

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

EL PASO NATURAL GAS COMPANY,

Defendant.

CASE NUMBER 1:95CV00067

JUDGE: Harold H. Greene

DECK TYPE: Antitrust

DATE STAMP: 01/12/95

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of defendant El Paso Natural Gas Company ("El Paso") in this civil antitrust proceeding.

NATURE AND PURPOSE OF THE PROCEEDING

On January 12, 1995 the United States filed a civil antitrust Complaint alleging that El Paso had entered into a contract, combination or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that El Paso, which provides natural gas gathering services in the San Juan Basin area of New Mexico and Colorado, tied the installation of metering facilities to the provision of its gas gathering service.

On January 12, 1995 the United States and El Paso filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to prevent any recurrence of such tying

activity in the future. Under the proposed Final Judgment, El Paso will be enjoined from conditioning the provision of gas gathering service upon the gathering customer also purchasing meter installation from El Paso. In addition, El Paso will be required affirmatively to inform its gathering customers that they have the option of using someone other than El Paso to provide installation of all or any part of the metering facilities. The proposed Final Judgment allows El Paso to continue to provide meter installation, but only after a customer has been explicitly informed that it has the option of using someone other than El Paso to provide this service. The decree also contains provisions to ensure that El Paso does not disadvantage well operators who choose competing meter installation providers.

I.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

In order to market natural gas, it must be carried by pipeline from the point of production to the point of use. Without transportation away from the well, natural gas has virtually no value, and no means of transportation other than via pipeline is economical. To market gas, it is first "gathered" from wells through small diameter pipes. The gas is then fed from the gathering system into one or more interstate pipelines that carry the gas to local distribution systems which in turn deliver the gas to the end users (consumers). Thus, gathering is an essential step

in getting natural gas to market. Because of scale economies and network efficiencies associated with pipelines, it is often uneconomical for a producer to be served by more than one pipeline system.

The San Juan Basin is a natural gas production area located in northwestern New Mexico and southern Colorado. El Paso's gas gathering system permeates the basin. Many of the producers that have wells connected to El Paso's San Juan gathering system have no alternative means of transportation. El Paso's San Juan gathering system is regulated by the Federal Energy Regulatory Commission ("FERC"). FERC regulations require El Paso to limit to a published tariff rate the amount that it may charge for gathering. The FERC does not regulate the rate that El Paso charges for meter installation associated with the provision of its gathering service.

El Paso provides gathering at a charge based upon the volume of gas transported. A meter is a device used to measure the volume of gas flowing from a well into the gathering system. Connecting a well to the gathering system involves laying pipe from the well-head to the gathering pipeline. At the same time, metering equipment is installed at the well-head or along the pipe leading to the gathering system. Connecting a well to the gathering system also includes placing a "tap", or break of the gathering pipeline wall at the point of interconnection with the well-tie pipeline.

"Meter installation" as used in the Complaint and this statement, refers to the construction and installation of metering equipment or facilities, as well as the construction and installation of the pipe used to connect the metering equipment to the gathering system. Installation of meters and associated pipe requires adherence to certain safety precautions due to the proximity of the meter installation construction to the existing gas gathering pipeline, as well as the need to minimize hazards associated with future operations involving a pipe which will carry natural gas.¹

When a well operator is considering whether to drill a well in a production area, it must determine first whether the well will be profitable. In deciding whether to drill, the operator will consider many factors including the gathering charge, transportation fees and the amount of money it will have to pay initially for the construction of the facilities necessary to hook the well to the gathering system. In an older field such as the San Juan Basin where wells do not generally produce at high rates, meter installation costs can make the difference between whether or not a well is drilled, affecting whether additional natural gas sites are made available to meet consumer demand.

¹Installation may require compliance with standards developed by the United States Department of Transportation Office of Pipeline Safety Standards, the American National Standards Institute, the American Petroleum Institute, the American Society of Mechanical Engineers and the American Society of Testing and Materials.

