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FEDERAL TRADE COMMISSION

[Docket No. C-4760]

Petition of EnCap Investments L.P., et al., to Reopen and Modify Order

AGENCY: Federal Trade Commission.

ACTION: Announcement of petition; request for comment.

SUMMARY: EnCap Investments L.P. ("EnCap"), EnCap Energy Capital Fund XI, L.P., Verdun Oil Company II LLC ("Verdun"), XCL Resources Holdings, LLC ("XCL"), and EP Energy LLC ("EP Energy") have asked the Federal Trade Commission ("FTC" or "Commission") to reopen and set aside the Commission's Decision and Order entered on September 13, 2022, to remove certain prior approval requirements. Publication of their petition is not intended to affect its legal status or its final disposition.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: "EnCap et al. Petition to Reopen; Docket No. C-4760" on your comment and file your comment online at *www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex P), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Maribeth Petrizzi (202-326-2564), Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(g) of the Federal Trade Commission Act, 15 U.S.C. 46(g), and FTC Rule 2.51, 16 CFR § 2.51, notice is hereby given that the above-captioned petition has been filed with the Secretary of the Commission and is being placed on the public record for a period of 30 days. After the period for public comments has expired and no later than 120 days after the date of the filing of the request, the Commission shall determine whether to reopen the proceeding and modify the Order as requested. In making its determination, the Commission will consider, among other information, all timely and responsive comments submitted in connection with this notification.

The public, redacted version of the petition is provided below. Confidential and/or competitively sensitive information has been removed at places where the notation "**[redacted text]**" appears. An electronic copy of the filed petition and any public exhibits attached to it can be obtained from the FTC website at this URL: *https://www.ftc.gov/legal-library/browse/cases-proceedings/2110158-encapep-energy-matter*.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Write "EnCap et al. Petition to Reopen; Docket No. C-4760" on your comment. Your comment—including your name and your State—will be placed on the public record of this proceeding, including, to the extent practicable, on the *www.regulations.gov* website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *www.regulations.gov* website. If you prefer to file your comment on paper, write "EnCap et al. Petition to Reopen; Docket No. C-4760" on your comment and on the envelope, and mail your comment to the following address: Federal

Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex P), Washington, DC 20580. If possible, submit your paper comment to the Commission by overnight service.

Because your comment will be placed on the publicly accessible website at *www.regulations.gov*, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. Your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other State identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *www.regulations.gov* – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from that website, unless you submit

a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy*.

Authority: 15 U.S.C. 46, 5 U.S.C. 552.

April J. Tabor,

Secretary.

Text of Petition of EnCap Investments L.P., et al., to Reopen and Modify the Decision and Order

Pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and section 2.51 of the Federal Trade Commission's Rules of Practice, 16 CFR § 2.51, Respondents EnCap Investments L.P. ("EnCap"), EnCap Energy Capital Fund XI, L.P., Verdun Oil Company II LLC ("Verdun"), XCL Resources Holdings, LLC ("XCL"), and EP Energy LLC ("EP Energy")[1] (collectively, "Respondents") respectfully request that the Commission reopen and modify the Decision and Order entered on September 13, 2022 in Docket No. C-4760 ("Order") to remove the prior approval requirements in Section X.

[1] EP Energy Corporation has been dissolved. EP Energy LLC is now owned by Verdun.

The Order's purpose was to prevent the potential elimination of "substantial head-to-head competition between EnCap and [EP Energy]" due to Verdun's proposed acquisition of EP Energy (the "Acquisition").[2] *See* Ex. 1, Complaint ¶ 24; Ex. 2, Decision and Order ("Order") § XV. That purpose was fulfilled when Respondents divested EP Energy's Uinta Basin assets to Crescent Energy Company ("Crescent") on March 30, 2022, resolving any concern that the Acquisition would substantially lessen competition. *See* Ex. 3, *Crescent Energy Closes $690 Million Acquisition of EP Energy Uinta Assets*, Hart Energy (Mar. 30, 2022), https://www.hartenergy.com/exclusives/crescent-energy-closes-690-million-acquisition-ep-energy-uinta-assets-199505.

EnCap and XCL have since exited the production of crude oil and natural gas in the Uinta Basin. In October 2024, XCL sold its Uinta Basin crude oil and natural gas assets to SM Energy Company ("SM Energy") and Northern Oil and Gas, Inc. Ex. 4, Press Release, SM Energy Announces Closing of Uinta Acquisitions – Significantly Expanding Its Top-Tier Portfolio (Oct. 2, 2024); Ex. 5, Press Release, NOG Closes Uinta Basin Acquisition (Oct. 2, 2024). The Respondents no longer operate any oil- or gas-producing assets in the area covered by the Order (the "Relevant Area").[3] Ex. 7, Declaration of Bryan Stahl in Support of Petition of Respondents EnCap, Verdun, and XCL to Reopen and Modify Decision and Order ("Stahl Decl.") ¶ 8; *see generally* Ex. 2, Order § I.DD ("'Relevant Area' means the following counties in Utah: Duchesne, Uintah, Utah, Grand, Emery, Carbon, and Wasatch."). Still, Respondents cannot acquire material interests in the Relevant Area without the Commission's prior approval.

