Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. El Paso Natural Gas Co., and Pacific Northwest Pipeline Corp., U.S. District Court, D. Colorado, 1972 Trade Cases ¶73,975, (Jun. 25, 1971)

United States v. El Paso Natural Gas Co., and Pacific Northwest Pipeline Corp.

1972 Trade Cases ¶73,975. U.S. District Court, D. Colorado. Civil Action No. C-2626. Filed June 25, 1971; findings, conclusions, opinion amended as to "The Court's Plan for Divestiture and Allocation of Reserves," July 26, 1971. Case No. 1354, Antitrust Division, Department of Justice.

Clayton Act

Acquisitions and Mergers—Injunctive Relief—Natural Gas—Divestiture and Allocation of Reserves.— Pursuant to the Supreme Court's decision in *Utah Ptiblic Sendee Commission v. El Paso Natural Gas Co*. (1969 TRADE CASES ¶ 72,824), a plan for divestiture and allocation of reserves was drafted. The procedure encompassed (1) an allocation of gas reserves as required by *Utah*, (2) reopening of consideration of which applicant should acquire the divested property, and consideration of whether an award to a particular applicant will have any anticompetitive effects either in the California market or in other markets, and (3) provision for complete divestiture to the selected applicant. Various issues of divestiture were reserved.

For plaintiff: Richard W. McLaren, Asst. Atty. Gen., John W. Dougherty and Joseph J. Saunders, Dept. of Justice, Washington, D. C, James L. Treece, U. S. Atty., and Carolyn J. McNeill, Asst. U. S. Atty., Denver, Colo.

For defendants: Leon M. Payne, A. H. Ebert, Jr., and P. Dexter Peacock, of Andrews, Kurth, Campbell & Jones, Houston, Tex., G. Scott Cuming, E. G. Najaiko, and David F. Mackie, El Paso, Tex., for El Paso Natural Gas Co.

For intervenors: Gary Nelson, Atty. Gen., Phoenix, Ariz., for Ariz., ex rel. Ariz. Corp. Com.; Nicholas H. Powell, of Snell & Wilmer, Phoenix, Ariz., for Ariz. Public Serv. Co.; A. Y. Holesapple, of Holesapple, Conner, Jones, McFall & Johnson, Tucson, Ariz., for Tucson Gas & Elec. Co.; Louis F. Callister, of Callister, Kesler & Callister, Salt Lake City, Utah, for Ariz. Public Serv. Co. and Tucson Gas & Elec. Co.; John T. Miller, Washington, D. C, and Frederic L. Kirgis, of Gorsuch, Kirgis, Campbell, Walker & Grover, Denver, Colo., for Ariz., ex rel. Ariz. Corp. Com., Ariz. Public Serv. Co., and Tucson Gas & Elec. Co.; Evelle I. Younger, Atty. Gen., and Iver E. Skjeie, Deputy Atty. Gen., Sacramento, Cal., for Cal.; James E. Faust, Salt Lake City, Utah, for Cal. Pacific Utilities Co.; Sheldon Rosenthal, San Francisco, Cal., for Public Utilities Com. of Cal.; Richard B. Hooper and Wilbert C. Anderson, of Jones, Grey, Kehoe, Bayley, Hooper and Olsen, Seattle, Wash., for Cascade Natural Gas Co.; Duke W. Dunbar, Atty. Gen., John E. Archibold and Robert E. Commins, Asst. Attys. Gen., Denver, Colo., for Colo., ex rel. Colo. Public Utilities Com.; Paul W. Williams and Don B. Stookey, of Cahill, Gordon, Sonnett, Reindel & Ohl, New York, N. Y., for Committee of El Paso Natural Gas Co. Institutional Bond and Debenture Investors; W. Anthony Park, Atty. Gen., Idaho Public Utilities Com., Larry D. Ripley, Spec. Asst. Atty. Gen., of Elam, Burke, Jeffersen, Evans and Boyd, Boise, Idaho, for Idaho, ex rel. Idaho Public Utilities Com.;Claude Marcus, of Marcus & Marcus, Boise, Idaho, for Intermountain Gas Co.; Joseph S. Jones, and John Crawford, Jr., Salt Lake City, Utah, for Mountain Fuel Supply Co.; Robert List, Atty. Gen., Carson City, Nev., for Public Serv. Com. of Nev.; David L. Norvell, Atty. Gen., Santa Fe, N. M., William J. Cooley and Joel B. Burr, Jr., Agency Asst. Attys. Gen., Farmington, N. M., for N. M. Public Serv. Com.; Harold W. Pierce, Portland, Ore., for Northwest Natural Gas Co.; Lee Johnson, Atty. Gen., and Richard W. Sabin, Asst. Atty. Geti., Salem, Ore., for Ore., ex rel. Public Utility Commissioner of Ore.; Malcolm W. Furbush, Daniel E. Gibson, and Joseph S. Englert, Jr., San Francisco, Cal., for Pacific Gas & Elec. Co.; David R. Pigott and Donald J. Richardson, Jr., of Chickering & Gregory, San Francisco, Cal., for San Diego Gas & Elec. Co.; Rollin E. Woodbury, Rosemead, Cal. and R. Clyde Hargrove, Shreveport, La, for Southern Cal. Edison Co.; John Ormasa, W. H. Owens, and P. Dennis Keenan, Los Angeles, Cal., for Southern Cal. Gas Co.; Charles H. McCrea, and Lawrence V. Robertson, Jr., Las Vegas, Nev., for Southwest Gas Corp.; Edward F. Richards, of Gustin and Richards, Salt Lake City, Utah, for Utah Gas Serv. Co.; Vernon B. Romney, Atty. Gen., Joseph P. McCarthy and H. Wright Volker, Asst. Attys. Gen.,

