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126 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Kern River Gas Transmission Company — Docket Nos. RP04-274-000, RP04-274-009, RP00-157-015

OPINION NO. 486-B

ORDER ON REHEARING, PROPOSED SETTLEMENT AND PAPER HEARING

(Issued January 15, 2009)

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A. **Composition of the Proxy Group**

50. As the court explained in *Petal v. FERC*, the purpose of the proxy group is to "provide market-determined stock and dividend figures from public companies comparable to a target company for which those figures are unavailable. Market-determined stock figures reflect a company's risk level and when combined with dividend values, permit calculation of the 'risk-adjusted expected rate of return sufficient to attract investors.'"[80] It is thus crucial that the firms in the proxy group be comparable to the regulated firm whose rate is being determined. In other words, as the court emphasized in *Petal v. FERC*, the proxy group must be "risk-appropriate."[81]

51. However, given the numerous factors that can vary the risk profile of the individual firm, it is difficult in an individual case to develop a proxy group of sufficient numbers in which the members will have exactly the same risk. In the instant case, 100 percent of Kern River's assets, revenues, and earnings are derived from its interstate gas transmission pipeline function. Given this level of natural gas pipeline activity, it is unlikely there will be complete congruence among the characteristics of all proxy group members. For this reason, as both BP and Staff assert, *Petal* requires a full and complete analysis of the similarities and differences between the business activities of each of the proposed proxy firms and Kern River in order to ensure that the operations presented by the proxy group companies adopted are analogous to Kern River's operations and risks.

52. The paper hearing participants propose a range of proxy group members for both a 2004 and 2007-2008 proxy group. Staff proposes three different groups for the year 2004, one of four members and two of five members. After eliminating a number of firms Staff concluded were inappropriate, Staff's 2004 proxy group included KMI, National Fuel, Northern Border Partners, L.P. (Northern Border), Questar, and TC Pipelines, L.P. (TC Pipelines). For the year 2008 Staff proposed two proxy groups consisting of six and seven members and added the following to the 2004 group: Enterprise Products Partners, L.P. (Enterprise), Equitable, Kinder Morgan Energy Partners, LP (KMEP), Oneok Partners (Oneok, formerly Northern Border), and Southern Union Company (Southern Union), but deleted KMI.[82] BP proposes a nine member group for the year 2004: Equitable, KMEP, KMI, National Fuel, NiSource, Inc. (NiSource), Oneok Partners, L.P. (Oneok, meaning Northern Border in that year),

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[80] *Petal v. FERC*, 496 F.3d at 697 (*quoting CAPP v. FERC*, 254 F.3d 289 at 293).

[81] *Id.*

[82] Initial Brief of the Commission Trial Staff (Staff Initial Brief), Ex. S-2 at Schedules 1-3 and 7-9.

Questar, Southern Union, and TC Pipelines.[83] BP also proposes an eleven member group for the year 2008 that added Boardwalk Partners (Boardwalk), Spectra Energy Partners, L.P. (Spectra Partners), Spectra Energy Corporation (Spectra Energy), and deleted KMI.[84] Kern River proposed a four firm sample for the 2004 test year, consisting of Enterprise, KMI, KMEP, and Northern Border, and no proxy group for the year 2008.[85]

53. RCG proposed seven members for the year 2008 consisting of Southern Union, Spectra Energy, TC Pipelines, KMEP, TransCanada Corporation (TransCanada), Oneok, and Boardwalk[86] and later a 2004 group consisting of Equitable, KMI, National Fuel, Questar, TransCanada, Enterprise, and Northern Border. Reliant proposed a three member group for the year 2004 consisting of KMI, Northern Border, and TC Pipelines[87] and a five member sample group for the year 2008 that deleted KMI and added Boardwalk, Southern Union, and Spectra Energy.[88] Staff, Reliant, and BP proposed using a 2004 or 2008 test year with BP favoring 2004, Reliant 2008, and Staff asserting that either was acceptable. Kern River asserted that only the year 2004 is appropriate with RCG first proposing a 2004 test year, but later accepting a 2008 test year as well.

