

Decision 10-11-012 November 19, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of Lodi Gas Storage, L.L.C. (U912G), Buckeye Gas Storage LLC, and Buckeye Partners, L.P. for Expedited Approval of Indirect Control of Lodi Gas Storage, L.L.C. Pursuant to Public Utilities Code § 854(a).

Application 10-08-018
(Filed August 24, 2010)

DECISION GRANTING MOTION TO DISMISS APPLICATION

1. Summary

This decision grants Lodi Gas Storage, L.L.C. (LGS), Buckeye Gas Storage LLC, and Buckeye Partners, L.P.'s (Buckeye Partners), (collectively, Joint Applicants) motion to dismiss application to surrender indirect control of LGS by transferring to the Buckeye Partners public limited partnership unitholders the right to vote for members of the board of directors of Buckeye GP LLC, the general partner of Buckeye Partners. The transfer of voting rights does not require prior approval under Pub. Util. Code § 854(a).

2. Background

Lodi Gas Storage, L.L.C. (LGS), a limited liability company with its principal place of business in Houston, Texas, is an independent natural gas storage provider in northern California. Buckeye Gas Storage, LLC (Buckeye Storage) a limited liability company with its principal place of business in Houston Texas, was formed for the purpose of holding all of the outstanding limited liability company interests of LGS. Buckeye Partners, L.P. (Buckeye

Partners) a publicly traded partnership with its principal place of business in Houston, Texas, owns and operates an independent refined petroleum products pipeline system. Buckeye Partners' limited partners currently are the predominant owners of Joint Applicants, with control of Buckeye Partners vested in its general partner, Buckeye GP LLC (Buckeye GP), which in turn is wholly owned by Buckeye GP Holdings L.P. (Holdings). Holdings is owned by a combination of public limited partners and units owned by BGH GP Holdings, LLC (BGH Holdings). Holdings is controlled by its general partner, MainLine Management LLC (Holdings GP), which is wholly owned by BGH Holdings. The limited partner interests of Buckeye Partners and Holdings are traded on the New York Stock Exchange as limited partnership units. Holdings GP currently controls Buckeye Partners and indirectly LGS through its power to appoint all eight members of Buckeye GP's Board.

Under the Amended and Restated Agreement and Plan of Merger (Merger Agreement), entered into on August 18, 2010, Buckeye Partners will acquire Holdings through a merger of Grand Ohio, LLC (MergerCo) with and into Holdings, with Holdings surviving the merger. As a result of the merger, Holdings will become a subsidiary of Buckeye Partners, with Buckeye Partners as Holdings' sole limited partner. Following approval of this application or granting of the Motion to Dismiss, all public owners of Buckeye Partners limited partnership units (including those who were unitholders before the merger and those who received units as a result of the merger, but excluding any affiliates of BGH Holdings) will be granted the right to vote for seven of the nine members on Buckeye GP's Board. Until approvals are received, Holdings GP will continue to appoint members of the Board. After approvals are received, Holdings GP will no longer control Buckeye Partners. Holdings GP will

continue to appoint two members of the Board, unless BGH Holdings and its affiliates reduce their ownership of Buckeye Partners limited partnership units.

There will be no change in the legal ownership of LGS. No party protested the application or opposed the motion to dismiss.

3. Discussion

Joint Applicants request dismissal of this application, because there is no actual transfer of control that will occur when the voting provisions in the Amended Partnership Agreement become effective. Joint Applicants state there can be no actual acquisition of the power to elect a majority of the Board before at least two annual elections of Buckeye GP's directors have been held by the public limited partners due to staggered Board elections and voting power restrictions.

3.1. The Grant of Voting Rights Does Not Result in an Indirect Transfer of Control

Under Section 852, no public utility, and no subsidiary, affiliate of, or corporation holding a controlling interest in a public utility shall purchase or acquire, take or hold, any part of the capital stock of any other public utility, organized or existing under the laws of this state, without prior Commission authorization. Section 854 further requires Commission authorization before a company may "merge, acquire, or control . . . any public utility organized and doing business in this state . . ." The purpose of these and related sections is to enable the Commission, before any transfer of a public utility is consummated, to

review the situation and to take such action, as a condition of the transfer, as the public interest may require.”¹