Salt Lake City, Utah, for Utah Public Serv. Com.; John W. Chapman, of Cartano, Botzer & Chapman, Seattle, Wash., for Wash. Natural Gas Co.; Slade Gorton, Atty. Gen., Frank P. Hayes and Robert E. Simpson, Asst. Attys. Gen., Olympia, Wash., for Wash. Utilities and Transportation Com.; Robert L. Simpson, of Paine, Lowe, Coffin, Herman & O'Kelly, Spokane, Wash., and A. Wally Sandack, of Draper, Sandack & Saperstein, Salt Lake City, Utah, for Wash. Water Power Co.; Don M. Empfield, Spec. Asst. Atty. Gen., Cheyenne, Wyo., for Public Serv. Com. of Wyo.

For *amicus curiae:* Gordon Gooch, George P. Lewnes and John P. Mathis, Washington, D. C, for FPC.

For applicants for acquisition: James D. Voorhees, of Moran, Riedy & Voorhees, Denver, Colo., A. John Cressey, Minneapolis, Minn., and William R. Cormole, of Connole & O'Connell, Washington, D. C, for Banister Continental Corp.; David K. Watkiss, of Pugsley, Hayes, Rampton & Watkiss, Salt Lake City, Utah, James D. McKinney, of Ross, Marsh & Foster, Washington, D. C, C. H. McCall, Houston, Tex., and John W. Hammett and Charles F. White, Oklahoma City, Okla., for Alas. Interstate Arco-Gulf-Tipperary Grant; Walter W. Sapp, Colorado Springs, Colo., James L. White, Robert T. Connery, and David G. Owen, of Holland and Hart, Denver, Colo., for Colo. Interstate Corp.; Jefferson D. Giller and Howard Wolf, of Fulbright, Crooker, Freeman, Bates and Jaworski, Houston, Tex., and Jack Ware, Crystal City, Tex., for Copaco, Inc.; Marvin J. Bertoch, of Ray, Quinney & Nebeker, Salt Lake City, Utah, George S. Dibble, Jr., Cody, Wyo., and Royce H. Savage, of Boone, Ellison & Smith, Tulsa, Okla., for Husky Oil Ltd.; C. Keefe Hurley and Earle C. Cooley, of Hale and Dorr, Boston, Mass., and Brigham E. Roberts, of Rawlings, Roberts & Black, Salt Lake City, Utah, for Paradox Production Corp.; Benjamin H. Parkinson, of Ackerman, Johnston, Norberg & Parkinson, San Francisco, Cal., Hugh J. McClearn, of Van Cise, Freeman, Tooley & McClearn, Denver, Colo., J. Evans Atwell and Lynn R. Coleman, of Vinson, Elkins, Searls & Smith, Houston, Tex., J. Donald Brinkerhoff, Menlo Park, Cal., Edward O. Werner, of Hardy, Peal, Rawlings & Werner, New York, N. Y., and Robert Paradise, Los Angeles, Cal., for Western Sunset Transmission Co.