1. <u>The Test Year for This Proceeding</u>

54. This order now addresses the threshold issue of whether the proxy group should be determined based on proxy company data for (1) the 2004 test period upon which Kern River's rates in this rate case are based[89] or (2) updated data for 2008. Opinion No. 486 was based on a 2004 test year. At this juncture, Kern River and Calpine assert that the Commission should retain the 2004 test year. Reliant, BP, and Staff provide proposed proxy groups and DCF analyses for the years 2004 and 2008. RCG first included only a year 2008 proxy group but later devised one for 2004 as well.

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[83] BP Initial Brief at 3.

[84] *Id. a*t 4

[85] Supplemental Initial Brief of Kern River Transmission Company in Response to Opinion No. 496-A (Kern River Initial Brief) at 1, 6-10.

[86] RCG Initial Brief at 2, 11-13.

[87] Reply Brief of RCG in Response to Opinion No. 486-A (RCG Reply Brief) at 5.

[88] Reliant Initial Brief at 1, 6-7.

[89] The last twelve months of the test period in this rate case was the year ending on October 31, 2004. For convenience, in this order we shall refer to that period as "the 2004 test year."

55. The parties advancing the use of the 2008 test year argue that nothing in Opinion No. 486-A precludes the use of a 2008 test year, and that in fact the Commission reopened the record in that time frame. Staff further argues that even in gas cases the Commission has a longstanding policy to consider updated financial data beyond the test period when circumstances warrant. While Staff takes no definite position, it suggests that the Commission could establish one equity cost of capital for the period November 1, 2004 through April 17, 2008, and a second thereafter. [90] BP states that there are synchronization and consistency issues if the year 2008 is used and believes that the year 2004 is the better year.[91] Reliant and RCG assert that the year 2008 is the better year because it more accurately reflects economic conditions for the time frame the rates will be in effect. They place particular emphasis on continued growth in Kern River's throughput after 2004, its stronger contractual position in 2008, and the improved prospects for production in the gas basins it serves. They use this evidence to bolster their argument that Kern River is materially less risky than other gas pipelines and should be placed at the lower end of the zone. They argue that the more recent 2008 throughput data establishes that Kern is significantly over recovering its 2004 cost of service.[92]

56. Kern River argues that the year 2008 does not reflect the elements in its cost of service or its risk in that year. It also asserts that many of the firms proposed for the 2008 proxy group did not even exist in 2004 and it is hard to see how the risks of those firms in 2008 could possibly be comparable to the conditions Kern River faced in 2004. Kern River further argues that the additional information regarding volumes and its more recent prospects is wholly inconsistent with the Commission's test period concept. It requests the Commission to exclude all 2008 evidence from the record.[93]

57. The Commission will retain the 2004 test year. All other aspects of Kern River's rates are being established based on data from that time frame, and therefore Kern River's rates should also reflect its capital costs at that time. Kern River's capital cost is the weighted cost of its debt and equity capital structure. The only debt information here is for the year 2004. Thus, if the Commission were to use a 2008 proxy group, it would have to combine a 2004 debt cost with a 2008 equity cost, which distorts the overall weighted cost of capital. Moreover, equity cost is directly related to the cost of debt

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[90] *Citing Williston Basin Interstate Pipeline Company*, 72 FERC ¶ 61,075, at 61,373 (1995).

[91] BP Initial Brief at 4.

[92] RGC Initial Brief at 7-9; Reliant Initial Brief at 5-6 and 15-16.

