



UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

## Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

*Buckeye Partners, L.P./Magellan Midstream Partners, L.P., FTC File No. 211 0144*

June 2, 2022

The proposed consent order announced today settles the Commission’s allegations that the proposed acquisition of 26 light petroleum product terminals from Magellan Midstream Partners, L.P. by Buckeye Partners, L.P. may substantially lessen competition. While we voted to accept this proposed consent order for public comment, we write to call attention once more to the now-standard use of prior approval provisions in FTC consent agreements, including this one.<sup>1</sup> There is a purpose to prior approval, but—as recent events suggest—it does not always benefit competition or consumers. We encourage interested stakeholders to examine today’s prior approval provision and others that are proposed going forward, and provide comments to help inform the Commission of the full range of impacts these provisions may have.

On July 21, 2021, by a partisan vote, the Commission repealed the 1995 Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases.<sup>2</sup> On October 29, 2021, using the zombie vote of a former commissioner, a divided

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<sup>1</sup> As Congress recognized in enacting the Hart-Scott-Rodino Antitrust Improvements Act of 1976, consumers and businesses alike benefit from resolving competition concerns before mergers are consummated. 15 U.S.C. § 18a. Consumers benefit when competition issues are resolved before the harms from consummation occur. Pre-consummation actions also protect consumers by avoiding the risk of insufficient remedies from attempts to “unscramble the eggs” after the parties have integrated their operations. Businesses benefit from the certainty of addressing competition issues without costly and uncertain litigation, and doing so pre-consummation enables merged parties to avoid the risk of government action years after a merger is closed. A majority of commissioners now insist on routinely including prior approval provisions in consent orders, and as a result some companies are agreeing to them. While we do not always agree they are warranted for the reasons discussed, we are mindful that parties are in the best position to evaluate whether the benefits of a transaction and the certainty of a consent order outweigh the costs to them. Thus, we have not opposed consents on the grounds that they include provisions that are unnecessary and counterproductive.

<sup>2</sup> Press Release, Fed. Trade Comm’n, 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>. See also Oral Remarks of Commissioner Christine S. Wilson Open Commission Meeting on July 21, 2021,

Commission implemented a new Statement of the Commission on Use of Prior Approval Provisions in Merger Orders,<sup>3</sup> pursuant to which today's prior approval provision is incorporated in the proposed order. The new policy provides that the Commission will include prior approval provisions that last for a minimum of ten years in all merger divestiture orders for every relevant market in which harm is alleged.<sup>4</sup> And, in some situations, the Commission may seek prior approval provisions that cover product and geographic markets beyond the relevant product and geographic markets affected by the merger.<sup>5</sup> The policy also provides that the Commission will pursue prior approval provisions even against merging parties that abandon their transactions.<sup>6</sup>

Today's proposed order is not the first instance in which, pursuant to the new policy, a prior approval provision has been deployed in the oil and gas industry. On March 25, 2022, the Commission accepted for public comment, subject to final approval, a consent agreement designed to remedy the anticompetitive effects that otherwise would result from EnCap Energy Capital Fund XI, L.P.'s proposed acquisition of EP Energy Corp.'s crude oil production operations in the Uinta Basin in Utah.<sup>7</sup> In addition to asset divestitures, the proposed Order

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[https://www.ftc.gov/system/files/documents/public\\_statements/1592366/commissioner\\_christine\\_s\\_wilson\\_oral\\_remarks\\_at\\_open\\_comm\\_mtg\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf); Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1592398/dissenting\\_statement\\_of\\_commissioner\\_phillips\\_regarding\\_the\\_commissions\\_withdrawal\\_of\\_the\\_1995.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf).

<sup>3</sup> Press Release, Fed. Trade Comm'n, FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers>; Fed. Trade Comm'n, Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), <https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders>. See also Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (October 29, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1598095/wilson\\_phillips\\_prior\\_approval\\_dissenting\\_statement\\_102921.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf).

<sup>4</sup> Fed. Trade Comm'n, Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders at 2 (Oct. 25, 2021), <https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Analysis of Agreement Containing Consent Orders to Aid Public Comment in the Matter of EnCap Investments L.P., File No. 211-0158, Docket No. C-4760 (Mar. 25, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/211%200158%20C4760%20EnCap\\_EP%20AAPC.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/211%200158%20C4760%20EnCap_EP%20AAPC.pdf) ("In addition to requiring the asset divestitures, the proposed Order requires EnCap to obtain prior approval from the Commission before making certain future acquisitions in the Utah counties that encompass the Uinta Basin (Duchesne, Uintah, Utah, Grand, Emery, Carbon, and Wasatch) over the next ten years.").

requires EnCap to obtain prior approval from the Commission before making specified future acquisitions in the Uinta Basin during the next decade. EnCap’s subsidiaries, which include several small exploration and production companies among hundreds in the U.S. now cannot buy assets in that area without affirmative government approval—and the FTC is under no obligation to say yes or no within a given amount of time. Other competitors have no such obligations.