The Order's prior approval provision harms competition and should be removed. It impedes investment by Respondents' knowledgeable, efficient, and conscientious

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[2] EnCap Energy Capital Fund XI, L.P. is, and was at the time of the Acquisition, the ultimate parent entity of Verdun Oil Company II, LLC and XCL Resources Holdings, LLC.

[3] **[redacted text]**. Ex. 6, Declaration of Nicholas Barham in Support of Petition of Respondents EnCap, Verdun, and XCL to Reopen and Modify Decision and Order ("Barham Decl.") ¶ 12.

operators who could make the most of the Relevant Area's natural resources and increase U.S. crude oil and natural gas production. This problem is not hypothetical: Because of the uncertainty and delay associated with prior approval, XCL recently lost a **[redacted text]**, HSR-reportable acquisition. Ex. 6, Barham Decl. ¶¶ 13-15. It also incurred significant costs related to obtaining prior approval to purchase Altamont Energy, LLC ("Altamont"), a small operator with no active drilling rigs at the time of purchase. *Id.* ¶¶ 7-8, 10-11; Ex. 8, Petition for Prior Approval of XCL Resources Holdings, LLC's Proposed Acquisition of Altamont Energy, LLC, at 4 ("Altamont Prior Approval Petition").

Prior approval provisions tend to do more harm than good. *See* Ex. 9, Dissenting Statement of Comm'r Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases, at 3-4 (July 21, 2021) ("Dissenting Statement of Phillips"). In 1995, the Commission rejected its policy of routinely requiring prior approval provisions in orders addressing mergers, finding that the HSR Act strikes a better balance between detecting anticompetitive mergers and imposing costs on parties. *See* Ex. 10, *Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases*, 60 FR 39745, 39745-46 (Aug. 3, 1995) ("1995 Policy Statement"). Yet, in October 2021, the Commission instituted a blanket policy requiring prior approvals in orders addressing mergers, indicating that they would generally be imposed on both the merging parties and divestiture buyers for a minimum of ten years. Ex. 11, Statement of the Comm'n on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021) ("2021 Policy Statement"). It adopted this policy based on the votes of two Democratic Commissioners and a "zombie" vote by a third who had already left the Commission. Ex. 12, Dissenting Statement of Comm'rs Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Comm'n on Use of

Prior Approval Provisions in Merger Orders (Oct. 29, 2021) ("Dissenting Statement of Wilson and Phillips"). The policy is a needless, punitive, and selectively applied tax on business that harms competition by hindering the transfer of assets to those who can use them most effectively. *See id.* at 1 n.2, 4. Respondents have experienced the negative effects of this bad policy.

The Order's prior approval provision is set to remain in place until September 2032—nearly eight more years—regardless of changes in the Relevant Area or in hydrocarbon production and consumption. *See* Ex. 2, Order § XVI. But in just the two and a half years since the Order's enactment, there have been significant changes within and outside of the Relevant Area. XCL no longer operates assets in the Relevant Area. Uinta Basin waxy crude oil production has increased by roughly 50% to around 170,000 barrels per day,[4] driven in large part by XCL's expansion activity prior to the sale of its assets. Historically smaller producers in the Relevant Area have grown, and new producers have entered. Ex. 8, Altamont Prior Approval Petition at 8-10. Increasing the domestic energy supply has become a national priority, and so has reducing regulatory impediments to crude oil and natural gas production: Agency heads have been asked to "review all existing regulations, orders, guidance documents, policies, settlements, consent orders, and any other agency actions . . . to identify those agency actions that impose an undue burden on the identification, development, or use of domestic energy resources," including crude oil and natural gas. Ex. 13, *Executive Order 14154 of January 20, 2025*, *Unleashing American Energy*, 90 FR 8353, 8354 (Jan. 29, 2025).

In light of these changed circumstances and harm to the public interest, the Order should be modified to remove the prior approval requirements in Section X.

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[4] *See Oil & Gas Well Production Volumes*, Utah Division of Oil Gas and Mining, https://oilgas.ogm.utah.gov/oilgasweb/live-data-search/lds-prod/prod-lu.xhtml (last visited Feb. 14, 2025) (Set search criteria to "County Name" and "Report Date," limit to counties in Relevant Area and years 2022 – 2024, and calculate percentage increase from September 2022 to September 2024.).

I. Background.

A. EP Energy Acquisition.

Pursuant to a July 26, 2021 purchase agreement, Verdun agreed to acquire EP Energy in a transaction subject to review under the HSR Act. Stahl Decl. ¶ 4. EP Energy had emerged from bankruptcy less than one year prior. Ex. 14, Shariq Khan & David French, *Buyout firm EnCap Investments agrees $1.5 bln purchase of EP Energy -sources*, Reuters (Aug. 11, 2021), https://www.reuters.com/business/energy/buyout-firm-encap-investments-agrees-15-bln-purchase-ep-energy-sources-2021-08-11/. Following the Acquisition, Verdun intended to operate EP Energy's Eagle Ford, Texas assets and transfer EP Energy's Uinta Basin assets to XCL.

The FTC reviewed the Acquisition and asserted that it would "eliminate substantial head-to-head competition . . . for the development, production, and sale of Uinta Basin waxy crude to targeted Salt Lake City area refiners." Ex. 1, Complaint ¶ 24. Respondents disagreed and believed they had a strong record on which to defend the Acquisition, but after a seven-month investigation, EnCap faced a difficult choice: Accept the FTC's proposed order with prior approval requirements or lose the opportunity to acquire EP Energy's Texas assets within the timeframe allowed by the purchase agreement. Ex. 7, Stahl Decl. ¶ 7. Confronted with this ultimatum, Respondents accepted the Order.