Findings of Fact, Conclusions of Law, and Opinion on Divestiture and Allocation of Gas Reserves

CHILSON, D. J.: This case was originally commenced in the United States District Court for the District of Utah, Central Division, as Civil Action No. 143-57. In October 1970, it was transferred to this Court for the convenience of parties and witnesses.

Preliminary Statement

The following is a brief summary of the facts and background which lead to the present phase of this litigation. A more detailed account is found in three decisions of the Supreme Court:

California v. Federal Power Commission [1962 TRADE CASES ¶ 70,302], 369 U. S. 482.

United States v. El Paso Natural Gas Co., et al. [1964 TRADE CASES ¶ 71,073], 376 U. S. 651.

Cascade Natural Gas Corp. v. El Paso Natural Gas Co., et al. [1967 TRADE CASES ¶ 72,019], 386 U. S. 129 (Referred to as Cascade).

Prior to the year 1954, El Paso Natural Gas Company (El Paso) was engaged in the business of transporting natural gas interstate to the California border for sale to distributors who distributed the gas to users in Southern California. At that time,El Paso was the sole out-of-state supplier to the California market.

In 1954, Pacific Northwest (PNW) received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin in New Mexico to the State of Washington to supply gas to the then unserved Pacific Northwest area. The pipeline was completed and service was begun in 1956.

PNW had obtained authorization to receive large quantities of Canadian gas and, in addition, had acquired Rocky Mountain gas reservoirs along its route and gas reserves in the San Juan Basin. In 1954, PNW tried to enter the rapidly expanding California market by transportation of Canadian gas to Pacific Gas & Electric Co. (PG & E) in Northern California, and the effort was renewed in 1955. In 1956, PNW negotiated with Southern California Edison Co. (Edison) to supply it with natural gas.

Although PNW had no pipeline into California and its efforts to enter the California market were unsuccessful, these efforts were a substantial competitive factor in the California market and led to a price reduction and other concessions to the ultimate benefit of Edison.

El Paso had been interested in acquiring PNW since 1954. The first offer from El Paso was in December 1955, an offer PNW rejected. Negotiations were resumed by El Paso in the summer of 1956, while, PNW was still trying to obtain entry to the California market.

In November of 1956, El Paso offered to exchange El Paso shares for PNW shares. This offer was accepted by PNW directors and by May 1957, El Paso had acquired 99.8 percent of PNW's outstanding stock.

In July 1957, the Department of Justice filed suit against El Paso in the U. S.-District Court for the District of Utah charging that the stock acquisition violated Section 7 of the Clayton Act.

In August 1957, El Paso applied to the Federal Power Commission for permission to acquire the assets of PNW, and on December 23, 1959, the Commission approved and the merger of PNW with El Paso was effected on December 31, 1959. California, an intervenor in the proceedings, obtained a review by the Court of Appeals, which affirmed the Commission [1961 TRADE CASES ¶ 69,967] (111 U. S. App. D. C. 226, 296 F. 2d 348). The Supreme Court granted certiorari and set aside the Commission's approval, holding that it should not have acted until the District Court had passed on the Clayton Act issues. *California v. Federal Power Commission*, 369 U. S. 482 (supra).

Meanwhile, (in October 1960) the United States amended its complaint in the District Court so as to include the asset acquisition by merger in the charge of violation of the Clayton Act. Upon trial of this action, the District Court found for El Paso; the U. S. appealed; the Supreme Court, on review of the record which was composed largely of undisputed evidence, concluded that the effect of the acquisition “may be substantially to lessen competition” within the meaning of Section 7 of the Clayton Act, reversed the judgment and remanded with directions to the District Court “to order divestiture without delay.” *United States v. El Paso Natural Gas Company, et at*, 376 U. S. p. 651 (supra).

Upon remand to the District Court, motions to intervene by the State of California, Southern California Edison Company, (Edison and Cascade Natural Gas Company (Cascade Company)) were denied, and the District Court entered a decree of divestiture which had been agreed upon by the Department of Justice and El Paso.

California, Edison, and Cascade Company appealed from the denial of their motions to intervene. The Supreme Court in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company et al*. [1967 TRADE CASES ¶ 72,019], 386 U. S. 129 (Cascade) reversed the District Court and remanded with directions to allow each appellant to intervene as a matter of right and that the proceedings be reopened to give California, Edison, and Cascade Company an opportunity to be heard as intervenors.

