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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Lodi
Gas Storage, LLC to Modify Decision
00-05-048 (U912G)

Application 09-06-011
(Filed June 12, 2009)

**SUPPLEMENTAL PROTEST
BY THE DIVISION OF RATEPAYER ADVOCATES**

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April 1, 2010

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I. INTRODUCTION

In accordance with Rules 1.12, subdivision (b), and Rule 2.6, subdivision (a) of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure ("Rule"), the Division of Ratepayer Advocates ("DRA") protests in whole the Application ("A.") 09-06-011 of Lodi Gas Storage, L.L.C. (U912G) ("Applicant"¹ or "LGS"), as amended on March 2, 2010 ("Amended Application").² This supplements DRA's Protest filed on July 20, 2009 ("2009 Protest"). That Protest, DRA's Opening Comments (filed February 16, 2010), and its Reply (filed February 22, 2010) are incorporated by reference as if fully stated here.

The sections below present the facts and/or law constituting the grounds for this Supplemental Protest and the reasons DRA believes the Amended Application is unreasonable, unjustified, inconsistent with the law, and harmful to ratepayers. In accordance with Rule 2.6, subdivision (b), DRA requests a Prehearing Conference and reserves the right to request an evidentiary hearing. If a hearing were held, DRA would

¹ The term "Applicant" means also Buckeye Partners, Ltd Partnership, which wholly owns Buckeye Gas Storage LLC which in turn wholly owns LGS.

² Amend. Appl. filed on Mar. 2, 2010 is available at <http://docs.cpuc.ca.gov/efile/AA/114365.pdf>. Currently, LGS is wholly owned by Buckeye Gas Storage LLC, which in turn is wholly owned by

(continued on next page)

present the facts asserted in its past and present filings regarding this matter. DRA also reserves the right to present additional facts, law, or issues before or at such hearing, assuming further discovery is allowed because of the Amended Application filing.

II. BACKGROUND

A. The Surety or Performance Bond Requirement

In D. 00-05-048, the Commission required as a condition to its Certificate of Public Convenience and Necessity (“CPCN”) that LGS provide a surety or performance bond in the amount of \$20 million to cover the costs of meeting its obligations under its CPCN (hereafter referred to as the “Bond requirement” or “Bond”).³ In 2004, in response to LGS’s petition for modification, the Commission reduced the amount of the Bond requirement to \$10 million.⁴

In A. 05-08-031 2005, when a partial ownership interest in LGS changed hands, none of the applicants in contested the Bond requirement.⁵ In A.07-07-025 when Buckeye Partners became an affiliated owner of LGS, none of the applicants in that proceeding requested removing the Bond requirement.⁶

(continued from previous page)
Buckeye Partners, Ltd. Partnership.

³ LGS, D. 00-05-048, Ord. Para. 5, 2000 Cal. PUC LEXIS 394, at *122 (Bond required to cover the costs of meeting LGS’s obligations under its CPCN, which include, but not limited to, reburial of the pipeline in case of soil subsidence covering the pipeline, area restoration in the event of abandonment or bankruptcy, etc.)

⁴ LGS, D. 04-05-034, 2004 Cal. PUC LEXIS 265 (dated May 27, 2004).

⁵ D. 05-12-007 *deciding* A. 05-08-031, OP 3(a), 2005 Cal. PUC LEXIS 527, at *24-*25 (dated Dec. 1, 2005) (sale of 50% of Western Hub LLC’s ownership of LGS Gas Holdings LLC to Western Acquisition Company II, LLC). *See* D. 03-02-071, OP 3(a), 2003 Cal. PUC LEXIS 133, at *34 (dated Feb. 7, 2003), *deciding* A. 01-09-045 (filed September 28, 2001) (2003 sale of 50% of Western Hub LLC’s ownership of LGS Gas Holdings LLC to Western Acquisition Company LLC).

⁶ D. 08-01-018, 2008 Cal. PUC LEXIS 4 (dated Jan. 10, 2008), *deciding* A. 07-07-025. *See supra* note 1 re Buckeye Partners’s indirect and affiliated ownership of LGS.