B. Decision and Order.

When the Commission published notification of the Order in the *Federal Register*, Ex. 15, *EnCap/EP Energy; Analysis of Agreement Containing Consent Orders to Aid Public Comment*, 87 FR 19090 (Apr. 1, 2022) ("FTC Analysis to Aid Public

Comment"), it received nearly 30 comments expressing significant concern about the Order's effect.[5] For example:

- Big West Oil, a Salt Lake City refiner, commented that the prior approval restriction "seems to put XCL in an unfair competitive position with other producers" and "could have a negative impact to healthy, competitive growth and development of Uinta Basin resources which could harm the potential crude supply to Salt Lake Refiners and development opportunities for small producers and non-operating working interest owners in the Uinta Basin." Ex. 18, Public Comments, Big West Oil Comment (May 2, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0022.

- Silver Eagle Refining, another Salt Lake City refiner, commented, "SER is very concerned that overly burdensome oversight by the FTC of XCL could discourage the ongoing investment and development of the Uinta Basin thus threatening SER's ability to source the necessary yellow wax crude oil we need. The FTC's proposed actions to oversee XCL may have the opposite effect than intended, rather than protecting SLC refiner's interests it will lead to reduced investment in the Uinta Basin thus leading to lower crude production driving prices higher." Ex. 18, Public Comments, Silver Eagle Refining, Inc. Comment (Apr. 25, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0004.

- The Duchesne County Commission stated, "When prices drop or Federal regulators provide uncertainty or additional regulatory burdens, energy producers are too quick to relocate their investments to more stable markets. The issuance of the proposed Order will simply exacerbate this problem." Ex. 18, Public Comments, Duchesne County, Utah Comment (Apr. 29, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0013 ("Duchesne County Comment").

Nevertheless, the Commission approved the Order on September 13, 2022.

The Order required Respondents to divest EP Energy's Uinta Basin assets to Crescent within 10 days of consummating the Acquisition. Ex. 2, Order § II.A. Respondents complied with that requirement on March 30, 2022. The Order also required Respondents to provide transitional assistance to Crescent for a period of time post-divestiture. *Id.* § IV. As described in the compliance reports submitted pursuant to

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[5] XCL also expressed concerns in its February 15, 2022 and May 23, 2022 letters to Commission staff. Ex. 16, Letter from EnCap and XCL to Commission Staff (Feb. 15, 2022); Ex. 17, Letter from XCL to Commission Staff (May 23, 2022).

Section XII of the Order detailing Respondents' compliance, Respondents promptly fulfilled all of their transitional assistance obligations and have complied with all other requirements of the Order.

The Order still requires EnCap, Verdun, and XCL to obtain the Commission's approval before consummating certain transactions.[6] *Id.* § X. Specifically, the Order requires prior approval for direct or indirect acquisitions of (1) any interest in any Relevant Area producer "that has produced or sold, on average over the six months prior to the acquisition, more than 2,000 barrels per day of waxy crude in the Relevant Area" or (2) any "ownership or leasehold interest in lands located in the Relevant Area" that would "result[] in an increase (or net increase, in the case of an acreage swap) in Respondent's land interests in the Relevant Area of more than 1,280 acres." *Id.* These thresholds are very low. Two thousand barrels per day is only about one percent of the Relevant Area's current daily production, and 1,280 acres is the size of just one "drilling spacing unit." Ex. 6, Barham Decl. ¶ 4.

C. XCL Resources.

When it entered the Uinta Basin in 2019, XCL Resources jumpstarted the region's crude oil and natural gas production. It was the first operator in the area to deploy modern drilling and completion techniques at a reasonable cost. *Id.* ¶¶ 3, 6. To reduce costs, XCL invested in novel resource development strategies, including multi-well pad development, electric completion crews, co-development of multiple formations, and recycling produced water for operations, among other examples. *Id.* ¶¶ 3-6; *see also, e.g.*, Ex. 18, Public Comments, Liberty Pioneer Energy Source, Inc. Comment (May 3, 2022) to FTC

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[6] The Order also requires Crescent to obtain the Commission's prior approval before selling, licensing, or conveying the divested assets to any Relevant Area producer. Ex. 2, Order § XI. This reduces the likelihood that the divestiture assets will be maximally productive for the same reasons that the prior approval provision applied to Respondents reduces the likelihood that Relevant Area assets will be maximally productive.

Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0025 (acknowledging XCL's "cost-effective and often cutting-edge drilling program") ("Liberty Pioneer Energy Source Comment"). This inspired other operators to do the same, which expanded the productive potential of the entire region—not just XCL's acreage. *See* Ex. 6, Barham Decl. ¶ 6.