The Court also held that the agreed decree, entered by the District Court, was not in accord with the Supreme Court's mandate in 376 U. S. 651 (supra) which required that PNW, or a new company, be at once restored to a position where it could compete with El Paso in the California market; ordered the District Court to vacate the orders of divestiture previously entered; “have de novo hearings on the type of divestiture” the Court envisioned and made plain in its opinion in 376 U. S. 651; directed “… there be a divestiture without delay”; suggested guidelines that should be followed in ordering the divestiture and ordered that a different District Judge be assigned to hear the case.

On April 18, 1967, the undersigned was assigned to the District of Utah to conduct the further proceedings required by Cascade. During the years 1967 and 1968, this-Court conducted “de novo hearings” including extensive evidentiary hearings in which the plaintiff, defendant, the Federal Power Commission as Amicus Curiae, twenty-two intervenors and nine applicants for acquisition of the properties to be devested, participated in all or part of those proceedings.

On June 21, 1968, the Court entered tentative Findings of Fact, Conclusions of Law and Opinion [1968 TRADE CASES ¶ 72,533] which with some modifications were made a final judgment of the Court on August 29, 1968, hereafter referred to as the 1968 Decree. Minor amendments were thereafter made, the last of which were

entered November 7, 1968, at which time, the Findings, Conclusion and Opinion became the final judgment of this Court.

Upon review, the Supreme Court in *Utah Public Service Commission v. El Paso Natural Gas Company et al*. [1969 TRADE CASES ¶ 72,824] 395 U. S. 464 (hereafter referred to as Utah, vacated the 1968 Decree and remanded the case "for proceedings in conformity with this opinion."

The reasons for the remand stated in *Utah* are:

> "We find that the decree of the District Court does not comply with our mandate; it does not apportion the gas reserves between El Paso and New Company in a manner consistent with the purpose of the mandate, and it does not provide for complete divestiture. We therefore vacate the judgment and remand the case for further proceedings."

The purpose and object of the apportionment of reserves and the standards therefore are stated in the opinion as follows:

> "The purpose of our mandate was to restore competition in the California market. [1] An allocation of gas reserves should be made which is "equitable" with that purpose in mind. The position of the New Company must be strengthened and the leverage of El Paso not increased. That is to say, an allocation of gas reserves—particularly those in the San Juan Basin—must be made to rectify, if possible, the manner in which El Paso has used the illegal merger to strengthen its position in the California market. The object of the allocation of gas reserves must be to place New Company in the same relative competitive position vis-a-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger."

The opinion also states:

> "A reallocation of gas reserves under this standard may permit an applicant other than Colorado Interstate Corporation to acquire New Company and make it a competitive force in California. Thus, the District Court is directed to effect this reallocation of gas reserves, and in light of the reallocation, to reopen consideration of which applicant should acquire New Company. Such consideration should, of course, include whether an award to a particular applicant will have any anti-competitive effect either in the California market or in other markets."

We determined the procedure to comply with *Utah* should be:

> First, make an allocation of gas reserves as required by *Utah;*
>
> Second, reopen consideration of which applicant should acquire the divested property, and in so doing, to consider whether an award to a particular applicant will have any anti-competitive effects either in the California market or in other markets; and
>
> Third, provide for a "complete divestiture" to the selected applicant as required by the *Utah* opinion.

Following this procedure, we ordered submission by the parties of proposals or suggestions for allocation of gas reserves which would meet the requirements of *Utah*, held evidentiary hearings thereon, and ordered permissive filing of briefs. The briefs have been received and considered by the Court, and the Court is now prepared to make an allocation of reserves in accordance with the *Utah* opinion.

Allocation of Gas Reserves Findings of Fact, Conclusions of Law and Opinion

To expedite the hearings, the evidence admitted in the 1967-68 hearings, insofar as that evidence is pertinent to the reserves and their allocation, was admitted as evidence in the current hearings.

We found from the evidence received in the 1967-68 hearings that the total system reserves were not sufficient to serve the requirements of both the Northwest and Southern divisions and at the same time, provide New Company with sufficient reserves to support a New Company project to California, and that to divest to New

Company sufficient reserves from the San Juan Basin so that New Company could supply a project to California, would invade reserves which were dedicated to the service of the Southern division.

