threshold for acquisitions of carbon-based mineral reserves is $500 million. 16 C.F.R. § 802.3(a) (imposing $500 million reportability threshold for "[a]n acquisition of reserves of oil, natural gas, shale or tar sands, or rights to reserves of oil, natural gas, shale or tar sands together with associated exploration or production assets."). For most acquisitions, by contrast, the 2025 HSR reportability threshold is $126.4 million. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 90 Fed. Reg. 7697 (Jan. 22, 2025).

[82] Petition at 12.

[83] Order Reopening and Modifying Order, *In the Matter of Duke Energy Corp.*, Matter No. 0010080 (Sept. 26, 2007).

[84] Order Reopening and Modifying Order, *In the Matter of Koninklijke Ahold N.V. and Bruno's Supermarkets, Inc.*, Matter No. 0110247 (July 10, 2007).

[85] Order Reopening and Modifying Order, *In the Matter of DTE Energy Co.*, Matter No. 1910068 (Nov. 23, 2021).

making representations that they had exited the relevant market. Respondents have not made such a representation here. To the contrary, as noted above, the parties have stated an intention to reenter the Relevant Market,[86] which must be considered in conjunction with (1) the higher HSR reportability threshold for carbon-mineral based assets, (2) past representations (uncovered during the investigation of an anticompetitive acquisition that gave rise to the Order) about a desire to pursue anticompetitive acquisitions in the Relevant Market, and (3) more recent evidence that the Respondents sought to evade their obligations under the HSR Act.

Indeed, after Respondent XCL sold its Uinta Basin assets and exited the market, it attempted to purchase the assets of another Uinta Basin producer.[87] Although XCL was unable to complete the transaction, the attempt demonstrates Respondents' interest in reentering the market. This interest, when considered in combination with Respondents' past conduct outlined above, justifies the Commission imposing a modification to ensure it has the opportunity to review future acquisitions taken by Respondents following their reentry into the Relevant Market.[88]

V. CONCLUSION

The modifications ordered by the Commission provide relief to Respondents while ensuring that the Commission can engage in pre-consummation review of Respondents' future transactions in the relevant area.

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4760 be, and hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and hereby is, modified by replacing Section X with the following:

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[86] Respondents' desire to be able to reenter the relevant market unfettered by the Order appears to be a motivating driver behind their Petition. *See* Barham Decl. ¶ 16 (explaining that Respondent XCL "remains concerned that the prior approval provision in Section X of the Order impedes its ability to effectively compete in the [listed Uinta Basin] counties of Utah, and that removal of the provision would better position XCL to apply its pro-growth, pro-competition, and pro-consumer exploration and production strategies to assets in Utah"); Stahl Decl. ¶ 10 (same for Respondent EnCap); Petition at 12 (discussing the possibility that Respondents might reenter the market and arguing that this should be encouraged).

[87] Petition at 20; Barham Decl. ¶ 13.

[88] Respondents' other cited cases are also distinguishable. In *AEA Investors*, the petitioner had been made a party to the complaint only because it was the ultimate parent entity of other respondents and its inclusion was necessary to ensure compliance by these subsidiaries. *See* Order Reopening and Modifying Final Order, *In the Matter of AEA Invs. 2006 Fund L.P.*, Matter No. 0810245, at 2 (Apr. 30, 2013). The Commission set aside the order as to the parent-petitioner once it sold its interest in the subsidiaries, who remained under order, as the petitioner was no longer in a position to ensure the subsidiaries' compliance. *Id.* at 3. In *Entergy*, the petitioners sought relief from mandated procedures that were intended to rectify incentives to raise prices due to the petitioners' ownership interests in both a natural gas transporter and regulated utilities. Order Reopening and Setting Aside Order, *In the Matter of Entergy Corp. and Entergy-Koch, L.P.*, Matter No. 0010172, at 2 (July 1, 2005). The Commission set aside the procedural obligations because, when the petitioners sold their interest in the gas transporter, not only did that change the incentives, but it substantially changed petitioners' ability to comply with the order's procedural obligations. *Id.* at 3. Neither *AEA Investors* nor *Entergy* is pertinent to this case.

X. Prior Notice

IT IS FURTHER ORDERED that:

A. Respondents EnCap, EnCap Fund XI, Verdun, and XCL shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries, partnerships, joint ventures, affiliated or controlled funds, or otherwise:

1. Any ownership, leasehold, stock, share capital, equity, or other interest in any Relevant Area Producer that has produced or sold, on average over the six months prior to the acquisition, more than 2,000 barrels per day of waxy crude in the Relevant Area; or

2. Any ownership or leasehold interest in lands located in the Relevant Area (including through swap or trade transaction) where the transaction (or sum of transactions with the same counterparty during any 180-day period, inclusive of transactions involving that counterparty's parents, subsidiaries, partnerships, joint ventures or affiliates) results in an increase (or net increase, in the case of an acreage swap) in Respondent's land interests in the Relevant Area of more than 1,280 acres.

Provided, however, that Respondents are not required to provide advance written notification before entering into surface use or right of way agreements or to increase their ownership or leasehold interests in drilling spacing units already operated by Respondents.

Provided further, however, that EnCap Investments, L.P., EnCap Energy Capital Fund XI, L.P., Verdun Oil Company II LLC, XCL Resources Holdings, LLC, and EP Energy LLC (each an "Exempted Entity") are not required to provide such notification if, at the time of such transaction, no Exempted Entity owns any interest in, directly or indirectly, in whole or in part, any asset used or previously used in (and still suitable for use in), or any business engaged in, the production or sale of more than 2,000 barrels per day (on average over the most recent six month period prior to the acquisition) of waxy crude in the Relevant Area ("exempted re-entry transaction"). *Provided further, however*, that the Exempted Entity shall inform the Commission of any exempted re-entry transaction within 10 days of completing the transaction via email at ElectronicFilings@ftc.gov and bccompliance@ftc.gov.

B. Any advance written notification required under Paragraph X.A shall be given on the Notification and Report Form set forth in Appendix A to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the notification to the Commission at least thirty (30) days prior to

consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that advance written notification shall not be required by Paragraph X.A for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

By the Commission, Commissioner Holyoak recused.

April J. Tabor
Secretary

SEAL:
ISSUED: July 7, 2025