XCL was also instrumental in developing new customers for Uinta Basin crude. Ex. 19, Declaration of Kit Pfeiffer in Support of Petition of Respondents EnCap, Verdun, and XCL to Reopen and Modify Decision and Order ("Pfeiffer Decl.") ¶¶ 6-7. This required sophisticated and complex supply chain systems that no other producer had ever sustainably developed at scale. *Id.* Expanding the Uinta Basin's customer base incentivized production. *See, e.g.*, Ex. 18, Public Comments, Duchesne County Comment ("The lack of alternative buyers outside the Salt Lake market resulted in Uinta Basin production being capped by Salt Lake demand and depressed pricing. . . . Additional demand therefore supports additional expansion of production in the Uinta Basin."). Previously, operators could not profitably produce more crude oil than Salt Lake City refineries could process. *See id.*; Ex. 19, Pfeiffer Decl. ¶ 7. But with more outlets for their production as a result of XCL's efforts, operators produced more.

Combining the technical and commercial talents of its people, XCL was able to increase the production of its assets from 8,000 barrels per day to 60,000 barrels per day in just a few years. *Id.* ¶ 5. This explosive growth led to the employment of hundreds of Utah residents and hundreds of millions in local, Tribal, and State revenues. *See, e.g.*, Ex. 18, Public Comments, Star Point Enterprises, Inc. Comment (Apr. 29, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0009 (commenting that XCL "has been and remains a consistent and reputable addition to the Uintah Basin since 2019 employing an enormous workforce of Utah local employees and subcontractors").

XCL achieved this growth using low-emission designs. It installed vapor recovery units, built gas pipeline infrastructure, and deployed the first electric hydraulic fracturing fleet in Utah. Ex. 6, Barham Decl. ¶ 5. It also built robust water recycling facilities to nearly eliminate draws on freshwater resources. *Id.* XCL's total investment in infrastructure alone approached **[redacted text]**. *Id.* Through these efforts, XCL was one of the lowest-emission operators in the Uinta Basin. *Id.* ¶ 6; *see also, e.g.*, Ex. 18, Public Comments, Utah Royalty Owners Ass'n Comment (April 25, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0003 (commenting that "XCL has proven to be one of the most responsible oil & gas producing companies when [it] comes to drilling and completing wells, protecting the environment, using less water and reducing emissions").

By investing approximately **[redacted text]** into Utah over the past five years, Ex. 6, Barham Decl. ¶ 5, XCL began a development wave that benefitted the entire region. Its efforts led to lower oil prices for its customers and lasting benefits for the Uinta Basin. Without the burden of prior approval, XCL would be better placed to apply its innovative, pro-growth, pro-competition, and pro-consumer methods to opportunities for years to come. *Id.* ¶ 16.

II. Changed conditions of fact require the order to be modified.

The Commission must reopen an order to consider whether it should be modified when a respondent makes a satisfactory showing that changed conditions of law or fact so require. 15 U.S.C. 45(b); 16 CFR § 2.51. A showing is satisfactory when respondent identifies "significant changes in circumstances" that "eliminate the need for the order or make continued application of it inequitable or harmful to competition." *In re Entergy Corp.*, Dkt. No. C-3998, Order Reopening and Setting Aside Order, at 3 (F.T.C. July 1, 2005). The Commission may also reopen and modify an order on the independent ground

that it is in the public interest. *In re The Stop & Shop Cos.*, Dkt. No. C-3649, Order Reopening and Modifying Order, at 4 (F.T.C. June 20, 1997).

A. Respondents have exited the Relevant Area.

When the Order was executed, EnCap and XCL had crude oil and natural gas exploration and production operations in the Relevant Area. XCL sold its operations on October 1, 2024 and, as a result, none of EnCap, XCL, or Verdun operate any oil- or gas-producing assets in the Relevant Area.[7] Ex. 6, Barham Decl. ¶ 12; Ex. 7, Stahl Decl. ¶ 8.

The sale of XCL's assets constitutes a changed circumstance sufficient to support modifying the Order. The Commission has found on numerous occasions that exiting the area covered by an order eliminates the continuing need for the order's requirements. *See, e.g.*, *In re DTE Energy Co.*, Dkt. No. C-4691, Order Reopening and Modifying Order, at 3 (F.T.C. Nov. 23, 2021) (modifying order because respondent no longer had relevant business interests in the area covered by the order); *In re AEA Investors 2006 Fund L.P.*, Dkt. No. C-4297, Order Reopening and Modifying Final Order, at 4 (F.T.C. Apr. 30, 2013) (same); *In re Duke Energy Corp.*, Dkt. No. C-3932, Order Reopening and Modifying Order, at 4 (F.T.C. Sept. 26, 2007) (same); *In re Koninklijke Ahold, N.V.*, Dkt. No. C-4027, Order Reopening and Modifying Order, at 4-5 (F.T.C. July 10, 2007) (same) and Order Reopening and Modifying Order, at 4-5 (F.T.C. July 21, 2006) (same); *In re Entergy Corp.*, Dkt. No. C-3998, Order Reopening and Setting Aside Order, at 3 (F.T.C. July 1, 2005) (same).