But the evidence at the previous hearings also supported the Court's finding:

> "The Court is satisfied that capable management of New Company can obtain the reserves necessary to compete in the California market without invading the reserves dedicated to the service of the Southern division." [1968 TRADE CASES ¶ 72,533], (291 F. Supp. 20).

Plaintiff correctly states at Page 20 of its brief filed March 24, 1971, that at the previous hearings, new gas supplies were believed to be abundant. The evidence at the recent hearings discloses for the first time in these proceedings, an entirely different picture with respect to domestic reserves.

Two members of the staff of the Federal Power Commission (Thompson and Breene) testified that domestic sources of supply are unable to keep pace with the demands; that reserve inventories are declining; that the demand is increasing while the discoveries of new domestic supplies are decreasing; in 1968, more gas was consumed than was discovered, and the indications-are that existing proved reserves from which gas flows generally to the Western states will be exhausted by 1979. No evidence to the contrary was offered, and the plaintiff, defendant, intervenors, and most of the applicants for acquisition have accepted this evaluation without question.

The domestic reserves of the defendant are no exception. The defendant estimates that after divestiture of the reserves as proposed by it, that the deliverability life of the reserves remaining to serve the certificated commitments of the Southern division is three years, i. e., the period before which El Paso will be unable to meet the requirements which the Federal Power Commission has certificated for the Southern division. (Federal Power Commission brief, Page 5-15, FPC Staff Exhibits 1000 and 1006 and El Paso Exhibit 151.)

Mr. Breene, of the Federal Power Commission staff, testified that in 1969, he estimated the deliverability life of the reserves for the Southern division at five years. No evidence was offered to the contrary and the briefs indicate that the parties generally accept the evidence of the staff witnesses as a true picture of the present domestic supply and reserve conditions, and that the estimates of deliverability life of the reserves remaining to supply the Southern division is from three to five years.

The evidence will permit no finding other than that at the present time a divestiture of more San Juan Basin reserves to New Company than that ordered in the 1968 Decree and now proposed by defendant would jeopardize the ability of the defendant to serve the certificated requirement of the Southern division.

The Court finds that the defendant presently is not a competitor for incremental demands in the California market and that it cannot be such a competitor unless and until it obtains additional gas supplies and reserves over and above those necessary to assure continued service of its present commitments under the Southern division.

If additional supplies and reserves are acquired by defendant which are not physically available for service through the Southern division, those supplies and reserves could be used by the defendant to compete for new increments of demands in the California market. (For example, service of liquefied natural gas derived from foreign sources.)

As the evidence disclosed a drastic decrease in the ability of domestic supplies and reserves to meet increasing demands in the short time since the 1967-68 hearings, so also does the evidence disclose the possibilities of a very substantial increase in domestic supplies and reserves.

The evidence reveals that the domestic areas which have traditionally served to supply the Western United States have a gas supply potential of 180.5 trillion cubic feet (TCF), almost four times their present proved reserves. The Bureau of Mined has estimated that 317 TCF are contained in formations along the Rocky Mountains which may be susceptible to recovery by nuclear stimulation. It is estimated that recoverable coal reserves in the United States contain a potential of 12,000 TCF of synthetic pipeline gas and that the processing of oil shale reserves in Colorado alone would yield about 6,000 TCF of pipeline gas (FPC staff Exhibits 1000 and 1006). In addition to the potential domestic gas supplies and reserves, Western Canada and the Arctic Islands

have a potential of over 530 TCF, (El Paso Exhibit 120 Page 17), and Alaska's estimated potential is about 420 TCF. (Staff Exhibit 1000 Page 3.)

The transportation of liquified natural gas by ocean tanker may well render vast quantities of overseas supplies physically available to American markets., (FPC Staff Exhibit 1006-D Page 60-64.)

El Paso is now furnishing to the gas market on the Eastern seaboard of the United States, liquified natural gas from Algeria.

In the light of this evidence, the Court cannot find that El Paso will not be a competitor for increments of demand in the California market in the future and perhaps the near future.

Therefore, we must take into consideration the possibility of the defendant again becoming a competitor in the California market and include In the divestiture decree provisions which will accomplish the objects and purposes set forth in the *Utah* opinion.

In the light of the foregoing, we consider the proposals of the parties.

Plaintiff's Proposals

Plaintiff assumes the divestment of reserves proposed by defendant and its proposals are in addition thereto.