[93] Reply Brief of Kern River Transmission Company in Response to Opinion No. 486-A (Kern River Reply Brief) at 2-4 and 7-11.

because it reflects in part a markup over debt cost based on the risk of the firm in the same period. Thus, it is internally inconsistent to use debt and equity costs from different periods. Finally, the Commission concludes that RCG and Reliant's use of post-2004 increases in Kern River's throughput to justify a 2008 proxy group is generally inconsistent with the 2004 test period and serves to highlight the lack of synchronization between a cost of service and operating profile grounded in 2004 data and a risk profile based on the year 2008. As Kern River points out, some of the firms relied on for the 2008 proxy group did not even exist in 2004 and as such may not have had a risk profile similar to that of Kern River.[94]

58. This order now turns to an analysis of the firms the parties proposed to include in the proxy group based on data for the year 2004. These firms fall into three categories. These are (1) corporations historically recognized as predominantly engaged in the interstate natural gas transmission business; (2) MLPs owning natural gas transmission companies; and (3) diversified natural gas companies with some interstate natural gas transmission business but with a majority of the business in other natural gas activities such as distribution and exploration and production.

2. Gas Pipeline Transmission Corporations

59. As described above, the Commission historically required that a proxy firm's pipeline business account for, on average, at least 50 percent of the firm's assets or operating income over the most recent three-year period. The possible sample of gas pipeline corporations which satisfy that standard is limited, because El Paso and Williams, two traditional gas transmission companies, are excluded from the 2004 proxy group for the reasons stated in Opinion No. 486. The remaining corporations which satisfy this standard, discussed by the parties, are KMI and TransCanada Corporation. As of the end of 2004, KMI's ownership of Natural Gas Pipeline Company of America (Natural) accounted for 55 percent of its assets.[95] In addition, its investment in KMEP accounted for another 23 percent of its assets. As discussed further below, about 35 percent of KMEP's assets are natural gas pipeline facilities. Thus, KMI's pipeline business accounts for over 60 percent of its assets. All the parties accept KMI as an appropriate interstate gas transmission firm given its predominance of interstate gas pipeline operations. Therefore KMI will be included in the Kern River proxy group.

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[94] Rebuttal Brief of Kern River Transmission Company in Response to Opinion No. 486-A (Kern River Rebuttal Brief) at 8.

[95] Ex. S-3 at 31.

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60. Approximately 91 percent of TransCanada's operating income is from its natural gas pipeline business.[96] However, all the parties except RCG oppose its inclusion in the proxy group, because it was involved in a nearly two billion dollar acquisition of Gas Transmission Northwest in 2004, which could distort its stock price and dividend yield.[97] Also, TransCanada's Canadian pipeline is subject to a significantly different regulatory structure that renders it less comparable to domestic pipelines regulated by the Commission.[98] For these reasons, TransCanada will be excluded from the proxy group.

3. MLPs Owning Transmission Companies

61. Various parties suggest four MLPs owning different types of transmission companies for inclusion in the proxy group. The four MLPs are Northern Border, TC Pipelines, KMEP, and Enterprise. Of these, Northern Border and TC Pipelines had gas transmission assets and/or operating income in excess of fifty percent in 2004. The other two MLPs do not satisfy the fifty percent standard, but nevertheless are supported by certain parties. For the reasons discussed below, the Commission includes Northern Border, TC Pipelines, and KMEP in the proxy group, but excludes Enterprise.

a. Northern Border and TC Pipelines

62. During 2004, 91 percent of Northern Border's operating income came from interstate natural gas pipeline operations, with the remainder from gathering and processing.[99] While Northern Border was not followed by Value Line, it was publicly traded and IBES did report on it, including providing a five-year growth projection. All the parties support including Northern Border in the proxy group, and accordingly, the Commission will do so.

63. TC Pipelines is an investment partnership, which in 2004 owned a 30 percent interest in Northern Border Pipeline Co. and a 49.1 percent interest in Tuscarora Gas

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[96] Ex. S-2, Schedule 3.

[97] *Transcontinental Gas Pipe Line Corp.*, 90 FERC ¶ 61,279, at 61,932-33 (2000).

[98] Staff Initial Brief at 8; Staff Reply Brief at 13; Kern River Rebuttal Brief at 14. Value Line recognizes this difference by categorizing TransCanada as among the firms in the "Canadian Energy Industry," and not the firms in the "Natural Gas (Diversified) Industry." Ex. S-3 at 7.

