Greenberg Traurig

Memorandum

TO: Senator Therriault
Representative Samuels
Joe Balash
Henry Webb
Bonnie Robson

FROM: Donald C. Shepler

DATE: April 22, 2005

RE: Competitive Analysis of Producer-Owned Alaska Natural Gas Pipeline

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At your request we have examined the competitive issues that might arise in the context of an Alaska natural gas pipeline if owned by the major North Slope producers. As you are aware, in 1977 the U.S. Attorney General recommended that such ownership be prohibited in implementing the Alaska Natural Gas Transportation Act ("ANGTA"). President Carter later forbade any producer ownership interest in the ANGTA pipeline. Recently, on January 28, 2005, those historical events were highlighted when the Chairman of the FERC wrote that the Commission would be mindful of competitive issues in reviewing any certificate application for a producer-owned line and noted that the antitrust concerns of the 1970's were "still valid and will be addressed" by the Commission.

Our analysis of the competitive issues is set forth in the accompanying memorandum by Ken Minesinger and Cecil Chung of Greenberg Traurig.[1] We conclude that the vertical integration arising from the largest North Slope producers also owning the only gas pipeline out of the state continues to raise serious competitive issues. Indeed, based on FTC precedent there is a significant chance that if the pipeline existed today the major producers would not be allowed to acquire it, largely because, and in contrast with an independent pipeline, the producer-owners would have the incentive and the ability to use their control over the pipeline to discriminate against rival producers and delay or defeat an expansion. Another concern relates

[1] Mr. Minesinger, who is a past Chairman of the Antitrust Committee of the Energy Bar Association, has a unique combination of antitrust experience, having worked on numerous mergers involving major natural gas pipelines and other energy companies before the Federal Trade Commission ("FTC") and Department of Justice, and FERC experience, including several major FERC market power cases involving natural gas pipelines. Mr. Chung worked for years on the staff of the FTC -- the federal antitrust agency that typically reviews natural gas pipeline as well as many other energy sector mergers and acquisitions. While at the FTC, Mr. Chung investigated numerous energy industry mergers and acquisitions, including several natural gas pipeline transactions, and has continued to work on energy matters in private practice.

to the ability of producer-owners to raise rates on the pipeline, thereby raising the real cost to their competitors of doing business in Alaska. Such discrimination and delay could potentially cause competing producers to sell their leases at distress prices or even surrender their leases. Thus, an independent pipeline would be notably superior to a producer-owned pipeline from a competitive perspective.

We would anticipate that if the North Slope producers file for FERC approval of a pipeline the Commission would be required to address these competitive problems. This could well require that FERC adopt remedies that go beyond its existing regulations recently promulgated in Order No. 2005, and under Order No. 2004 (dealing with treatment of affiliates who own capacity on interstate pipelines).[2] These new remedies would likely include "structural" remedies which FTC and DOJ, and in some instances FERC itself, favor as a more effective means of preventing anticompetitive conduct than regulatory remedies. Such remedies could include: (1) partial divestiture to an independent pipeline; (2) establishment of an independent system operator, with the power to require expansions; and, (3) creation of an independent market monitor. FERC has adopted some of these remedies in electric utility cases, although these remedies would essentially be "new ground" in the context of a FERC pipeline certificate proceeding.

Although we deem it unlikely that FERC would refuse to certificate a producer-owned pipeline, we believe that a producer application would encounter moderate to significant delay compared to an application by an independent pipeline company due to litigation of the competitive and remedial issues identified above. This process could well result in conditions being imposed on the certificate that will be unacceptable to the producer-owners, who, in the end, may elect not to build the pipeline after all. An independently owned pipeline, by contrast, would face the same rate, tariff, design and environmental review processes at the FERC, but none of the competitive concerns that would give rise to such delay and risk that the pipeline will not be built.

[2] Order No. 2005—dealing with open season rules for an Alaskan pipeline—is the subject of rehearing petitions filed by the North Slope producers. Further, ChevronTexaco has filed an appeal of Order No. 2005 in the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 05-1111).