Plaintiff frankly recognizes that a divestiture at this time of additional San Juan Basin reserves to New Company, over and above those defendant proposes to divest to enable it to compete at once for new increments of demand in the California market would jeopardize El Paso's ability to meet the supply requirements of the Southern division which the Federal Power Commission has certificated, and that such a divestiture at the present time would be at the expense of those California gas users presently served by the Southern division.

The plaintiff, therefore, does not propose a divestiture of additional San Juan reserves to New Company at this time to be used by it to compete for incremental demands in the California market. What plaintiff proposes is a divestiture by El Paso of a portion of the physical facilities of the Southern division (specifically the 34-inch San Juan main line) ; a takeover by New Company of a portion of El Paso's commitments to California customers, and a divestment to New Company of sufficient San Juan reserves to supply the service commitments which New Company proposes to take over from El Paso.

As an alternate proposal, plaintiff proposes a take over by New Company of a part of the service commitments of El Paso to its California customers; a transfer to New Company of San Juan reserves sufficient to supply those commitments, and that El Paso be required to transport this gas for New Company from the San Juan Basin to the California customers upon “reasonable terms”.

Plaintiff acknowledges that its proposals will not restore New Company as a competitor in the California market, but contends that its proposals arc the *only weans* by which to place New Company in a position to compete with El Paso for new increments of demand in the California market if and when gas supplies become available to New Company for that purpose.

Until these new supplies become available to New Company, the plaintiff's proposals, if adopted, would result in the same gas, in the same volumes, being delivered to the same customers, in the same amounts and through the same facilities as at present.

Plaintiff's proposals are opposed by all parties and all applicants for acquisition with the exception of Paradox and Bannister. Paradox supports the plaintiff's proposals and also proposes a variation—divestment of the 24-inch San Juan main line in lieu of the 34-inch line proposed by plaintiff.

Bannister supports the plaintiff's alternate proposal—the transportation agreement.

Consideration of Plaintiff's Proposals

The Court has considered plaintiff's proposals and the evidence in support of and in opposition thereto and determines that neither of the plaintiff's proposals nor the Paradox variation thereof should be adopted by the Court for the reasons which follow.

The Court has not considered the question of whether or not it has the power to divest a portion of the Southern division pipelines which were constructed before the merger and consequently, were not acquired as a result of the merger. Nor has the Court considered the question of its authority to order a divestment by El Paso of a portion of its gas supply contracts which were the basis for the Federal Power Commission certifications.

The Court has elected to consider plaintiff's proposals on their merits, and has assumed that it has the power and authority to adopt the proposals of the plaintiff or Paradox.

In the Court's opinion, the adoption of any or all of the proposals of the plaintiff and Paradox would be a clear violation of that portion of the *Utah* opinion which states:

> "The severance of all managerial and financial connections between El Paso and the New Company must be complete for the decree to satisfy our mandate."

The evidence is undisputed that the Southern division pipeline system is an integrated system of many pipelines which extend from the Permian Basin in West Texas, the Hugoton-Anadarko producing area in the Texas-Oklahoma Panhandle, and the San Juan Basin. These producing areas produce the gas which is supplied by the Southern division. The Southern division consists of the California main line which delivers gas to Pacific Lighting Service Company at Blythe, California, and in general, consists of parallel 26-inch and 30-inch pipelines. The San Juan main line delivers gas to the California border at Topoc and consists in general of 24-inch, 30-inch and 34-inch parallel pipelines. The California main line system is connected to the San Juan main line system by crossover pipelines referred to as the Permian-San Juan crossover, the San Juan-Maricopa crossover, and the Havasu crossover. (See FPC Exhibit 1005.) All of these pipelines are operated as one integrated system generally referred to as the Southern division. The evidence is undisputed and it is obvious that to sever one portion of this complex, integrated system and make it operate with efficiency and reliability would require an operating agreement between New Company and El Paso and a joint exercise of managerial skill and judgment. This would increase rather than decrease the managerial and financial ties between New Company and El Paso, contrary to the mandate of *Utah*.

Plaintiff contends that the adoption of one of its proposals is *necessary* to enable New Company to compete with El Paso for new increments of demand in the California market when New Company acquires the necessary gas supplies. The evidence does not establish the plaintiff's contention. The evidence is that of the reserves proposed to be divested to New Company there may be 100,000 MCF per day, on an annual basis, available from New Company's San Juan Basin reserves which New Company could use to supply new increments of demand in the California market.