B. Events Occurring after Issuance of the Proposed Decision

On January 25, 2010, the Proposed Decision (“PD”) was issued. On February 11, 2010, in an ex parte meeting with the Office of Commissioner Bohn, the Applicant proposed to modify A. 09-06-011 as follows:

LGS would be permitted to meet the obligations now covered by the bond with a parental guaranty, subject to an automatic return to the bond obligation if Buckeye Partners’ credit rating fell below investment grade at some point in the future.⁷

On February 16, 2010, in Opening Comments to the PD, the Applicant presented *inter alia* the following proposed amendment of A. 09-06-011:

[A] mechanism under which a parental guaranty would be permitted at all times during which Buckeye Partners maintains an investment grade rating, subject to an automatic re-trigger of the bond requirement in the event that the credit rating agencies downgrade Buckeye Partners below investment grade.⁸

On February 22, 2010, DRA’s Reply protested the Applicant’s Opening Comments as violating Rule 1.12, subdivision (a), by seeking to amend A. 09-06-011 after the Scoping Memo and the PD were issued. DRA asked the Commission to reject the proposed changes as an abuse of Commission processes and a denial of the ratepayers’ right to due process and the opportunity to be heard.⁹

On February 23, 2010, at the direction of Commissioner Bohn’s Office the Applicant filed a motion to amend A. 09-06-011, which stated *inter alia*:

Counsel for LGS was subsequently informed by Assigned Commissioner Bohn’s office that LGS should file a Motion to Amend Application 06-09-011 in order to more formally include the modifications to the proposal into the record to this proceeding and facilitate action by the ALJ to

⁷ LGS Notice of Ex Parte filed Feb. 17, 2010, available at <http://docs.cpuc.ca.gov/efile/EXP/114407.pdf>. Contrary to Rule 8.3, the Applicant’s Ex Parte Notice of the February 11, 2010 meeting was filed on February 17, 2010, six days after the meeting instead of the requisite three days.

⁸ LGS Op. Commts (filed Feb. 16, 2010) at 3, available at <http://docs.cpuc.ca.gov/efile/CM/113770.pdf>.

⁹ DRA Reply (filed Feb. 22, 2010) at 1-2, available at <http://docs.cpuc.ca.gov/efile/CM/114033.pdf>.

provide the other parties with an opportunity to comment on the modified proposal.¹⁰

On March 2, 2010, the Amended Application was filed with the Commission, which only added *inter alia* the following contingency to A. 09-06-011:

At any point in time during which LGS remains under the control of Buckeye Partners, if Buckeye Partners' [sic] credit rating falls below investment grade, LGS shall again be required to provide a surety or performance bond in the amount of \$10 million, adjusted annually for inflation from the date of the issuance of D.00-05-048, to cover the costs of meeting LGS' [sic] obligations under the CPCN. LGS shall obtain such surety or performance bond within thirty days of the triggering drop in credit ratings.¹¹

The “triggering drop in credit ratings” is defined in the Amended Application as when Standard & Poor’s (“S&P”), an investment analysis and advisory service, grades Buckeye Partners’s financial strength as below “BBB minus.”¹² Inconsistently, however, DRA discovered that Buckeye Partners currently has a S&P grade of “BBB.” Thus, the Amended Application would not require LGS to obtain a Bond, even if Buckeye Partners’s capability to meet its financial commitments were to fall from BBB to BBB minus.

III. ISSUES

The Amended Application does not alter the basic issues as stated by the 2009 Protest, which are as follows: Is it reasonable, consistent with the law, and in the public interest to replace the \$10 million Bond requirement with Buckeye Partners’s guaranty in

¹⁰ LGS Motn to Amend (filed Feb. 23, 2010) at 3, *available at* <http://docs.cpuc.ca.gov/efile/MOTION/114287.pdf/>.

¹¹ See Amend. Appl. at 10, *available at* <http://docs.cpuc.ca.gov/efile/AA/114365.pdf/>.

¹² S&P rates the financial strength of businesses on a scale from AAA (strongest) to AA, A, BBB, BBB minus, and so on to CCC. Most grades may also be modified with a plus-or minus-sign according to the business’s relative strength among similar companies. *Black’s Law Dictionary* at 1535 (9th ed. 2009). The Amended Application also included Moody’s credit ratings analogous to S&P’s for Buckeye Partners . This Protest will discuss only S&P’s grades but equally applies to Moody’s comparable grading.

the same amount? The burden of proof remains on the Applicant to support its claims with clear and convincing evidence of record.

IV. ARGUMENTS AND AUTHORITIES IN SUPPORT OF THE SUPPLEMENTAL PROTEST

A. As with A. 09-06-011, the Amended Application Fails to Justify Burdening Ratepayers with the Risks and Uncertainties of the Proposed Guaranty that Do Not Exist with the Bond.

The Amended Application states that

[U]nder the Buckeye Partners' ownership, a costly bond could be replaced with a parental guaranty *without reducing* any protection now covered by the bond requirement.[Emphasis added.]¹³

The 2009 Protest points out numerous facts that refute this claim.¹⁴ As in its prior filings, the Applicant asserts that not a single incident of soil subsidence has occurred during LGS's operations, or LGS's economic value has increased dramatically.¹⁵ These assertions are beside the point. The key questions are who is best capable of covering LGS's CPCN obligations, Buckeye Partners or RLI? What justifies having ratepayers bear the risks and uncertainties under a Buckeye Partners's guaranty, when the current Bond requirement presents no such potential harms.

