**PUBLIC VERSION**

**UNITED STATES OF AMERICA**
**BEFORE FEDERAL TRADE COMMISSION**



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| **In the Matter of** | ) | |
| | ) | **Docket No. C-4355** |
| **Kinder Morgan, Inc.,** | ) | |
| **a corporation** | ) | |
| | ) | |

**APPLICATION FOR APPROVAL**
**OF PROPOSED DIVESTITURE**

Pursuant to Section 2.41(f) of the Federal Trade Commission ("Commission") Rules of Practice and Procedure, 16 C.F.R. § 2.41(f) (2012), and Paragraph II of the Commission's Decision and Order ("Order") in the above captioned matter, Kinder Morgan, Inc. ("Kinder") hereby petitions the Commission to approve the divestiture of the KM Pipeline Assets to Tallgrass Energy Partners, LP ("Tallgrass").[1]

## I. BACKGROUND

On October 16, 2011, Kinder entered into an agreement to acquire El Paso Corporation ("El Paso"), the Acquisition. On May 1, 2012, the Commission issued a Complaint alleging that the Acquisition would substantially lessen competition in the markets for pipeline transportation and processing of natural gas in certain areas in the Rocky Mountains region. Also on May 1, 2012, the Commission accepted an Agreement Containing Consent Orders ("Agreement") resolving the charges in the Complaint. The Agreement included a proposed Decision and Order

[1] Capitalized terms not defined herein have the definition given them in the Order.

and an Order to Hold Separate and Maintain Assets ("Hold Separate"). After a public comment period, the Commission issued the Order on June 12, 2012, and it became final on June 15, 2012.

Effective on May 25, 2012, Kinder acquired El Paso. Paragraph II of the Commission's Order requires that Kinder divest the KM Pipeline Assets no later than 180 days from the Acquisition Date (*i.e.*, by November 21, 2012). The KM Pipeline Assets have been operating in accordance with the Hold Separate under the oversight of a Commission-appointed Trustee.

This application describes the principal terms of the purchase and sale agreements between Kinder and Tallgrass by which Kinder proposes to divest the KM Pipeline Assets, and explains why the divestiture of the KM Pipeline Assets to Tallgrass satisfies the purposes of the Commission's Order.

This application contains confidential and competitively sensitive information relating to Kinder, the divestiture of the KM Pipeline Assets, and the proposed acquirer, Tallgrass. Consequently, pursuant to Sections 6(f) and 21(c) of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2(c) (2012), and Sections 2.41(f), 4.9 and 4.10 the Commission's Rules of Practice and Procedure, 16 C.F.R. §§ 2.41(f), 4.9 and 4.10 (2012), Kinder requests that non-public, commercially or competitively sensitive information contained in this application be treated by the Commission as strictly confidential and not be made available to the public.[2] The disclosure of this information would prejudice Kinder and Tallgrass, cause harm to the ongoing competitiveness of the KM Pipeline Assets, and impair Kinder's ability to comply with its obligations under the Order. Kinder requests that the Commission inform Kinder immediately if

[2] For the convenience of maintaining the public record, Kinder is submitting two versions of this application. The Confidential Version contains the information necessary to enable the Commission to assess the application; however, some of the information is confidential and proprietary. The Public Version redacts confidential and proprietary information.

the Commission cannot treat the confidential information contained in this application as confidential in order to provide Kinder an opportunity to seek appropriate relief.

Kinder desires to complete the proposed divestiture of the KM Pipeline Assets as soon as possible following Commission approval. Prompt consummation will further the purposes of the Order and is in the interests of the Commission, the public, Tallgrass, and Kinder. First, it will restore the competition that the Commission's Complaint alleges would be lost as a result of Kinder's acquisition of El Paso. Second, it will allow Tallgrass to move forward with its business plans for the competitive operation of the KM Pipeline Assets. Third, it will allow Kinder to fulfill its obligations under the Order as soon as possible. Accordingly, Kinder requests that the Commission promptly commence the public comment period pursuant to Section 2.41(f) of the Commission's Rules, 16 C.F.R. § 2.41(f) (2012), limit the comment period to the customary 30 days, and approve this application for divestiture as soon as practicable after the close of the public comment period.