The possibility that Respondents might reenter the Relevant Area does not justify continued application of the Order's prior approval provision. Reentry into the Relevant Area would be procompetitive and should be encouraged. Verdun has significant

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[7] Verdun has never operated oil- or gas-producing assets in the Uinta Basin. Ex. 7, Stahl Decl. ¶ 9.

experience in expanding production outside of the Relevant Area. Ex. 20, Verdun Oil Company, https://verdunoilco.com/company/ (last visited Mar. 4, 2025) (showing production growth from roughly 2,000 barrels of oil equivalent per day to more than 80,000 barrels of oil equivalent per day, a fortyfold increase in approximately seven years). EnCap and XCL have considerable experience in expanding production within the Relevant Area. Prior to the SM Energy acquisition, XCL drilled nearly 200 horizontal wells and invested approximately **[redacted text]** in its properties in just five years. Ex. 6, Barham Decl. ¶ 3, 5. These efforts grew the production of its assets by more than 500%. *See* Ex. 19, Pfeiffer Decl. ¶ 5. Between 2021 and 2023, XCL drilled approximately 80 more new wells than any other producer in the Relevant Area. Ex. 6, Barham Decl. ¶ 6. Because of XCL's innovative techniques and experience, these wells were more efficient than those drilled by competitors. *See id.* Respondents' reentry into the Basin would benefit consumers. *See, e.g.*, Ex. 18, Public Comments, Liberty Pioneer Energy Source Comment (commenting that the prior approval restriction "hamstring[s] one of the most nimble, forward-thinking, and results driven operators in the basin"); Ex. 18, Public Comments, Rig II, LLC Comment (Apr. 25, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0005 (describing XCL as "the most active driller in Utah" and a "good and reputable operator"); Ex. 18, Public Comments, Roger Doxey Comment (May 2, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0015 ("Without question, the most reliable and productive oil relationship we have had in <u>all</u> of our years in the Uinta Basin, has been the one we have with XCL Resources.") (emphasis in original); Ex. 18, Public Comments, Craig Peterson Comment (Apr. 29, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0010 ("XCL Resources entered the Uinta Basin in late 2019 after purchasing Axia Energy's assets, and today they are the

most active producer (currently running 3 large horizontal rigs)."); Ex. 18, Public Comments, Hyrum Winterton Comment (May 3, 2022) to FTC Analysis to Aid Public Comment, https://www.regulations.gov/comment/FTC-2022-0024-0024 ("AXIA only drilled three wells in three different sections that we had [] interests in. XCL has drilled at least 12 in one section and they are planning to drill many more. XCL is the ultimate long-term operator."); Ex. 18, Public Comments, Duchesne County Comment, at 2 ("EnCap's production outperforms its peers with lower per-barrel costs than EP and other peer producers. EnCap is concerned about our air quality issues and is . . . reduc[ing] emissions.").

Speculation that Respondents might engage in future anticompetitive transactions does not justify the Order either. There is no evidence that Respondents have a propensity for harmful deals. And there are no examples of Respondents attempting an anticompetitive transaction. In its submissions to the FTC, Respondents provided substantial evidence that even the EP Energy acquisition would not have led to a reduction in competition. *See, e.g.*, Ex. 21, EnCap White Paper (Jan. 14, 2022) ("White Paper"). There is also no evidence that future Relevant Area transactions below the HSR thresholds are likely to harm competition. In fact, during the review of the EP Energy acquisition, the FTC viewed the largest producers as the only meaningful competitors in the Uinta Basin, *see, e.g.*, Ex. 1, Complaint ¶ 24, suggesting that the acquisition of smaller producers or acreage would be unlikely to raise competitive concerns.

Congress designed the HSR Act to detect anticompetitive mergers, and as the Commission has previously recognized, it has "proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur." Ex. 10, 1995 Policy Statement at 39,745. The Commission should modify the Order and allow the democratically enacted merger review process to work as intended. *See In re Koninklijke Ahold, N.V.*, Dkt. No. C-4027, Order Reopening and Modifying Order, at 4-5

(F.T.C. July 10, 2007) (setting aside a prior approval provision where the respondent exited the relevant markets and an acquisition "of any competitively significant supermarket operation in the relevant markets likely would be reportable under the Hart-Scott-Rodino Act").

B. The Relevant Area has become more competitive.

Since the Order's enactment, competition in the Relevant Area has intensified. Waxy crude oil production has increased and competitors have entered and grown. These changes to the competitive landscape undermine the core factual premise of the Order that further concentration of Uinta Basin producers would incentivize them to reduce supply below Salt Lake City refinery demand. *See* Ex. 1, Complaint ¶ 24. For this reason alone, the Order should be modified. *See, e.g.*, *In re Toys "R" Us Inc.*, Dkt. No. C-9278, Order Reopening and Modifying Order, at 4 (F.T.C. Apr. 11, 2014) (finding that Toys "R" Us' reduced importance in the marketplace required order modification).

When the Commission was investigating the Acquisition, there were roughly 35 active producers in the Uinta Basin, including XCL. Ex. 21, White Paper at 1. Collectively, they produced an average of less than 100,000 barrels per day of waxy crude oil.[8] The Salt Lake City refineries' maximum capacity to process it was about 80,000 barrels per day. Ex. 1, Complaint ¶ 21. In that context, the Commission was concerned that the Acquisition might enable producers to raise prices for waxy crude oil by strategically reducing its supply to Salt Lake refiners. Ex. 15, FTC Analysis to Aid Public Comment at 19,091 ("Uinta Basin producers have received higher realized prices when Uinta Basin waxy crude production falls short of demand from Salt Lake refiners.").

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[8] *See Oil & Gas Well Production Volumes*, Utah Division of Oil Gas and Mining, *https://oilgas.ogm.utah.gov/oilgasweb/live-data-search/lds-prod/prod-lu.xhtml* (last visited Feb. 22, 2025) (Set search criteria to "County Name" and "Report Date," limit to counties in Relevant Area and August 2021 through March 2022, calculate average daily production.).