As noted in Decision (D.) 08-12-021, the Commission evaluates whether a transaction requires prior approval under Section 854 on a case-by-case basis, based on the relevant facts and circumstances.² In past decisions the Commission has considered factors such as:

- 1) whether the acquiring entity’s equity interest in the utility or its parent will be greater than 50%;³
- 2) whether the acquiring entity has the power to appoint a majority of the members of the board of directors or to direct management of the utility or its parent entity;⁴ and
- 3) whether the acquiring entity has actual or working control of the day-to-day business of the utility.⁵

Under the circumstances presented here, there is no acquiring entity. Instead, the transaction grants voting rights to the public owners of Buckeye Partners limited partnership units. Further, Holdings GP relinquishes control of Buckeye Partners and indirect control of LGS. Thus, the above-mentioned

¹ *San Jose Water Co. (1916) 10 CRC 56.*

² D.08-12-021, (*Warburg Pincus Private Equity IX, L.P., Warburg Pincus Private Equity X, L.P. and Electric Lightwave, LLC (U5377C), Eschelon Telecom, Inc. (U6864C), and Advanced Telcom, Inc.*) 2008 Cal. PUC LEXIS 469 **8, 9.

³ D.86-02-059 (*In Re Pacific Telesis Group*), D.86-12-090 (*BellSouth Corp. and Mobile Communications Corp.*), D.98-12-056 (*MM Holdings Corp.*), and D.96-02-061 (*San Francisco Thermal.*)

⁴ See D.93-11-063 (*In Re Paging Network of San Francisco*), D.96-02-061 (*San Francisco Thermal*).

⁵ See D.94-01-025 (*In Re San Jose Water Company*), D.90363 (*WUI Inc. v. Continental Tel. Corp.*)

factors the Commission has considered in weighing whether the transaction results in an indirect transfer of control do not apply to the circumstances of this transaction, and we will address the specifics of the transaction.

As of August 10, 2010, there were 51,537,631 Buckeye Partners partnership units held of record by approximately 1,900 holders, 27,774,016 Holdings common units held of record by approximately 8 holders, and 525,984 Holdings management units held by two holders. After the merger is completed, Holdings unitholders will receive approximately 20 million Buckeye Partners partnership units. The Buckeye Partners public limited partnership unitholders will be able to elect seven members of the Board, and Holdings GP will appoint two members of the Board. Although one or more public owners could in the future accumulate enough units to establish control, after the merger the members of the Board will remain those appointed by Holdings GP until the first election. The first annual election will elect three members of the Board, and the successive two elections will elect two members at each election.⁶

The potential for a future transfer of control is limited by the staggered elections of the members of the Board and restrictions placed on the voting power of any individual or entity or group holding more than 20% of the limited partnership units. The Amended Partnership Agreement limits any person or group beneficially owning 20% or more of the outstanding limited partnership units by precluding the voting of units in excess of 20% and not counting the units in excess of 20% when calculating the required votes for such matter. In

⁶ If a vacancy occurs prior to the first election or in between elections, the independent directors would appoint a new director who would be up for election at the same time as other directors in that class of directors.

effect, in order to gain control of the Board an individual would need to acquire more than 63% of the outstanding units, if BGH Holdings continues to own 17% of the limited partnership units, and more than 80% of outstanding units, if BGH Holdings no longer owns any partnership units. Under current ownership by public unitholders, no individual or entity holds or otherwise controls more than 5% of the Buckeye Partners limited partnership units. Thus, an indirect transfer of control does not occur when voting rights are granted to the public owners of Buckeye Partners limited partnership units, and an indirect transfer of control could not occur for a substantial period of time. Because there is no indirect transfer of control, preapproval of this transaction under § 854 is not required. In the event of an actual transfer of control at some point in the future, Joint Applicants acknowledge that Commission preapproval of that transfer of control is required.

3.2. Motion for Leave to File Confidential Materials Under Seal

LGS' August 24, 2010 motion to file under seal the LGS audited financial statements, attached as Exhibit 3 to the application, is granted.

4. Categorization and Need for Hearing

There is no need to alter the preliminary determinations made as to categorization and the need for a hearing made in Resolution ALJ 176-3260, dated September 2, 2010.

5. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure,

the otherwise applicable 30-day period for public review and comment is waived.