As DRA noted in its 2009 Protest, the surety for the Bond requirement is the RL Insurance Company ("RLI"), an insurance company graded by A.M. Best Company's "Financial Strength Ratings" as "A+ (Superior) (effective May 21, 2009)," which represents "*superior ability* to meet ongoing insurance policy and contract obligations." [Emphasis added.]¹⁶ Under D. 00-05-048, D. 04-05-034, and the Bond, RLI is contractually responsible for paying \$10 million or more, if LGS should fail "to cover the

¹³ Amend. Appl. at 9.

¹⁴ See 2009 Protest at 4-5.

¹⁵ Amend. Appl. at 12.

¹⁶ *Supra* note 12.

cost of meeting its obligations under the CPCN,” such as in the event of soil subsidence or bankruptcy.¹⁷

By contrast, Buckeye Partners capacity to meet its financial commitments is only “adequate,” according to S&P’s definition of the BBB grade, as follows:

[A]dequate capacity to meet its financial commitments but adverse economic conditions or changing circumstances are more likely to lead to a *weakened* capacity of the obligor to *meet its financial commitments*. [Emphasis added.]¹⁸

Thus, contrary to the Amended Application, replacing the Bond with Buckeye Partners’s guaranty would reduce ratepayers’ protections under the Bond. Buckeye Partners’s capability to cover the cost of LGS’s CPCN obligations is far less than RLI’s. Moreover, Buckeye Partners is vulnerable to adverse or changing circumstances, which is not shown for RLI.

B. The Amended Application Fails to Justify Setting the “Triggering Event” at an S&P Grade that Is Lower than Buckeye Partners’s Current Grade.

In data responses, LGS states “that the creditworthiness of Buckeye Partners is a much more significant and meaningful determination of its ability to perform on its obligations.” Buckeye Partners’s current S&P grade is “BBB.”¹⁹ The Amended Application, however, sets the “triggering event” for reinstalling the Bond requirement at when Buckeye Partners falls below BBB minus. The minus sign indicates that Buckeye Partners’s financial strength to meet its commitments has weakened when compared with similar companies.²⁰

The Amended Application offers no justification for setting the triggering event at a S&P grade lower than Buckeye Partners’s current and higher grade. While it may profit Buckeye Partners to avoid reinstalling the Bond requirement while its financial

¹⁷ See 2009 Protest at 5 n. 14.

¹⁸ 2009 Protest at 6 n.20 (*citing* S&P grade definitions).

¹⁹ 2009 Protest at 6 & n.19 (*citing* LGS’s Data Resps. PSZ2-4 and PSZ2-5, dated July 14, 2009).

²⁰ *Supra* note 12 (Black’s Law Dict.)

strength is falling to the BBB minus level, this does not justify exposing ratepayers to increasing harms. The Commission should dismiss the Amended Application as unjustifiably putting ratepayers at greater risks than under the Bond.

C. The Feasibility of LGS Obtaining a Bond if Buckeye Partners's S&P Grade Were to Fall Below BBB Minus Is Unsupported.

According to the Amended Application, if Buckeye Partners's S&P grade falls below BBB minus (i.e., “investment grade”) while LGS remains under the control of Buckeye Partners, LGS will obtain a Bond of \$10 million “within thirty days” of the drop in credit rating.²¹

The Amended Application fails to show with any data or other information whether LGS could obtain a Bond, when its affiliated owner Buckeye Partners's S&P grade declines below BBB minus, which could range from “C” to “CCC.” It stands to reason that as Buckeye Partners's financial condition increasingly weakens, it would become correspondingly more difficult and unlikely for LGS to obtain a Bond. The Amended Application has given no reasons to assume the contrary. Therefore, the Amended Application is unjustified because it relies on speculation and should be dismissed.

D. Buckeye Partners's Guaranty Would Present a Host of Legal Uncertainties that Do Not Arise under the Bond Requirement, and It May Be Redundant.

LGS is owned by a chain of affiliated limited liability corporations, limited partnerships, and holding companies. Buckeye Gas Storage LLC wholly owns LGS, which in turn is wholly owned by Buckeye Partners. The general partner of Buckeye Partners is Buckeye GP LLC, which in turn is owned by Buckeye GP Holdings Limited Partnership. Each LGS affiliate is governed by statutory and contractual provisions that limit their legal liabilities. The Applicant has not explained at any time in this proceeding

²¹ Amend. Appl. at 10.

how these legal complications could impact any affiliate's responsibility, such as Buckeye Partners, to pay for the costs of LGS's CPCN obligations, in the event of a soil subsidence or bankruptcy. In contrast, the Bond requirement directly and simply fixes on a surety the responsibility to cover LGS's CPCN costs. The Commission should uphold the bond requirement and dismiss the Amended Application.