The Salt Lake City refineries' maximum capacity to process waxy crude oil has not materially changed,[9] but Utah producers have expanded production by more than 50% to over 170,000 barrels per day.[10] The Relevant Area's waxy crude production is now roughly double Salt Lake City refinery demand, and the likelihood that future transactions by Respondents could reduce waxy crude supply below Salt Lake City refinery demand is vanishingly small, particularly for transactions that do not meet the HSR Act's minimum size thresholds.

Salt Lake City refiners' access to alternative crude oils has also increased. Around the time the FTC reviewed the Acquisition and entered the Order, Holly Energy Partners' Frontier Aspen Pipeline and MPLX's SLC Core Pipeline expanded. Ex. 19, Pfeiffer Decl. ¶ 9. Salt Lake City refiners now have direct pipeline access to the major supply hub of Guernsey, Wyoming, where crude oils from a variety of locations, including Canada, Wyoming, and North Dakota, are available. *Id.*; *see also* Ex. 25, Kristy Oleszek, *Small WY Town Carries Big Weight in Crude Logistics*, East Daley, https://www.eastdaley.com/media-and-news/small-wy-town-carries-big-weight-in-crude-logistics (last visited Feb. 24, 2025). As Respondents explained in their January 14, 2022 white paper to Commission staff, crude oils from outside of the Uinta Basin substitute for, compete with, and price constrain waxy crude oil. Ex. 21, White Paper § II.

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[9] *See* Ex. 22, U.S. Energy Information Administration (EIA), *Number and Capacity of Petroleum Refineries in Utah*, (June 14, 2024), https://www.eia.gov/dnav/pet/pet_pnp_cap1_dcu_SUT_a.htm (catalytic cracking and catalytic hydro-cracking capacity in terms of barrels per calendar day increased from 82,490 in 2022 to 84,890 in 2024). Catalytic cracking capacity determines the amount of waxy crude oil the Salt Lake City refineries process because these units are required to turn the waxy crude into consumer fuels. *See, e.g.*, Ex. 23, Utah Department of Environmental Quality, *Petroleum* (Aug. 20, 2021), https://deq.utah.gov/general/petroleum; Ex. 24, Housley Carr, *I Believe in Miracles … Where're You From, You Waxy Thing - Uinta Basin's Waxy Crude Is On A Roll*, RBN Energy LLC: Daily Blog (Feb. 20, 2023), https://rbnenergy.com/i-believe-in-miracles-wherere-you-from-you-waxy-thing-uinta-basins-waxy-crude-on-a-roll (explaining that waxy crude oil is "useful to refineries with a high proportion of fluid catalytic cracker (FCC) capacity").

[10] *See Oil & Gas Well Production Volumes*, Utah Division of Oil Gas and Mining, *https://oilgas.ogm.utah.gov/oilgasweb/live-data-search/lds-prod/prod-lu.xhtml* (last visited Feb. 22, 2025) (Set search criteria to "County Name" and "Report Date," limit to counties in Relevant Area and years 2022 – 2024, and calculate percentage increase from September 2022 to September 2024.).

Therefore, the expanded availability of alternative crude oils in the Salt Lake City area further diminishes the probability that Uinta Basin producers could somehow harm their local customers.

Finally, waxy crude oil producers have continued to enter and expand since the Order became effective. For example, Scout Energy Partners and Wasatch Energy Management, which was formerly a marketing company with no production capabilities, have entered and drilled new wells.[11] Anschutz Corporation has increased its production nearly twentyfold since 2022.[12] And KODA Resources drilled nine wells in 2023 after drilling no wells from 2020 to 2022. Ex. 8, Altamont Prior Approval Petition at 10. More generally, operators have continued to explore geological formations since the Order's enactment, leading to new development in previously unexplored depths and regions. Ex. 26, Chris Matthews, *Early Innings: Uinta's Oily Stacked Pay Exploration Only Just Starting*, Hart Energy (Mar. 4, 2025), https://www.hartenergy.com/exclusives/early-innings-uintas-oily-stacked-pay-exploration-only-just-starting-212175.

Expanded production, new supply, and new entry in the Relevant Area over the past three years is evidence of healthy competition. Respondents should not be subjected to an inflexible Order that prevents them from fully participating in this ever-changing marketplace for eight more years.

III. The public interest requires the Order to be modified.

The public interest independently requires the Order's modification. Modifying an Order serves the public interest when it would "relieve any impediment to effective

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[11] *See Oil & Gas Well Production Volumes, Utah Division of Oil Gas and Mining*, https://oilgas.ogm.utah.gov/oilgasweb/live-data-search/lds-prod/prod-lu.xhtml (last visited Feb. 24, 2025) (Set search criteria to "County Name," "Operator," and "Report Date," limit to counties in Relevant Area, Operator values of "WEM" and "Scout," and years 2021 – 2024.).