## II. THE PROPOSED DIVESTITURE

On August 17, 2012, Kinder and Tallgrass entered into agreements for the sale and purchase of the KM Pipeline Assets.[3] Specifically, there are two agreements: (i) a purchase and sale agreement relating to the KMIGT and Trailblazer[4] Interstate Pipeline Systems ("KMIGT Purchase Agreement"), and (ii) a purchase and sale agreement relating to the REX Interstate Pipeline System ("REX Purchase Agreement") (collectively, the "Purchase Agreements").

[3] *See* Press Release, Kinder Morgan Inc. (Aug. 20, 2012), http://www.businesswire.com/news/home/20120820005400/en/KMP-Enters-Agreement-Divest-Assets; *see also* Press Release, Tallgrass Energy Partners (Aug. 20, 2012), http://www.businesswire.com/news/home/20120820005469/en/Tallgrass-Energy-Partners-LP-Acquire-Significant-Midstream.

[4] Included in the Trailblazer Interstate Pipeline System assets are the related Casper-Douglas natural gas processing and West Frenchie Draw treating facilities.

Copies of the Purchase Agreements were filed with the Securities and Exchange Commission in Kinder's Form 8-K, dated August 23, 2012.

As explained below, the terms of the Purchase Agreements comply with the Commission's Order, the proposed divestiture to Tallgrass satisfies the purposes of the Commission's Order, and Tallgrass will be a viable competitor.

## III. THE PROPOSED DIVESTITURE IS CONSISTENT WITH THE TERMS AND PURPOSE OF THE ORDER

### *A. The Proposed Divestiture Is Consistent With The Terms Of The Order*

Paragraph II.A of the Order requires that Kinder divest the KM Pipeline Assets no later than 180 days from the Acquisition Date. Kinder must divest the KM Pipeline Assets absolutely and in good faith, as an on-going business, and at no minimum price.

Pursuant to the Purchase Agreements, Kinder has agreed to sell, and Tallgrass has agreed to purchase and take assignment of, the KM Pipeline Assets. The purchase and sale transactions described in the Purchase Agreements comprise all of the KM Pipeline Assets as defined and described in Paragraph I.R of the Order. Specifically, (i) pursuant to Paragraph 2.1 of the REX Purchase Agreement, Tallgrass will purchase the "Purchased REX Interests" (defined as the fifty percent (50%) of the outstanding membership interests in Rockies Express Pipeline, LLC owned by Kinder) and the "NatGas Interests" (defined as one hundred percent (100%) of the outstanding membership interests in Kinder Morgan NatGas Operator LLC); and (ii) pursuant to Paragraph 2.1 of the KMIGT Purchase Agreement, Tallgrass will purchase one hundred percent (100%) of the outstanding membership interests in each of Kinder Morgan Interstate Gas Transmission LLC, Trailblazer Pipeline Company LLC, KM Upstream LLC, and Kinder Morgan



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Pony Express Pipeline LLC (collectively, the "Purchased Interests").[5] Kinder will not have continuing ties to Tallgrass or the KM Pipeline business[6] (*e.g.*, no ongoing supply agreements or security interests in the assets being divested) and Kinder will not have a financial stake in Tallgrass's success. Accordingly, the proposed divestiture to Tallgrass satisfies Kinder's obligation to divest absolutely the KM Pipeline Assets.

Paragraph II.B of the Order requires that Kinder grant to the acquirer a license to intellectual property relating to operation of the KM Pipeline Assets, and secure all consents or assignments that are necessary for the divestiture. The Purchase Agreements each provide for Kinder and Tallgrass to enter into intellectual property license agreements upon closing.[7] Kinder will grant Tallgrass worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable license to use intellectual property that is currently used in the operation of the KM Pipeline Assets. The intellectual property that will be licensed primarily is software used to operate the business (e.g., scheduling software, accounting software, and other software for administrative functions). However, certain Kinder intellectual property (e.g., trade names, logos, service marks) will be retained by Kinder and licensed to Tallgrass only for a transitional period.

Procurement of all authorizations, consents and approvals (or waiver thereof) required to consummate the sale of the KM Pipeline Assets is a condition to closing.[8] In particular, the operating agreement of the Rockies Express Pipeline, LLC provides a right of first refusal ("ROFR") to the other members of the limited liability company, Sempra Energy and Phillips 66 (as successor to ConocoPhillips) prior to a sale of Kinder's membership interest. The ROFR

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[5] Capitalized terms used herein regarding the Purchase Agreements have the definitions given them in the Purchase Agreements.

[6] Of course, pre-existing commercial relationships between the businesses, such as pipeline interconnections and leases will continue after the divestiture.

[7] *See* Purchase Agreements at Paragraphs 3.2, 3.3, and Exhibit C.

[8] *See* Paragraphs 4.6 and 5.4 of the Purchase Agreements.

provided the other members with a 30-day period to decide whether to purchase Kinder's membership interest on the same terms that Kinder has negotiated with Tallgrass. The ROFR expired, and Sempra and Philips 66 did not exercise their respective right to purchase Kinder's membership interest. In addition, Kinder's subsidiary, Kinder Morgan NatGas Operator LLC, currently operates the REX pipeline. The other members of the Rockies Express Pipeline LLC also were notified of Kinder's intention to sell 100 percent of its membership interest in Kinder Morgan NatGas Operator LLC to Tallgrass, through which Tallgrass would assume the operatorship of the REX pipeline. Both Sempra Energy and Phillips 66 have consented to the assumption by Tallgrass of the operating responsibility for the REX pipeline in connection with the sale of the KM Pipeline Assets. Therefore, Kinder has obtained the consents needed to sell its 50 percent interest in REX, and Kinder also has obtained the consents needed to sell/transfer the operatorship of the REX pipeline to Tallgrass upon closing.

Paragraph II.D of the Order requires that, at the acquirer's request, Kinder must provide Transitional Assistance to the acquirer for a period of up to nine (9) months after the date of the divestiture. The Purchase Agreements provide for Kinder and Tallgrass to enter into an agreement to provide transitional assistance upon closing.[9] Kinder will provide all services requested by Tallgrass in order to enable Tallgrass to operate the KM Pipeline Assets in substantially the same manner as operated by Kinder. The services will be provided at direct cost and for a period no longer than nine months after closing.

Paragraph II.E of the Order also requires Kinder to provide the acquirer with an opportunity to recruit and retain any KM Pipeline Employee, to not interfere with the acquirer's efforts to hire any KM Pipeline Employee, and to provide KM Key Employees with a financial

[9] *See* Purchase Agreements at Paragraphs 3.2, 3.3.

incentive to accept the position if they receive an offer from the acquirer. Kinder has provided Tallgrass with the opportunity to employ the KM Pipeline Employees, and Tallgrass has indicated that it plans to make job offers to most of these employees. In fact, the CEO of Tallgrass stated that Tallgrass is looking "forward to working with a talented group of Kinder Morgan employees and will leverage their integral experience as we continue the high level of operational performance of these assets, work to expand the asset base and grow the company."[10] Kinder's CEO also noted that: "It is very gratifying that Tallgrass is interested in retaining the employees of the entities that will be divested."[11] Further, Tallgrass' plans for the business are based on the premise that the employees will continue the day-to-day operation and management of the KM Pipeline Assets.[12]

Through the provisions of the Purchase Agreements and other actions, Kinder has complied with the terms of the Order and the proposed sale to Tallgrass is consistent with the terms of the Order.

### *B. The Proposed Divestiture Is Consistent With The Purpose Of The Order*

Paragraph II.H recites that the purpose of the Order's provisions concerning the divestiture of the KM Pipeline Assets is: to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of Kinder's acquisition of El Paso; and to remedy any lessening of competition resulting from the acquisition as alleged in the Commission's Complaint. The proposed divestiture to Tallgrass is consistent with the purpose of the Order.

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[10] *See* Press Releases, *supra* note 3 (Aug. 20, 2012).

[11] *See* Press Release, Kinder Morgan Inc., *supra* note 3 (Aug. 20, 2012).

[12] *See* James Dornbrook, *Tallgrass CEO Wants Deals to Flow - $3.3B purchase will serve as base*, KAN. CITY BUS. J., Aug. 31 – Sept. 6, 2012, at 1, 31.



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According to the Bureau of Competition, "to be acceptable, a buyer must be competitively and financially viable ... The staff will therefore evaluate a proposed buyer to determine whether it has (1) the financial capability and incentives to operate the assets, and (2) the competitive ability to maintain or restore competition in the market."[13] Divestiture of the KM Pipeline Assets to Tallgrass meets these articulated criteria.

As discussed in greater detail in Section IV of this application, Tallgrass is a newly formed entity led by David G. Dehaemers, Jr. as CEO along with an experienced management team, and equity partners – Energy & Minerals Group ("EMG"), Kelso & Company ("Kelso") and Magnetar Financial LLC ("Magnetar") – that either specialize or have significant experience in the energy sector, including companies with significant midstream assets. The Tallgrass management team has many years of experience in the midstream energy sector, and the company would retain all of the employees who currently operate the business on a day-to-day basis. Tallgrass has access to sufficient equity and debt financing to close the acquisition, and it will have access to the credit and working capital necessary to successfully operate the business. Tallgrass does not own any pipeline or processing assets in the Rocky Mountains region. The significant equity investments in Tallgrass by the private equity funds and management team also will create economic incentives to compete vigorously in the market so that the investors are rewarded with return on their investment. In sum, Tallgrass has the financial capability and incentives to operate the assets competitively.

Kinder's sale of the KM Pipeline Assets to Tallgrass will remedy any competitive harm in the processing and pipeline transportation of natural gas resulting from Kinder's acquisition of El Paso alleged in the Commission's Complaint. The Complaint alleges that the effect of the

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[13] Statement of the Federal Trade Commission, Bureau of Competition on Negotiating Merger Remedies at "An Acceptable Buyer;" *see also id.* ("Divestiture Applications").

Acquisition may be substantially to lessen competition in the relevant markets by: (a) eliminating actual, direct and substantial competition between Kinder and El Paso; and (b) increasing the likelihood that Kinder will exercise market power unilaterally. The sale of the KM Pipeline Assets to Tallgrass does not pose any of the competitive concerns alleged in the Complaint. Currently, Tallgrass does not engage in processing or pipeline transportation of natural gas. Therefore, through the acquisition of the KM Pipeline Assets, Tallgrass will become an independent competitor in the processing and transportation of natural gas in the relevant markets. As Tallgrass has the competitive ability to maintain or restore competition in the market, the proposed divestiture to Tallgrass will remedy the competitive harm alleged in the Commission's Complaint.

## IV. THE PROPOSED ACQUIRER IS A STRONG, EXPERIENCED AND VIABLE COMPETITOR

### *A. Tallgrass Is Financially Capable*

Tallgrass, a Delaware limited partnership, is headquartered in Overland Park, KS. Tallgrass is owned by its equity investors: Kelso, EMG, Magnetar, David G. Dehaemers, Jr., who will serve as President and CEO of Tallgrass, and Tallgrass KC, LLC, an entity owned by Mr. Dehaemers and the Tallgrass executive management.

Tallgrass, through its equity investors, is committing approximately $1 billion to acquire the KM Pipeline Assets.[14] In addition, Tallgrass has obtained a commitment for $875 million in debt financing for the transaction from Barclays Bank PLC ("Barclays").[15] Further, the

[14] *See* Purchase Agreements at Section 5.5(a).

[15] *Id.*

committed financing from Barclays includes an additional $150 million in revolving credit for working capital purposes.[16]

Tallgrass has conservatively financed the acquisition of the KM Pipeline Assets, with the $1 billion in equity representing a large proportion of total capitalization. Accordingly, Tallgrass is a financially capable buyer.

### *B. Tallgrass Leadership Has Experience in the Midstream Sector of the Energy Industry and Tallgrass Will Retain the KM Pipeline Employees*

Tallgrass is led by CEO David G. Dehaemers Jr. and an experienced management team with significant midstream energy experience.[17] Since 2008, Mr. Dehaemers has managed an investment partnership investing in the midstream energy sector. Previously, Mr. Dehaemers was a member of senior management in two public companies in the master limited partnership energy sector. From 1997 to 2003 he served as CFO and EVP of corporate development at Kinder, and from 2003 to 2007 he served as the EVP of corporate development at Inergy, LP, a publicly traded, diversified energy infrastructure and distribution company. In his career he has led more than $14 billion of midstream energy merger, acquisition and development opportunities. He is well acquainted with numerous assets in the energy midstream sector and has extensive experience acquiring, structuring and combining energy assets. His skill set includes experience in accounting, tax, legal, and mergers/acquisitions matters. Mr. Dehaemers has a BA in accounting from Creighton University, and a JD from the University of Missouri – Kansas City. He is a member of the Missouri bar (inactive) and a CPA, having held positions with the national accounting firms of Ernst & Whinney and Arthur Young.

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[16] *Id.*

[17] *See* Press Release, Tallgrass, *supra* note 3 (Aug. 20, 2012); *see also* Dornbrook, *supra* note 12.

The other equity investors also have significant experience with midstream energy assets. EMG is a private equity group focused on the midstream energy sector. EMG has $4.8 billion of committed capital, and has invested in nine midstream ventures comprising approximately $2.6 billion of equity capital including: Plains All American Pipeline, MarkWest Marcellus Shale Liberty Midstream JV, MarkWest Utica Shale Midstream JV, High Sierra, EMG Iron Ore, Medallion Midstream, INR Energy, and the ATEC Rail Group.[18] EMG was founded in 2006 by John T. Raymond, who previously held leadership positions with various energy companies, including CEO of Plains Resources, Inc. (the predecessor entity for Vulcan Energy Corporation) from 2001 to 2005, CEO of Plains Exploration and Production Company in 2001, and Director of Development for Kinder from 2000 to 2001. Mr. Raymond received a BS in management from the A.B. Freeman School of Business at Tulane University with dual concentrations in finance and accounting, and currently sits on Tulane University's Business School Council.

Kelso is one of the oldest and most established firms specializing in private equity. Since 1980, Kelso has invested in over 115 companies in a broad range of industry sectors with aggregate initial capitalization at closing of over $40 billion.[19] Representative energy investments include: Buckeye GP Holdings L.P., CVR Energy, Inc., Crescent Point Energy Corporation, Hunt Marcellus LLC, Tervita, and Venari Resources LLC. As a result of these investments, Kelso has several professionals with energy sector experience.

Magnetar is a multi-strategy investment manager with approximately $9 billion under management. Magnetar has an investment group focused solely on the North American energy

[18] *See* Press Release, Tallgrass, *supra* note 3 (Aug. 20, 2012); *see also* http://www.emgtx.com/about.html.

[19] *See* Press Release, Tallgrass, *supra* note 3 (Aug. 20, 2012); *see also* Kelso website, http://www.kelso.com/Investments/Default.aspx.

sector, which has completed 23 directly negotiated investments in North American energy companies.[20]

Most important, Tallgrass intends to retain almost all of the KM Pipeline Employees, including all of the KM Key Employees.[21] These employees, who have been held separate from Kinder pursuant to the Hold Separate, are the best positioned to continue operating the business as it has been run historically. Recognizing the value of these employees to the business, the CEO of Tallgrass stated "We look forward to working with a talented group of Kinder Morgan employees and will leverage their integral experience as we continue the high level of operational performance of these assets, work to expand the asset base and grow the company."[22]

As discussed above, the other owners of the REX pipeline, Sempra Energy and Phillips 66, have consented to Tallgrass operating the pipeline. The fact that these experienced energy companies have consented to Tallgrass taking over as operator of this major pipeline system is a testament to the industry's view of Tallgrass's capability and experience.

In sum, Tallgrass has substantial experience in the midstream energy sector through its investors, management, and the retained KM Pipeline Employees.

### *C. Tallgrass Will Be A Viable Competitor*

Tallgrass will be a viable competitor in the market for processing and pipeline transportation of natural gas in the Rocky Mountains region of United States. Because a significant portion of the capacity of the pipelines being acquired is contractually committed for several years, Tallgrass will have a stable base of FERC-regulated cash flow to support its long-term operations. Additionally, the KM Pipeline Assets have been well-maintained and will

[20] *See* Press Release, Tallgrass, *supra* note 3 (Aug. 20, 2012); Magnetar website, http://www.magnetar.com/.

[21] *See, e.g.*, Press Release, Kinder Morgan, Inc., *supra* note 3 (Aug. 20, 2012) ("'It is gratifying that Tallgrass is interested in retaining the employees of the entities being divested,' [Richard D.] Kinder said.").

[22] Press Releases, *supra* note 3 (Aug. 20, 2012).

require limited maintenance capital. In addition, Tallgrass plans to grow the business through increased pipeline connectivity and pipeline expansion projects.[23] Tallgrass also plans to continue the Pony Express natural gas to oil conversion project, which already completed a successful open season and has contracted with anchor shippers.[24] Tallgrass's post-acquisition plans and demonstrate that Tallgrass will be a viable competitor.

## V. CONCLUSION

For the foregoing reasons, Kinder respectfully requests that the Commission expeditiously approve the proposed divestiture of the KM Pipeline Assets to Tallgrass, in the manner provided in the Purchase Agreements, as soon as practicable after expiration of the public comment period.

Respectfully Submitted,

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[23] *See* Press Release, Tallgrass, *supra* note 3 (Aug. 20, 2012); *see also* Dornbrook, *supra* note 12.

[24] *See* Press Release, Tallgrass, *supra* note 3 (Aug. 20, 2012).