Moreover, Buckeye Partners and LGS's other affiliated owners are already obligated to guarantee LGS's CPCN costs. According to D. 08-01-018, Appendix A, "Condition 1," as follows:

BGH GP Holdings, LLC, MainLine Management LLC, Buckeye GP Holdings L.P., Buckeye GP LLC, Buckeye Partners, L.P. and Buckeye Gas Storage LLC, and any successors of any of them, *as well as any other intermediary entity*, shall take all steps reasonably necessary to ensure that Lodi Gas Storage, L.L.C. has capital sufficient to provide safe and reliable service.[Emphasis added.]²²

In Ordering Paragraph ("OP") 2 of D. 08-01-018, the Commission continued the Bond requirement as a condition of the transfer of LGS's ownership to Buckeye Partners and other affiliates. No objection to this requirement was raised at the time.²³

In OP 4, *supra*, the Commission ordered LGS's affiliates to comply with *inter alia* Condition 1, as follows:

The authority granted in OP 1 is conditioned upon full compliance with the settlement conditions filed in this proceeding on November 14, 2007, which settlement conditions are attached to this opinion as Appendix A.

Therefore, the Commission should dismiss the Amended Application. The guaranty offered by it is superfluous, because Buckeye Partners and other LGS affiliates are already required to

[T]ake all steps reasonably necessary to ensure that Lodi Gas Storage, L.L.C. has capital sufficient to provide safe and reliable service.²⁴

²² D. 08-01-018, OP 2, 2008 Cal. PUC LEXIS 4, at *51 (dated Jan. 10, 2008).

²³ *Id.* at *48.

E. No Justification Is Given Why the Applicant Could Not Have Amended A. 09-06-011 before Issuance of the Scoping Memo.

Rule 1.12, subdivision (a), provides:

An amendment to an application, protest, complaint, or answer must be filed prior to the issuance of the scoping memo.

Analogously, Rule 16.4, subdivision (d) requires that a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. The only exception provided is as follows:

If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

The Amended Application and its related Motion to Amend provide no justification for their filing, well after the issuance of the Scoping Memo on September 3, 2009, and nearly six months later in early March 2010. The Motion only states

Counsel for LGS was subsequently informed by Assigned Commissioner Bohn's office that LGS should file a Motion to Amend Application 06-09-011 in order to more formally include the modifications to the proposal into the record to this proceeding and facilitate action by the ALJ to provide the other parties with an opportunity to comment on the modified proposal.²⁵

The above statement is legally insufficient justification under Rule 1.12(a), because it does not explain any circumstances that precluded filing amendments prior to September 3, 2009. Therefore the Commission should dismiss the Amended Application.

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²⁴ *Supra* note 23 above.

²⁵ LGS Motn at 3.

V. CONCLUSION

The Amended Application fails on two grounds. First it is unsupported as reasonable. It assumes without any foundation that LGS could obtain a Bond, if S&P should downgrade Buckeye Partners's financial condition below BBB minus. It fails to justify exposing ratepayers to risks and uncertainties under a guaranty that are not presented by the Bond requirement. It also omits mentioning Buckeye Partners's and other affiliates' already existing legal duty to do whatever is reasonably necessary to ensure that Lodi Gas Storage, L.L.C. has capital sufficient to provide safe and reliable service. This renders Buckeye Partners guaranty unnecessary. Therefore, the Commission should dismiss with prejudice the Amended Application. The Applicant has had one too many bites of the apple.

Second, the Commission should dismiss the Amended Application to deter others from flouting its rules and regulations. Waiting to amend A. 09-06-011 until after the Scoping Memo and the PD are issued is sandbagging, which violates notions of fair play and due process. It also unjustifiably protracts these proceedings thus squandering scarce Commission and Staff resources. The Commission should uphold Rules 1.12(a) and 16.4(d), which are to give all parties an equal and full opportunity to be heard and bring finality to Commission proceedings.

Respectfully submitted,

/s/ CLEVELAND W. LEE

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April 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**SUPPLEMENTAL PROTEST BY THE DIVISION OF RATEPAYER ADVOCATES**” to each party of record on the official service list in **A.09-06-011** via electronic mail.

Parties who did not provide an electronic mail address, were served by U.S. mail with postage prepaid listed on the official service list.

Executed on **April 1, 2010** at San Francisco, California.

/s/ HALINA MARCINKOWSKI

Halina Marcinkowski

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