[12] *See Oil & Gas Well Production Volumes, Utah Division of Oil Gas and Mining*, https://oilgas.ogm.utah.gov/oilgasweb/live-data-search/lds-prod/prod-lu.xhtml (last visited Feb. 24, 2025) (Set search criteria to "County Name," "Operator," and "Report Date," limit to counties in Relevant Area, Operator value of "Anschutz," and years 2021 – 2024.).

competition." *In re The Stop & Shop Cos.*, Dkt. No. C-3649, Order Reopening and Modifying Order, at 4 (F.T.C. June 20, 1997). Here, the Order's prior approval provision impedes effective competition by acting as a "gratuitous tax on M&A activity" for only some competitors, stacking the deck against them even with respect to legal and procompetitive transactions. *See* Ex. 12, Dissenting Statement of Wilson and Phillips at 4. Respondents have concrete examples of this effect. Consistent with its 1995 bipartisan policy statement rejecting prior approval provisions except in rare cases, the Commission should reject the prior approval provision here. *In re Occidental Petroleum Corp.*, Dkt. No. 9205, 120 F.T.C. 944, 945-46 (F.T.C. Nov. 16, 1995) (modifying order to remove prior approval provision because the 1995 policy statement established a "rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement").

The prior approval process is vague and uncertain. A party must submit an application "fully describ[ing] the terms of the transaction" and "set[ting] forth why [it] merits Commission approval." 16 CFR § 2.41(f). This ambiguous guidance "flips the burden of proof on its head," placing the onus on the petitioning party to prove that its ordinary business activity is legal under the antitrust laws. *See* Ex. 12, Dissenting Statement of Wilson and Phillips at 3. After submitting an application, a party must wait for the Commission to post the application for public comment, wait for the 30-day public comment period to end, and then wait for the Commission to make a decision. *See* 16 CFR § 2.41(f). There is no limit on how long a party must wait. *Id.* If the Commission does not grant prior approval, the transaction is all but dead: The only recourse is to challenge the agency's decision as arbitrary and capricious, a difficult challenge to win. *See generally* Ex. 12, Dissenting Statement of Wilson and Phillips at 3 ("A lengthy investigation can be a death knell for many deals as financing runs out, suppliers and

customers hesitate to do business with the merging parties whose futures remain uncertain, and the parties hemorrhage employees in the face of uncertainty.”).

Prior approval subverts the merger review process Congress designed. *See id.* at 7. Under the HSR Act, parties know within 30 days of submitting their HSR filings whether their transaction will be cleared or investigated further. 15 U.S.C. 18a(b)(1)(B). Any further investigation is also time-limited, 15 U.S.C. 18a(e)(2), and the investigating agency must ultimately sue in court to block the transaction, where the agency will bear the burden of proof and the parties can make their case before an impartial judge. *See, e.g.*, *FTC v. Tempur Sealy Int’l, Inc.*, No. 24-cv-02508, 2025 WL 384493, at *13 (S.D. Tex. Jan. 31, 2025) (“[T]o grant injunctive relief under the Clayton Act, the Court *must* conclude that the Government has introduced evidence sufficient to show that the challenged transaction is likely to lessen competition substantially.” (alteration and emphasis in original) (quoting *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 189 (D.D.C. 2018), *aff’d*, 916 F.3d 1029 (D.C. Cir. 2019))).

The uncertainty associated with prior approval makes transactions less efficient and more expensive, sometimes prohibitively so. Sellers are hesitant to enter a sale process in which a government agency has total discretion over the closing date. *See* Ex. 9, Dissenting Statement of Phillips at 3. A buyer subject to prior approval is either excluded from a sale process altogether or forced to compensate the target company for the increased risk. *Id.*; *see* Ex. 6, Barham Decl. ¶¶ 7-8, 10-11, 14-15. For the same reason, no buyer wants to pay full price for a company with a prior approval requirement it might inherit. *See id*. A company subject to prior approval is hamstrung relative to its competitors, even if it is the best counterparty for an obviously procompetitive transaction. *See id.* Lengthy approval timelines could also lead to lower production if sellers reduce their activity levels between signing and closing.

The Order's prior approval provision has already disadvantaged EnCap and XCL relative to its rivals. When XCL acquired Altamont, **[redacted text]**. Barham Decl. ¶ 7. XCL then had to **[redacted text]** during the months-long prior approval process, which would not have been necessary except for the prior approval process. *Id.* ¶ 10.

More recently, the prior approval provision caused EnCap and XCL to lose a **[redacted text]**, HSR-reportable transaction. Despite having exited the Relevant Area, being the highest bid in a marketed process, and spending hundreds of hours and millions of dollars negotiating the transaction, the seller ultimately chose a different buyer because of the uncertainty associated with prior approval. *Id.* ¶¶ 13-14. This opportunity included the **[redacted text]** in the Relevant Area, and had there been a level playing field, the acreage would have been developed by the most active and experienced operator in the Uinta Basin's history. *Id.* ¶ 15. The opportunity related to this business will not come again: once land is drilled, it cannot be restored to its original state.

IV. The Commission has previously rejected prior approval provisions as unduly burdensome.

In 1995, in light of years of experience with the HSR Act, the Commission ended its policy of routinely requiring prior approval in orders addressing mergers. Ex. 10, 1995 Policy Statement at 39,745-46. The Commission determined that the HSR Act would "adequately protect the public interest in effective merger enforcement, without being unduly burdensome," and that future orders would only require prior approval for a transaction involving "essentially the same relevant assets that were involved in the challenged transaction." *Id.* at 39,746.