During the public comment period, which closed on May 2, 2022, the Commission received dozens of submissions highlighting the many harms that the EnCap/EP Energy prior approval provision may impose. The concerns raised include limiting the ability of local landowners to maximize the productivity and value of their land,<sup>8</sup> impeding the production of oil

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<sup>8</sup> See, e.g., Comment Submitted by Utah Royalty Owners Association - Allan Smith, FTC-2022-0024-0003 (Apr. 28, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0003> (“Uinta Basin land and mineral owners will be directly affected and harmed if XCL cannot acquire assets and be fairly treated just like all the other oil and gas producers. Our members depend upon the income derived from mineral leasing bonus payments, royalty sharing and surface use agreements for income that allows us to have a higher quality of life and support our local economy. ... Canceling the proposed XCL requirement, will foster fair competition, increase future Basin investments and allow our mineral and landowners to enjoy their private property assets to the fullest.”); Comment Submitted by RIG II, LLC, FTC-2022-0024-0005 (Apr. 25, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0005> (“The FTC’s current restrictions on XCL, drive land values down by eliminating competition. It also eliminates the most active driller in Utah from becoming an operator of acreage it does not currently have in its portfolio. It is extremely beneficial to minority Working Interest owners such as RIG II, to have their acreage developed by a good and reputable operator.”); Comment Submitted by Craig Peterson, FTC-2022-0024-0010 (Apr. 29, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0010> (“I believe these restrictions are anti-competitive, will reduce development, and directly harm land and mineral owners in the basin. Our family holds significant oil royalty interests in the basin, and your actions are unfair to us.”); Comment Submitted by Max Anderson, FTC-2022-0024-0014 (Apr. 29, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0014> (“As a surface and mineral owner in the Uinta Basin, I strongly object to the restrictions against XCL. Of all the Oil and Gas companies I have worked with in the basin, XCL has been the very best. Other Oil and Gas companies have forced their way onto our lands without our prior permission, while never working with us to come to a mutual agreement. Our surface deals with XCL has allowed for us to generate capital from our property. They are responsible operators, energy friendly, and great at developing minerals. Not allowing XCL to grow, does not allow for an even playing field with other companies and does a disservice to all surface and mineral owners. With that being said, we strongly oppose these restrictions and would like to see XCL continue to grow.”); Comment Submitted by Marilyn Edmunds, FTC-2022-0024-0021 (May 2, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0021> (“We believe these restrictions are very unnecessary, anti-competitive, and will not only reduce development but especially harm land and mineral owners in the basin. My parents, uncles, and aunts, and grandfather were some of the early settlers of the lands currently upon which XCL has been drilling in the Uintah Basin. As cattle ranchers, they taught us that the land was precious. We have been approached weekly by other oil companies but after much consideration, made a decision to work with XCL. We have appreciated the honesty, clear communications, and professionalism of XCL company representatives with whom we have worked. They particularly impress me with their environmentally conscious efforts which positively impact those who live and work in the Basin. Our family is very distressed by the recent XCL prior approval restrictions and believes they harm the land and mineral owners in the Uintah Basin.”).

and gas in the region,<sup>9</sup> and harming the economic development of Utah's Uinta Basin.<sup>10</sup> These comments are especially concerning in today's environment of high gas prices and record inflation. We thank the commenters in the EnCap matter for highlighting these concerns, and encourage comment both on today's prior approval provision and those that appear in future consent agreements.

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<sup>9</sup> Comment Submitted by Brent Brotherson, FTC-2022-0024-0017 (May 2, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0017> ("Expenses for any company are very high and over the years many companies have come and gone because of production costs and fluctuating oil prices. XCL already has been proven to be a very reliable, responsible company, and I feel the regulations and requirements imposed are not fair to them. As a landowner and mineral right owner, I would hope the FTC would drop those regulations imposed on XCL. Because of the nature and history of the past in the Uintah Basin, and because of the many companies here, I do not see XCL being able to make a monopoly here in the industry. As a farmer paying about double the cost of fuel for hay and grain production this year, I along with all farmers and ranchers are being hurt if oil production goes down.").

<sup>10</sup> Comment Submitted by Gordon Moon, FTC-2022-0024-0002 (Apr. 25, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0002> ("XCL is investing the most capital into the basin of any producer. By preventing them from growing their footprint, the FTC has directly limited the amount of investment in Utah which harms local business, employees, communities, and everyone who benefits from state and local tax revenues"); Comment Submitted by Myrin Ranch, Inc., FTC-2022-0024-0027 (May 3, 2022), <https://www.regulations.gov/comment/FTC-2022-0024-0027> ("We are writing to urge the FTC to drop the prior approval restrictions on XCL Resources. We are opposed to this rule because we believe the outcomes for our community, the local oil field and the environment will be better if XCL is able to proceed with their investments, acquisitions and operations without these restrictions.").