The Complaint alleges that El Paso forced customers (or "well operators") who needed to purchase El Paso's gathering service to purchase meter installation services from El Paso as well. The Complaint also alleges that when contacted, El Paso informs a potential gathering customer that El Paso will connect a well after the operator has agreed that El Paso will perform the meter installation associated with connecting that well to El Paso's system and has prepaid a flat fee for the installation. El Paso contracts out almost all of this construction work to other companies in the San Juan Basin and then charges the customer for the materials, El Paso labor, and "overheads". "Overheads" account for as much as one third of the total bill to the customer.

The speed with which a well can be connected to the gathering system is a significant factor in determining the potential profitability of that well. Once a well operator has agreed that El Paso will perform the meter installation, the well operator must rely on El Paso to schedule that installation. In many instances, El Paso has taken a significantly longer time to complete meter installation than it would have taken if the well operator had been able to use an alternative to El Paso.

Over the past three years, El Paso has permitted only three well operators, and then only reluctantly, to perform meter installation using their own contractors, and El Paso's permission in those three instances extended to only a limited number of well

connections. Each of these operators concluded that they could perform the installation for substantially less cost than El Paso, even if they had to follow El Paso's specifications when doing so. These well operators were able to perform meter installation at each well for nearly one-half of the El Paso construction cost estimate, thereby saving from \$5,000 to \$7,000 per well on each of the 121 wells they connected. Since 1991, a total of 453 wells have been connected to El Paso's gathering system. However, El Paso predicts that a significantly larger number of wells, 2200 or more, will be connected to its gathering system over the next five years. If well operators are able to secure like savings, either from third party competitors or from El Paso responding to the new competitive environment, then well operators in the San Juan Basin will likely save from \$11 to \$15 million dollars over the next five year period. Depending upon the number of new wells connected over the ten year life of the proposed Final Judgment, savings could reach the tens of millions of dollars.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to prevent El Paso from tying the service of meter installation to the provision of gathering on its San Juan gathering system. The proposed Final Judgment explicitly prohibits such tying. Section IV(A) provides that El Paso may not condition the provision of gathering upon a

well operator agreeing to purchase either the metering equipment or its installation from El Paso.

The proposed Final Judgment does not, however, prohibit El Paso from providing meter installation in the future. The proposed Final Judgment, therefore, contains a number of safeguards to ensure that in the future El Paso makes known to its gathering customers that they have the option of providing their own meter installation and gives its customers sufficient information to make a reasoned choice. To this end, at the time of any initial inquiry concerning gathering and connection to its gathering system, Section IV(D) of the proposed Final Judgment requires El Paso to fully disclose to the well operator that the operator has the option of having someone other than El Paso provide meter installation. Compliance with this section requires that El Paso provide the well operator with written notice that the customer has the right pursuant to this Final Judgment to choose a construction company other than El Paso; provide an estimate of all charges that El Paso will require from the well operator, both if the operator selects El Paso to do the installation and if it does not; provide the operator with sample copies of the contracts that El Paso will use if the operator chooses to have El Paso do the installation or selects to have someone other than El Paso do the meter installation; and, provide a copy of the specifications, standards, and procedures that El Paso will require the operator to follow if

the operator performs the installation. With this information, the well operator will be able to make an informed choice as to whether to use El Paso or another contractor for meter installation.

The proposed Final Judgment recognizes that El Paso has a reasonable need to assure the safety and integrity of its gathering system, and may have some legitimate concerns regarding its liability when well operators perform meter installations for wells connecting to its gathering system. Pipe and equipment that connect to El Paso's gathering pipeline can pose safety hazards if they are constructed in a substandard manner or with faulty materials.

Section V(E) of the proposed Final Judgment permits El Paso to protect its safety and liability concerns consistent with the tying prohibition found in Section IV(A). Connection of the well-tie line requires a "tap" into the gathering pipeline--an actual opening into the pipe. Welding and other construction of lines carrying natural gas must be done in a manner that safeguards the workers and the pipe involved. For this reason, Section V(E) allows El Paso to require well operators to use El Paso or El Paso contractors for the tap, but limits the price that El Paso may charge for this service.