[99] *See* Ex. S-2 at Schedule 2. In 2004, Northern Border held a 70 percent interest in Northern Border Pipeline Co., a 100 percent interest in Viking Gas Transmission Co. and Midwestern Gas Transmission Co., and a 33 percent interest in Guardian Pipeline Co. Ex. BP-150 at 1.

Transmission Co.[100] All of TC Pipeline's 2004 revenue came from dividends paid by those two pipelines. While TC Pipelines is not included in Value Line's list of diversified natural gas companies, it is followed by both Value Line and IBES.

64. Staff, BP, and RCG suggest that TC Pipelines could be a member of a 2004 proxy group. However, Kern River would exclude TC Pipelines from the 2004 proxy group as it has no pipeline operations of its own, is too small to be representative, and was not listed in the major edition of Value Line in 2004 even though all of its revenue derives from gas transmission.

65. The Commission concludes that TC Pipelines is an investment partnership that owned large minority interests in two major interstate natural gas pipelines in 2004 and all of whose revenue came from the dividends of those pipelines. It is true that it owned no pipeline assets of its own, and no credit ratings are included in the record. However, despite its small size, TC Pipelines was a publicly traded company on the New York Stock Exchange, was listed in the secondary or minor Value Line analysis in 2004,[101] and made distributions to its unit holders out of the dividends received from the pipelines in which it invested. Consistent with (1) the premise underlying the DCF methodology that a stock's price is equal to the present value of its future cash flows and (2) the fact that all of the cash flows from an investment in TC Pipelines derive from the gas transmission business, investors in TC Pipelines must view its risk profile as the same as that of the natural gas pipelines in which TC Pipelines invests. Thus, its unit price, cash distributions, and growth prospects are all tied to the health of the gas transmission business. In fact, Kern River's own witness conceded that TC Pipelines "was, and still is, a gas transmission play."[102]

66. Given the small number of firms available for inclusion in the proxy group for the year 2004, the Commission concludes that TC Pipelines should be included due to its predominately natural gas pipeline profile and its publicly traded status. This satisfies two of the Commission's traditional standards, the two more important for performing a representative DCF calculation, and comes close on the third, a listing in Value Line, in 2004. While it was not listed in the major edition of Value Line, it was reported on.[103]

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[100] Ex. BP-150 at 1.

[101] Ex. No. RES-16 at 12-14.

[102] Ex. KR-132 at 13.

[103] Reply Brief of Reliant Energy Services (Reliant Rely Brief) at 12, n.9, *citing* Ex. No. RES-16 at 15.

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The first assures that the company is representative of the industry and the second that the necessary trading and return information is available. The fact that TC Pipelines is relatively small can be addressed by evaluating its relative risk within the proxy group.

b. Kmep

67. KMEP is an MLP included in Value Line's list of diversified natural gas companies. KMI is its general partner. In 2004, KMEP owned 100 percent interests in two interstate natural gas pipelines, Kinder Morgan Interstate Transmission, Inc., and Trailblazer Pipeline Co.[104] In addition, effective November 1, 2004, KMI transferred its 100 percent ownership interest in TransColorado Gas Transmission Co. to KMEP.[105] According to Standard &Poors Ratings Direct (S&P) data provided by Trial Staff, KMEP's natural gas pipelines accounted for 35 percent of its total assets as of the end of 2004.[106] KMEP also owned oil and product pipelines which accounted for another 35 percent of its assets, CO2 pipelines which accounted for 14 percent of its assets, and terminal facilities which accounted for the remaining 15 percent.[107] The S&P 2004 operating income data for KMEP is distorted by a negative corporate overhead charge of 45 percent. However, similar to the distribution of its assets, KMEP had approximately equal amounts of operating income from its natural gas pipelines and from its oil pipelines and its income from CO2 pipelines and terminals was about half the amount from its gas and oil pipelines.[108] KMEP was not involved in any gas distribution, exploration and production, or trading and marketing activities during 2004.