6. Assignment of Proceeding

Commissioner Nancy E. Ryan is the assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Joint Applicants filed a motion to dismiss this application requesting approval under Pub. Util. Code § 854(a) of the indirect transfer of control of LGS.
2. No opposition to the motion was filed.
3. Buckeye Partners limited partners currently are the predominant owners of LGS, Buckeye Storage and Buckeye Partners, with control of Buckeye Partners vested in its general partner, Buckeye GP, which in turn is wholly owned by Holdings.
4. Holdings is owned by a combination of public limited partners and units owned by BGH Holdings.
5. Holdings is controlled by its general partner, Holdings GP, which is wholly owned by BGH Holdings.
6. The limited partner interests of Buckeye Partners and Holdings are traded on the New York Stock Exchange as limited partnership units.
7. Holdings GP currently controls Buckeye Partners through its power to appoint all eight members of Buckeye GP's Board.
8. Under the Merger Agreement entered into on August 18, 2010, Buckeye Partners will acquire Holdings through a merger of MergerCo with and into Holdings, with Holdings surviving the merger. As a result of the merger, Holdings will become a subsidiary of Buckeye Partners, with Buckeye Partners as Holdings' sole limited partner.

9. Following approval of this application or granting of the Motion to Dismiss, all public owners of Buckeye Partners limited partnership units (including those who were unitholders before the merger and those who received units as a result of the merger, but excluding any affiliates of BGH Holdings) will be granted the right to vote for seven of the nine members on Buckeye GP's Board.

10. Until approvals are received, Holdings GP will continue to appoint members of the Board.

11. After approvals are received, Holdings GP will no longer control Buckeye Partners and will no longer indirectly control LGS.

12. After approvals are received, Holdings GP will appoint two members of the Board, unless BGH Holdings and its affiliates reduce their ownership of Buckeye Partners limited partnership units.

13. After approvals are received, elections of the members of the Board are staggered over three years and restrictions are placed on the voting power of any individual or entity or group holding more than 20% of the limited partnership units.

14. Under current ownership by public unitholders, no individual or entity holds or otherwise controls more than 5% of the Buckeye Partners limited partnership units.

15. LGS filed an August 24, 2010 motion to file under seal the LGS audited financial statements, attached as Exhibit 3 to the application.

Conclusions of Law

1. It is reasonable to dismiss this application, because the grant of voting rights to the public owners of Buckeye Partners limited partnership units (including unitholders before the merger and those who received units as a

result of the merger) and the relinquishment of control of Buckeye Partners by Holdings GP does not result in an indirect transfer of control of LGS.

2. No pre-approval of the transaction under § 854 is required.
3. LGS' motion to file under seal the LGS audited financial statements, attached as Exhibit 3 to the application, should be granted.

O R D E R

IT IS ORDERED that:

1. The Motion to Dismiss Application 10-08-018, requesting approval under Pub. Util. Code § 854(a) of the indirect transfer of control of Lodi Gas Storage, L.L.C., is granted.
2. Lodi Gas Storage L.L.C., Buckeye Gas Storage LLC, and Buckeye Partners, L.P. shall comply with Pub. Util. Code § 854 in the future to the extent that it applies, and are subject to fines and other regulatory sanctions if violations occur.
3. The August 24, 2010 Motion of Lodi Gas Storage, LLC for leave to file confidential material under seal, namely audited financial statements for Lodi Gas Storage attached to the Joint Application as Exhibit 3, is granted. The aforesaid materials should be placed under seal for a period of two years from the effective date of this decision, through and including December 1, 2012, and during that period the material so protected shall not be made accessible or disclosed to anyone other than Commission staff except upon the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. If Lodi Gas Storage, LLC believes that further protection of the aforesaid

materials is needed after December 1, 2012, it may file a motion stating the justification for further withholding of these materials from public inspection, or for such other relief as the Commission's rules may then provide. Such a motion shall explain with specificity why the designated materials still need protection in light of the passage of time involved, and shall attach a clearly-identified copy of the ordering paragraphs of this decision to the motion. Such a motion shall be filed at least 30 days before expiration of the protective order set forth in this paragraph. The assigned ALJ or the designated Law and Motion ALJ has the authority to rule on such a motion.

4. Application 10-08-018 is closed

This order is effective today.

Dated November 19, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners