STEPHEN R. BRUCE LAW OFFICES
1667 K STREET, NW, SUITE 410
WASHINGTON, DC 20006
202-289-1117
Fax: 202-289-1583
stephen.bruce@prodigy.net

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BY PRIORITY MAIL

Kinder Morgan Retirement Plan A
Fiduciary Committee
1001 Louisiana St., Suite 1000
Houston, TX 77002

Re: Appeal for Unreduced Early Retirement Benefits Beginning at Age 62 for Curtis T. Pedersen

Dear Members of the Kinder Morgan Fiduciary Committee:

As you know, I represent Curtis T. Pedersen, who is a participant of the Kinder Morgan Retirement Plan A. Mr. Pedersen turned age 62 on November 11, 2019 and commenced his retirement benefits under the Retirement Plan on December 1, 2019. In accordance with the terms of the Retirement Plan and ERISA, Mr. Pedersen is entitled to an unreduced early retirement benefit of $3,679.98 per month beginning on December 1, 2019, the first of the month after he turned age 62. As explained before, the "detailed" calculation that Kinder Morgan provided Mr. Pedersen on October 11, 2019, decreased the monthly retirement benefits to which he is entitled to $1,933.69, which represents only 52.5% of the retirement benefits he is due. I explained why this violates ERISA and the Retirement Plan's terms in my November 5, 2019 appeal and I re-explain below in response to the February 27, 2020 denial letter by T. Mark Smith as "Claims Administrator" for the Plan.

We would be remiss not to again say that exhaustion of Kinder Morgan's procedures is not required: (1) because these are statutory claims and (2) because Mr. Pedersen and others have already exhausted the Plan's procedures on these claims. I have already submitted these claims to the Fiduciary Committee twice, and Mr. Pedersen, Beverly Leutloff and Randall Schmidgall have submitted them as well. *See, e.g., Richards v. General Motors Corp*., 991 F.2d 1227, 1235 (6th Cir. 1993); *Wallace v. Oakwood Healthcare, Inc*., 954 F.3d 879, 887 (6th Cir. 2020). We do, however, want to give Kinder Morgan and the Fiduciary Committee one last opportunity to do the right thing and grant these claims for relief before a complaint is filed.

1. The reduction of Mr. Pedersen's "Part 1" normal retirement benefit of $4,127.08 by applying a "fraction" that uses 43.4167 years in the "denominator" violates ERISA's benefit accrual rules, the Plan's terms, and ERISA's anti-cutback rule.

Based on the information we have to date, we agree with the October 11, 2019 "detailed" calculation that the "Part 1" normal retirement benefit for Mr. Pedersen based on the 2% of pay per year formula for 30 years is $4,127.08 per month ($5,068.07 - $940.99 [Soc. Sec. offset]). The October 11th calculation of Mr. Pedersen's retirement benefit shows, however, that Kinder Morgan has applied a "fraction" to Mr. Pedersen's $4,127.08 normal retirement benefit in which the numerator of the fraction is based on his 26.75 years of credited service, ***but the denominator*** counts the 43.4167 years between his year of hire and age 65, without limiting the denominator to the maximum of 30 years of service that can be credited under the formula or to the years of service up to the time when El Paso sold the Coastal subsidiary to TransCanada. Using 43.4167 in the denominator rather than the 30-year maximum on credited service violates ERISA's benefit accrual rules, the Plan's terms, and ERISA's anti-cutback rules. With Kinder Morgan's inconsistent denominator, Mr. Pedersen's 2% of pay per year normal retirement benefit for each of 30 years is effectively decreased to ***1.382%*** of his pay for each of his 26.75 years. By contrast, an employee whose participation started at age 35 would have an accrual rate of 2% of pay for each year, the same rate as promised in the normal retirement benefit formula. When a fraction is applied in which the numerator of 26.75 is divided by a denominator with a maximum of 30 years of credited service, Pedersen's retirement benefit is $3,679.98 per month ($4,127.08 x 26.75/30.00), which equals 2% of pay for each of his 26.75 years.

The Retirement Plan document establishes that a maximum of 30 years of credited service at a rate of 2% of final average monthly earnings for each year is used to determine the retirement benefit for former Coastal employees. *See* Section 4.1(c)(i) in Section 15 of Appendix X (the "Coastal Appendix"). When a "fractional rule" is applied to determine the benefit accruals, ERISA §204(b)(1)(C), 29 U.S.C. §1054(b)(1)(C), the fraction cannot be "less than" when "the denominator ... is the total number of years he would have participated in the plan if he separated at the normal retirement age." *Accord, Kifafi v. Hilton Hotels*, 616 F. Supp. 2d 7, 25-26 (D.D.C. 2009), *aff'd*, 701 F.3d 718 (D.C. Cir. 2012) (amendment to comply with fractional rule violated ERISA when the fraction caused "2% of pay per year" retirement benefit to be decreased). Consistent with ERISA's fractional rule, the terms of the Retirement Plan also provide that the denominator of the fraction shall be based on the potential years of credited service at age 65, which the preceding subsection of the Plan limits to 30 years.

The only place we have been able to locate a benefit accrual "denominator" that is not limited to the 30 years of credited service is in a 2000 Summary Plan Description, which says the years in both the numerator and the denominator will be "with no maximum number of years." The Plan document has not, however, ever contained this language, nor was it included in any of El Paso's *four subsequent* SPDs in 2002, 2004, 2006, or 2011. As you know, *Cigna Corp. v. Amara*, 563 U.S. 421, 436 (2011), provides that the terms of a plan cannot be amended by the description found in an SPD. Even if the plan's terms could be amended by an SPD's description that was omitted from four subsequent SPDs, the anti-cutback protection in ERISA §204(g)(1), 29 U.S.C. §1054(g)(1), provides that the "accrued benefit" of an employee participating in a company retirement plan like El Paso's "may not be decreased by an amendment of the plan." For this purpose, any "reinterpretation" of the plan's terms that decreases the accrued benefit is treated as "an amendment of the plan." *See, e.g.*, *Cottillion v. United Refining Co.*, 781 F.3d 47, 55 (3d Cir. 2015); *Johnston v. Dow Emples. Pension Plan*, 703 Fed. Appx. 397, 407-8 (6th Cir. July 19, 2017).

Our reply to February 27, 2020 letter:

IRS Document 6390 (rev. 12-98) provides that "Plans that meet the accrual rules are divided into two categories – plans that parallel the language of the statute and plans that otherwise satisfy the requirements though they do not contain specific statutory language." Many defined benefit retirement plans have "unit benefit" formulas like the Coastal Plan's 2 percent of final pay for each year of participation up to a maximum of 30 years. These are the types of plans the IRS is referring to that otherwise satisfy the requirements though they often do not contain specific statutory language. That unit formula complies with the 133-1/3 percent method and the fractional rule without any "specific statutory language."

Although it did not need to, El Paso's accrual formula also contained specific statutory language saying that the 2 percent of final pay formula should be multiplied by a fraction whose denominator is "the Participant's projected Credited Service determined as if the Participant continued to be an Active Participant until his or her Normal Retirement Date." This is nearly identical to the statutory language that says the denominator is "the total number of years he would have participated in the plan if he separated from service at the normal retirement age." ERISA §204(b)(1)(C), 29 U.S.C. §204(b)(1)(C). Even though neither the plan language nor ERISA says this, Kinder Morgan's February 27, 2020 now says that the denominator of this fraction should be without regard to the 30-year maximum and that it can thus be as many as 45 years, e.g., if a participant commenced participation at age 20. Assuming the participant has the maximum of 30 years, that would make the accrual rate much lower than 2 percent of final pay, e.g. 2% x 30 /45 = 1.33%.

Treas. Reg. 1.401(a)(4)-3, on "Nondiscrimination in amount of employer-provided benefits under a defined benefit plan," establishes "Uniformity requirements" for the "Period of accrual." Treas. Reg. 1.401(a)(4)-3(b)(2) specifically provides that "Each employee's benefit must be accrued over the same years of service that are taken into account in applying the benefit formula under the plan to that employee…Thus, for example, a plan does not satisfy the safe harbor in paragraph (b)(4) of this section unless the plan uses the same years of service to determine both the normal retirement benefit under the plan's benefit formula and the fraction by which an employee's fractional rule benefit is multiplied to derive the employee's accrued benefit as of any plan year." Likewise, Explanation No. 5A on "Safe Harbor Nondiscrimination Requirements Defined Benefit Plans" (Rev. 4-2016) requires that "The years of service over which the benefit accrues are the same as those taken into account under the plan's benefit formula" and specifically says that for the "fractional rule unit credit safe harbor, "The plan must "satisfy the uniformity requirements."