68. Kern River and BP both propose to include KMEP in the proxy group, but Trial Staff and the other parties do not. Several parties raise two concerns regarding the inclusion of KMEP in the proxy group, one based on its affiliate status with KMI and the second that some 35 percent of its operating income involves oil and product pipelines. Regarding the first concern, Trial Staff asserts that a MLP that has the same assets as a corporation parent should be excluded from the proxy group because including both firms

[104] BP Ex. No. 178.

[105] Ex. S-3 at 33.

[106] *Id.* at 36.

[107] *Id.*

[108] According to Kern River's analysis of KMEP's 2004 SEC Form 10-K, KMEP obtained 30 percent of its earnings from natural gas pipelines, 31 percent from petroleum pipelines, 20 percent from terminals, and 19 percent from CO2 pipelines. Ex. KR-133 at 2.

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double counts the assets and the income. It asserts this would count the cost of capital twice and would overweight the proxy group toward the equity cost of capital of those particular firms. Trial Staff also asserts that the cost of capital for KMI and KMEP is quite close, which indicates they have duplicating assets.[109]

69. In response, Kern River asserts that the two firms have different assets even if they have some similar assets that are owned by different firms. It also argues that the two firms have separately traded public securities and present options to investors. Specifically, KMEP is an MLP that places greater emphasis on distributions and less on growth. KMI is a corporation that places more emphasis on growth and less on current dividends. Thus, they are different firms with different investment profiles despite their interlocking financial interests.[110]

70. The Commission finds that KMI and KMEP represent sufficiently separate investments that both may be included in the proxy group. As of the end of 2004, KMI's investment in KMEP represented only 23 percent of its assets. In addition to its investment in KMEP, KMI also owned 100 percent of Natural, which represented 55 percent of its assets.[111] Thus, KMI's investment in KMEP represented less than one quarter of its assets, and a substantial part of its gas transmission business is unrelated to KMEP. As Kern River points out, KMI and KMEP are separately traded public securities. Given that KMI's business operations include substantial natural gas transmission and other business activities in which KMEP is not involved, the two stocks do not represent investments in the same business. That the investment community views the two stocks as separate and distinct investments is demonstrated by the fact that security analysts surveyed by IBES in 2004 projected significantly greater growth for KMI than for KMEP.

71. Moreover, KMEP's asset and earnings profile includes a products pipeline component equal to its natural gas pipeline component, and secondary CO_2 pipeline and terminal components of equal weight. All three of these non-natural gas pipeline components have a somewhat higher risk than the natural gas pipeline component of the firm. As such, Trial Staff's assertion that the two firms have similar risks because they

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[109] Ex. S-6 at 4.

[110] Kern River Reply Brief at 14-15 and Ex. No. KR-138 at 8; Kern River Rebuttal Brief at 14 and Ex. No. KR-139 at 16.

[111] According to Kern River, 39 percent of KMI's 2004 earnings were from Natural and TransColorado (prior to its November 1, 2004 transfer to KMEP), and 7 percent from the gas distribution business of Kinder Morgan Retail, while 53 percent were from KMEP. Ex. KR-133 at 4.

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have similar returns may mean that they have similar risks and returns because they have similar assets, not that they have the same assets. In fact, the analysis here would suggest that KMEP's risk is somewhat higher. This would be reflected to a degree in KMI's risk, but KMI would have less risk given its predominance of gas pipeline assets.

72. Thus, while KMEP's risk would be reflected in KMI's return, stock price, and financial ratings, the two firms offer different investment opportunities and ownership characteristics. KMEP and KMI are sufficiently distinct that KMI's partnership interest in KMEP does not require exclusion of KMEP from the proxy group given the instant facts.[112]

73. The second objection to including KMEP in the proxy group is the fact that a significant part of its business in 2004 was the oil pipeline business and therefore it should not be classified as a gas transmission firm because oil and product pipelines have different risks than natural gas pipelines. As Trial Staff notes, the Commission has traditionally considered oil pipelines to be somewhat more risky than natural gas pipelines. The principal reason is that oil pipelines frequently operate in markets where oil can be delivered by competing pipelines, or by barge for longer movements and by trucks from terminals for shorter movements. Oil pipelines must charge common carrier rates that are equal for all customers shipping between the same points. They thus have fewer opportunities to discount within the wider price range available to gas pipelines provided by the latter's ability to contract with individual customers. In contrast, BP asserts here that oil pipelines have no barriers to entry or exit and can recover cost increases through an indexing mechanism that reduces regulatory risk.[113] BP also asserts that the increased demand for the transportation of petroleum products since 2000 may have also reduced the market risk of many petroleum and product pipelines. It therefore concludes that oil pipelines are actually less risky than many, if not most, interstate gas pipelines.