Southern California Gas Company (So Cal) has offered to purchase this gas from New Company delivered near Ignacio, Colorado, and arrange for its transportation to California to serve So Cal's incremental demands. So Cal has also offered that when New Company has accumulated sufficient reserves to support daily deliveries at a level of 200,000 MCF per day, to purchase such gas from New Company delivered to California through a new pipeline to be constructed by New Company to supply the increasing demands for gas in the California market. So Cal will purchase additional quantities up to 600,000 MCF per day until January 1, 1977. This offer of So Cal supplies New Company with an entree to the California market immediately and with an assured market and without managerial or financial connections with the defendant. This makes it unnecessary to adopt either of the plaintiff's proposals to enable New Company to enter the California market and compete with El Paso for new increments of demand.

The evidence does not suggest that plaintiff's proposals are either necessary or helpful to New Company in competing in the California market with Canadian gas.

Plaintiff admits that the adoption of its proposals would result in an increase in the cost of service under the Southern division. There is a conflict in the evidence as to the amount of this increase. Plaintiff contends it is de minimus. The Court finds from the evidence that the increase in cost of service if either of the plaintiff's proposals were adopted would be substantial.

The Court finds that the severance and divestiture to New Company of either the 34-inch or 24-inch pipeline would result in a decrease in the efficiency and reliability of the system which is inherent in the common control and operation of the system as it now exists.

Admittedly, the present deliverability life of the San Juan Basin reserves remaining to serve the Southern division is only three to five years. If the Court adopts one of the plaintiff's proposals, it would divest a portion of these reserves to New Company to serve that portion of El Paso's service commitments which New Company would take over. In order for New Company to maintain its ability in the future to meet the commitments which it would take over, will require New Company to obtain new supplies for this purpose. This means that any new supplies obtained by New Company which are available to the Southern division must first be devoted to assuring New Company's ability to continue to supply the commitments which it takes over from El Paso, before it can use such new gas supplies to compete for and serve new increments of demand in the California market. To this extent, the plaintiff's proposals if adopted, might well delay rather than expedite the restoration of New Company as a competitive force in the California market.

It is the opinion of the Court that it would be unwise if not improper for the Court to require New Company to adopt any plan or proposal for competing in the California market. New Company management should be permitted to exercise its own judgment and discretion as to how and under what circumstances it will compete.

Defendant's Proposal

The defendant's proposal is concisely summarized in its Exhibit 118 as follows:

> “Basically, El Paso proposes to divest a total of 11.383 trillion cubic feet (tcf) of gas reserves to New Company, as compared with 9.256 tcf proposed in 1967. This 11,383 tcf is the balance remaining after deducting 1.178 tcf of production between 1967 and 1970. Thus, on a basis comparable with that set forth in El Paso's Plan of Divestiture dated August 4, 1967, 3.305 tcf have been added to the reserves proposed to be transferred to New Company at that time.
>
> “The total is comprised of the reserves which El Paso proposed to divest in, 1967, together with the reserves which were added by the elimination of the Sumas Exchange Agreement, plus additional increments to be imported from Canada at Sumas pursuant to agreements referred to as Sumas III and Sumas IV.”

No additional San Juan Basin reserves are included in defendants' proposal beyond those which the Court ordered to be divested in the 1968 Decree.

The evidence establishes and the plaintiff and intervenors admit that, under conditions as they exist today, to require an immediate divestiture of additional San Juan reserves in any significant quantity would jeopardize the ability of the defendant to serve the certificated requirements under the Southern division. This situation will continue until defendant acquires additional reserves and supplies in excess of those required to serve the Southern division requirements.

A divestiture of San Juan Basin reserves which will deprive the presently served customers in California of a portion of their present supplies would not be fair or equitable to those customers, and, over all, would not increase the gas supply to the California market.

We have previously pointed out in our findings, the potential which exists for future gas reserves and supplies to supply present and future demands in the Western United States, including California.

We cannot ignore this potential in developing a plan of divestiture and allocation of gas supplies to meet the requirements of *Utah*.

We cannot ignore this potential in developing a plan of divestiture and allocation of gas supplies to meet the requirements of *Utah*.

The defendant's proposal is based on today's conditions without consideration of the potential to which we have just referred.

Therefore, we cannot accept the defendant's proposal. To accomplish the purposes and objects of *Utah*, we must consider the supply conditions as they exist today and the potential of tomorrow.