More than a quarter century later, in July 2021, the Commission abruptly reversed course. It rescinded the 1995 policy with "the minimum notice required by law, virtually no public input, and no analysis or guidance." Ex. 9, Dissenting Statement of Phillips at 1. Two months later, two Democrat Commissioners, with the aid of a "zombie" vote

from another Democrat Commissioner who had already left the FTC, implemented a blanket prior approval policy without soliciting public comment. Ex. 12, Dissenting Statement of Wilson and Phillips at 1, 9 ("The majority's closed-door process starkly contrasts with the transparency previously employed by the FTC in this area – when a bipartisan Commission issued the 1995 Policy Statement, public comments were invited.").

The October 2021 prior approval policy does not serve the public interest and should not remain in force. In fact, it achieves none of its stated objectives of preventing "facially anticompetitive" transactions, detecting anticompetitive transactions below the HSR thresholds, or preserving Commission resources. *See* Ex. 11, 2021 Policy Statement at 1.

Preventing "facially anticompetitive" transactions. Prior approval provisions are not necessary to prevent "facially anticompetitive" transactions. To the extent any transaction is "facially anticompetitive," it is likely to be a large transaction subject to HSR reporting requirements. *See* Ex. 9, Dissenting Statement of Phillips at 4. The policy's real aim is deterrence: "Too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures. . . . Parties pursuing facially anticompetitive deals should now know that they are at risk of being subject to a prior approval provision." *See* Ex. 11, 2021 Policy Statement at 1; Ex. 12, Dissenting Statement of Wilson and Phillips at 9. But parties do not pursue transactions that they think will face the risk of undue delay, and they should be permitted to attempt transactions that they believe will be beneficial to their customers and stakeholders. If a transaction results in a divestiture, that is not evidence of bad faith: It is evidence that a portion of the transaction was very likely procompetitive. *See* Ex. 12, Dissenting Statement of Wilson and Phillips at 6.

Detecting anticompetitive transactions below the HSR thresholds. This objective rests on the premise that "merging parties with a history of attempting anticompetitive transactions" are more likely to engage in harmful transactions below HSR thresholds, but the policy provides no support for this premise. *See* Ex. 11, 2021 Policy Statement at 2. Furthermore, the suggestion that prior approvals are only applied to parties with a "history" of attempting anticompetitive transactions is belied by the Commission's undiscriminating policy of requiring prior approval provisions in all orders addressing mergers. *Id.* at 1. To the extent transactions below HSR thresholds are anticompetitive, the solution is for Congress to lower the thresholds, not to use prior approval provisions to affect an end-run around the HSR Act for select companies. *See* Ex. 27, John Yun, *Going Backwards: The FTC's New Prior Approval Policy*, Competition Policy Int'l (Mar. 8, 2022).

Preserving Commission resources. The concerns that the Commission might have to "re-review[] the same transaction on numerous occasions" or "review[] a similar transaction by one of the merging parties in the same market" are also unpersuasive. Ex. 11, 2021 Policy Statement at 1. In their remarks on the recission of the 1995 policy, former Chair Khan and Commissioner Chopra cite few examples of the Commission purportedly reviewing the same transaction more than once, revealing that parties rarely attempt "the same transaction on numerous occasions," and that if they do, "the proposed deals are frequently separated by a decade or two," during which time competitive conditions might well have changed. Ex. 12, Dissenting Statement of Wilson and Phillips at 8. As for the assertion that all future transactions by "one of the merging parties" in the "same market" are likely to be anticompetitive, the policy statement contains no evidence that this is true. *See* Ex. 11, 2021 Policy Statement at 1. Without more evidence supporting the policy's claims, it is hard to believe that the justification of "preserving Commission resources" is anything other than a pretext for avoiding the "strictures of the

[HSR Act], where the merging parties can force a Commission decision to sue." *Id.* Using prior approvals for this purpose is an abdication of duty. *See* Ex. 12, Dissenting Statement of Wilson and Phillips at 4 ("God forbid we should do our job of analyzing deals notified pursuant to the HSR Act.").

The flimsy justifications offered in the Commission's 2021 Policy Statement are not good reasons to mandate prior approval in any transaction, particularly where, as here, the factual circumstances have changed and Respondents have suffered tangible harm.

V. Request for Confidential Treatment.

This petition and its attachments contain commercially and competitively sensitive business information related to Respondents' businesses and business practices. Public disclosure of this information would prejudice Respondents. It also contains third-party information subject to paywalls. Accordingly, pursuant to sections 2.51(c) and 4.9(c) of the Federal Trade Commission's Rules of Practice, 16 CFR §§ 2.51(c) & 4.9(c), Respondents request confidential treatment of the confidential version of this petition, including its attachments. The confidential version of this petition should be afforded such confidential treatment under 5 U.S.C. 552(b), including paragraphs (b)(3), (4), and (9); 16 CFR § 4.10(a), including paragraphs (a)(2) and (a)(7); 15 U.S.C. 18a(h); 15 U.S.C. 46(f); and 15 U.S.C. 57b-2. If a determination is made that material marked as confidential does not merit confidential treatment, Respondents request prompt notice of and an adequate opportunity to appeal the determination.

VI. Conclusion.

For the foregoing reasons, the Respondents respectfully request that the Commission reopen and modify the Order to remove the prior approval requirements in Section X.

Dated: March 7, 2025

Respectfully submitted,

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