74. As noted, Trial Staff's 2004 analysis concludes that KMEP's operations, based on asset allocations to eliminate accounting distortions, were 35 percent gas transmission, 35 percent oil products, and 30 percent other.[114] The duality of the firm's operations is also reflected by the inclusion of KMEP in that year as part of Value Line's Natural Gas (Diversified) Group. In a later year KMEP became a member of a broad group that included both gas and oil transmission firms. As recently stated by Value Line:

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[112] *See* RCG Initial Brief at 12-13.

[113] Rebuttal Brief of BP Energy Company on Reopened Record Issues (BP Rebuttal Brief) at 19.

[114] Ex. S-3 at 36.

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> The Oil/Gas Distribution Industry is unusually homogeneous in its operations as members do little besides distribute hydrocarbons, mostly by pipeline.[115]

This homogeneity reflects the similarities, if somewhat different risks, of a firm owning both types of transmission firms. Thus, it is reasonable to include a firm such as KMEP in the proxy group if the weight of the gas and oil pipelines is similar and the combined transmission function exceeds 50 percent.[116] In fact, all parties did so in 2008, apparently overcoming any reservations regarding KMEP's oil pipeline component they had in 2004.

75. The Commission again concludes that the oil pipeline component of a diversified natural gas company will increase somewhat the firm's overall risk, primarily due to the oil pipeline industry's overall greater exposure to competition. However, this should not preclude the inclusion in a proxy group of a diversified firm having both components where, as here, the combined transmission function of 70 percent is significantly in excess of the 50 percent combined threshold previously discussed and no other one component predominates. Thus, the fact that KMEP has been included in oil pipeline proxy groups does not necessarily preclude its inclusion in a gas pipeline proxy group as the firm has a balanced investment in both businesses.

c. <u>Enterprise</u>

76. Enterprise is another MLP listed in Value Line's list of diversified natural gas companies. In 2004, Enterprise had minority interests in two small offshore NGA regulated pipelines (Nautilus and Venice Gathering System).[117] In addition, in December 2003, it announced a five billion dollar merger with Gulf Terra Energy Partners, L.P. That merger was completed on September 30, 2004, thus giving Enterprise significant onshore intrastate pipeline facilities regulated in part under section 311 of the Natural Gas Policy Act of 1978.[118] As of the end of 2004, after the merger with Gulf Terra, Enterprise's offshore pipeline facilities accounted for 9 percent of its assets and its

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[115] March 14, 2008 Issue; Staff Ex. 3 at 127.

[116] *See* Opinion No. 486, 117 FERC ¶ 61,077 at P 154, n.248, finding that pipelines that primarily transport oil, petroleum products, or natural gas liquids should not be included in a natural gas pipeline proxy group. Opinion No. 486 also excluded firms that were predominately or exclusively electric firms. *Id.* P 129, 138.

[117] Ex. BP-164 at 4.

[118] Ex. BP-164 at 4; Ex. S-1 at 6-7.

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onshore natural gas pipelines accounted for 49 percent of its assets. Enterprise also owned natural gas liquids pipelines regulated under the Interstate Commerce Act,[119] which accounted for 36 percent of its assets.[120] Its other assets are related to petrochemical services.