In recognition of El Paso's safety and liability concerns, Sections V(A)-(B) permit El Paso to specify to well operators reasonable specifications for the construction and installation of

metering facilities. At the same time, these sections also set forth conditions that limit El Paso's discretion regarding the type of standards and procedures El Paso may require and the manner in which it implements these standards and procedures. These limiting conditions will ensure that El Paso will not use its standard setting practices to discourage its gathering customers from using other contractors for meter installation in the future. Thus, specifications that have the effect of steering well operators to use of El Paso or El Paso-provided equipment for meter installation would violate this Final Judgment.

Similarly, El Paso has a bonafide interest in providing maintenance for meter equipment connected to its system because such maintenance is necessary to assure continuing provision of safe and efficient gas gathering. For this reason, Section IV(C) of the proposed Final Judgment allows El Paso to provide maintenance and to recover the cost for such maintenance, but only in the rate for gathering charged all gathering customers.

Well operators generally connect new wells again and again over the years. The proposed Final Judgment prevents El Paso from implementing practices designed, or having the effect when implemented, to discourage well operators who elect to perform their own meter installation from exercising that option again. Thus, although Section V permits El Paso to set standards and procedures that a well operator must follow when installing meters

connected to El Paso gathering system, and to require well operators to submit their installations to inspection by El Paso, it places certain restrictions on El Paso to assure that its specifications, procedures and inspections do not impose undue cost or delay.

As a means of monitoring El Paso's conduct with respect to the requirements it imposes, Section V(C) of the proposed Final Judgment provides that if El Paso does require meter installation inspections, its inspectors must create logs of their inspections of both El Paso and non-El Paso installations. El Paso must maintain these logs and make them available to well operators that choose to perform their own meter installation. To assure well operators timely access to these logs, the proposed Final Judgment (Section IV(E)) requires that any contract between a well operator and El Paso that provides for meter installation inspections must also contain a clause giving the well operator access to inspections records. These well operators will then be able to examine logs for their installation jobs and compare logs pertaining to meter installations performed by El Paso to aid in determining whether El Paso is conducting uniform and reasonable inspections.

Finally, the Final Judgment (Section IV(E)) requires that El Paso must give the well operator the unconditional option of including a clause in the meter installation contract that would

permit the well operator to elect binding arbitration rather than court litigation to resolve differences under the contract.

The United States is satisfied that the proposed Final Judgment sufficiently resolves the antitrust violations alleged in the Complaint. The provisions of the proposed Final Judgment should prevent any future tying activities, and will allow El Paso to safeguard the integrity and safety of its own gathering system while at the same time assuring that those operators who choose to perform their own meter installation are not indirectly burdened by El Paso for their choice. Compliance with the proposed Final Judgment would prevent any recurrence of the violations alleged in the Complaint, and thus provides complete relief.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured in his business or property as a result of conduct forbidden by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought.

V.

PROCEDURE AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT

The United States and defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Roger W. Fones, Chief
Transportation, Energy, and
Agriculture Section
Antitrust Division
Judiciary Center Building
555 4th Street, N.W., Rm 9104
Washington, D.C. 20001

VI.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial of the case against El Paso. In the view of the Department of Justice, such a trial would involve substantial cost to the United States and is not warranted because the proposed Final Judgment provides relief that will remedy the violations of the Sherman Act alleged in the United States' Complaint.

VII.

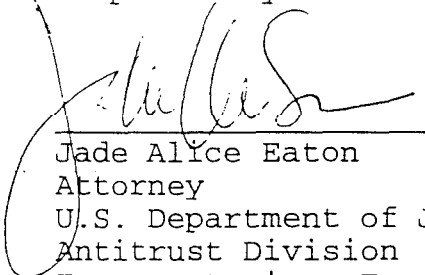
DETERMINATIVE MATERIALS AND DOCUMENTS

There are no materials or documents that the United States considered to be determinative in formulating this proposed Final Judgment. Accordingly, none are being filed with this Competitive Impact Statement.

Dated: January 12, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing COMPLAINT, STIPULATION, proposed FINAL JUDGMENT, and COMPETITIVE IMPACT STATEMENT to be served upon counsel in this matter in the manner set forth below:

By hand:

Mary Anne Mason
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1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dated: January 12, 1995



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