The Court's Plan for Divestiture and Allocation of Reserves

With this in mind, the divestiture and allocation of gas reserves shall be as follows:

1. Defendant shall divest to New Company, the reserves proposed to be divested by it and summarized at Tab A of El Paso Exhibit 118;

2. Prior to three years after the certification by Federal Power Commission of the operation by New Company of the property to be divested, defendant shall not increase the present level of its service commitments to customers in California served by the Southern division, (except for transportation of an annual volume of up to 36,500,000 MCF for Southern California Gas Company, to the extent that Southern California Gas Company purchases such volume from New Company), or use its present or future reserves in the San Juan Basin or permit the same to be used for any purpose other than the service of customers under the Southern division, or serve new increments of demand in the California market unless and until:

(a) Defendant shall divest to New Company additional reserves from the San Juan Basin, or such other source or sources as may be agreeable to New Company, in an amount which will supply New Company with not less than a daily average of 200,000 MCF with a deliverability life of at least ten years; or

(b) New Company shall be serving the California market at an average daily rate of at least 250,000 MCF, or

(c) Until the further order of this Court amending or modifying the foregoing and the Court retains continuing jurisdiction for this purpose.

3. Any reserves divested to New Company pursuant to paragraph 2(a) above shall be used by New Company solely to supply new increments of demand in the California market. If New Company, within one year after a divestment pursuant to paragraph 2(a) has not contracted to serve new increments of demand in the California market with such divested reserves and applied to the Federal Power Commission for authority therefor, the reserves divested pursuant to paragraph 2(a) shall revert to the defendant and the restrictions upon the defendant set forth in paragraph 2 shall terminate.

In the Court's opinion, the divestiture above described will accomplish the objects and purposes of *Utah*.

After this divestiture, New Company will be immediately restored to a position to compete for new increments of demand in the California market to the extent of an average annual amount of 100,000 MCF per day by utilizing that amount of its San Juan Basin supply and So Cal's offer to purchase and transport the gas to the California market.

On the other hand, El Paso immediately after the divestiture, will not be a competitor in the California market and under the Court's plan, it cannot become a competitor prior to the expiration of three years after the certification by the Federal Power Commission of the operation by New Company of the property to be divested, unless it makes the additional divestiture of reserves provided in paragraph 2(a) or unless New Company, in the meantime, shall have established itself as a substantial competitor in the California market.

New Company will also have the advantage of relatively easy access to Canadian gas supplies which are not presently available to El Paso. The evidence indicates that the future sources of supply of the incremental market in the West and particularly in California, will most likely be in large part from Canada and Alaska and not from the Permian and San Juan Basins. The Federal Power Commission, in its Amicus Curiae brief at Page 30 states:

> “Thus, New Company, with access to Canada, is in a better overall position to compete for incremental demand through pipeline-supplied gas than is El Paso.”

We believe this plan of divestiture and allocation places New Company in the same, if not a better relative competitive position vis-a-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger.

Proposal to Divest an Undivided Interest in the San Juan Reserves

Bannister, an applicant for acquisition, proposes the divestiture of San Juan reserves not on an individual lease or contract basis, but rather by the divestiture of an undivided interest in the entire "San Juan Common System and reserves."

We reject the proposal because it is clearly in violation of the mandate in *Utah*, requiring the severance of all managerial and all financial connections between El Paso and New Company. It is obvious that if El Paso and New Company own their reserves in common, joint management of those reserves would be required to determine production schedules, drilling programs, and other management problems, thereby increasing rather than severing the managerial and financial connections between the two companies.

Divestiture of Other Assets

The final decree of divestitures will deal in detail with all of the assets to be divested. Some of the parties in interest have expressed in their briefs, varying opinions as to the disposition which should be made of certain assets other than gas reserves. Some of the briefs raise other questions concerning the plan of divestiture. The Court believes these matters are better dealt with at or after the subsequent hearings.

Entered this 25th day of June, 1971.

Footnotes

1 Competition in the California market is explained and defined in *United States v. El Paso Gas Company* [1964 TRADE CASES ¶ 71,073], 376 U. S. p. 651 at 659-660, as follows:

"In this regulated industry a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry, pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel them. Those transactions with distributors are few in number…. *The competition then is for the new increments of demand that may emerge with an expanding population and with an expanding industrial or household use of gas."*