77. Kern River proposes to include Enterprise in its 2004 proxy group. Trial Staff and BP argue that Enterprise should be excluded from any 2004 proxy group because it does not have an investment grade rating. Trial Staff asserts that the Commission now excludes firms from the proxy group that do not have similar credit ratings[121] and that in 2004 Enterprise's rating was BB+, which is one notch below the lowest investment grade rating of BBB-, compared to Kern River's A3 rating.[122] Trial Staff also asserts that El Paso and Williams, the companies the Commission previously excluded from the 2004 proxy group on the grounds of their poor financial condition, also had speculative investment credit ratings in 2004. Trial Staff also states that Enterprise's S&P business profile rating of 6 is riskier than Kern River's rating of 3. Kern River argues that Enterprise was almost of investment grade in 2004 and should therefore be included in the proxy group.

78. The Commission concludes that Enterprise should not be included in the proxy group for several reasons. First, until the Gulf Terra merger was competed near the end of the test period for this rate case, Enterprise was primarily a natural gas liquids pipeline regulated under the ICA, not a gas transmission firm. Enterprise's SEC Form 10-K indicates that during 2004 only 10 percent of its revenues were from the natural gas business, while 73 percent were from its natural gas liquids pipelines.[123] Similarly, natural gas transmission accounted for 19 percent of Enterprise's gross operating margin in that year, while natural gas liquids transportation accounted for 57 percent. Most of the 2004 data which would be used to calculate Enterprise's dividend yield if it were included in the proxy group is for the period before the Gulf Terra merger was completed. As BP states, during that period, Enterprise's natural gas transmission business was "insignificant."[124] BP also presents extensive and convincing evidence that

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[119] Interstate Commerce Act, 49 U.S.C. App. § 1, *et seq.* (1988) (ICA).

[120] Ex. S-3 at 8.

[121] *Citing Southern California Edison Company*, 128 FERC ¶ 61,187, at P 27 (2008) (*SoCal*)

[122] S-1 at 6-7.

[123] Ex. KR-133 at 1.

[124] Ex. BP-143 at 7.

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Enterprise's natural gas liquids transmission business is particularly vulnerable to commodity risk due to the pricing mechanism it utilizes to transport natural gas liquids and related interest risk.[125] These points have merit because Enterprise's per barrel rate and margin is dependent on the margins of the underlying commodity transactions, and its tariffs are premised on the regulatory characteristics and risks of oil or petroleum pipeline, which were previously discussed in the context of KMEP.

79. Trial Staff and BP would also exclude Enterprise from the proxy group as a firm that has undertaken mergers or major acquisitions in the test year. Trial Staff asserts that such large scale activity can distort share prices by creating uncertainty (positive and negative) about the impact of change. Such transactions can also influence the stability of the dividend pattern.[126] In *Enbridge Pipelines (KPC)*, the Commission explained another reason for caution.

> [T]he Commission observes that both of Dr. Olson's DCF analyses relied on a proxy group that included the Coastal Corporation (Coastal), El Paso Natural Gas Company (El Paso), Enron Corporation (Enron), Sonat Inc. (Sonat), and The Williams Companies (Williams). But KPC conceded at hearing that it was a mistake to have included Sonat in the proxy group because Sonat was merged with El Paso on March 15, 1999, during the test period and once a company is the subject of an acquisition, the growth rate is based on whatever is expected to happen between that time and when the buyout is completed, which is inconsistent with the Commission's method which seeks to compute a growth rate beyond five years.[127]

80. Kern River argues Enterprise's lack of an investment grade rating was a short term function of a major acquisition with GulfTerra in 2004, a condition which continued until December 2006.[128] However, this simply establishes that Enterprise not only lacked an investment rating, the lack of that rating stemmed from adjustments to a major merger.

81. The Commission therefore concludes that Enterprise should not be included in the proxy group because its commercial characteristics are different from those of interstate gas pipelines and its financial profile was affected by a merger.

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[125] *Id.* at 9-12 and 14.

[126] Ex. Staff S-1 at 6-7 (*citing Southern California Edison Company*, 122 FERC ¶ 61,187 at P 27 (2008) (*SoCal*).

[127] *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260, at P 237 (2002) (*Enbridge*).

[128] Kern River Rebuttal Brief at 16-18.