For purposes of these regulations, the Coastal benefit formula is a unit credit formula rather than a "flat benefit" formula. The 1991 preamble for the nondiscrimination regulations defines "[a] unit credit plan, for purposes of the safe harbors" as a "plan that contains a benefit formula that provides all employees with the same number of years of service the same benefit (either as a percentage of compensation or as a dollar amount)." 1991 IRB Lexis 1638, *20. In contrast, Treas. Reg. 1.401(a)(4)-3(b)(4)(i)(C) says that a "flat benefit is a benefit that is the same percentage of average annual compensation or the same dollar amount for all employees who have a minimum number of years of service at normal retirement age (e.g., 50 percent of average annual compensation), with a pro rata reduction in the flat benefit for employees who have less than the minimum number of years of service at normal retirement age." Based on these definitions, the Coastal benefit formula cannot be a flat benefit formula because all employees who have a minimum number of years of service do not receive the same percentage of average annual compensation. Instead, if Coastal's benefit formula complies at all, it must comply as a "fractional rule unit credit" formula.

As stated, the Plan's unit benefit formula could have been left as is without any statutory language and it would comply with the fractional rule. It did not need the addition of any statutory language in order to comply with that rule. Adding the statutory language for the fractional rule also clearly did not require El Paso or Kinder Morgan to use a different number of years of credited service than appears in the normal retirement benefit formula. To use the fractional rule when the normal retirement benefit is a unit benefit formula, the years of participation in the fraction can simply be based on the same definition of years that is used in the normal retirement benefit formula, including any 30 or 33-1/3 year maximums.

Kinder Morgan nevertheless now says the terms of the plan are "clear" that the denominator for the fraction "does not include a limit on credited service projected to normal retirement date." However, the only specification in the El Paso Plan related to the denominator is that (1) it is "the Participant's projected Credited Service determined as if the Participant continued to be an Active Participant until his or her Normal Retirement Date," and (2) it is "determined without regard to the March 31, 2006, cutoff for Credited Service." There is no third specification that it is "determined without regard to the maximum of 30 years." It would, indeed, be strange that the plan's drafter put in a disregard of one "cutoff for Credited Service" but left another disregard to be implied. By contrast, in a one-time statement that was never repeated in any later SPD, the 2000 SPD said that the actual years in the numerator and the projected years in the denominator were "with no maximum number of years."

Kinder Morgan seems to be inferring the presence of such a disregard from its absence, thus inferring that the Coastal Plan "does not include a limit on credited service projected to normal retirement age" because of the absence of such a specification in Section 5.1(c) of the

Coastal Plan. Three contextual points weigh against Kinder Morgan's construction and in favor of Mr. Pedersen's: First, Section 5.1(c) provides for "up to the maximum number of Years of Service specified in the applicable benefit formula which the Participant would have attained had he continued to earn uninterrupted Years of Service until his Normal Retirement Age in lieu of his actual Years of Service." After the plan says this, one assumes, in the absence of a contrary expression, that the subsequent references to Years of Service in the same paragraph are subject to the same maximum number.

Second, as stated above, the "without regard to the March 31, 2006 cutoff for Credited Service" suggests that this disregard is not surplusage and that it could not be implied in the denominator without this expression. *See, e.g.*, *Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652, 1659 (2017) ("surplusage canon" is "the presumption that each word ... is there for a reason"). It also suggests there are no additional implied disregard of a service cutoff s in the denominator.

Third, when the 5-year Coastal Transition Benefit was adopted in March 31, 2001, which set up the March 31, 2006 cutoff, there were no examples showing how the 5-year transition benefit worked with the fractions that Kinder Morgan now says are "clear." The fractions that Kinder Morgan now says are "clear" would mean that those additional 5 years may only be worth two-thirds of 5 years for an employee who commenced participation at age 20: 5 years x 2% = 10%, but after Kinder Morgan's fraction of 30/45 is applied, the 10% benefit is reduced to 6.66% (5 years x 1.33%). That is a very significant limitation to the transition benefit to never have been explained or illustrated (and it is also a limitation that applied to no other 5-year transition benefit offered under the El Paso Plan, e.g., there was no such limitation for the El Paso Corporation employees). Providing the full 2% per year for the 5 year transition is, on the other hand, the logical and reasonably-expected result consistent with the promise of a "Five-Year Coastal Transition Benefit."

Kinder Morgan's position on this is also flawed because it violates the principle set out at the start of the accrued benefit regulations that a plan may satisfy one accrued benefit method with respect to the accrued benefits of different classifications of employees, "provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and this section. (For example, if a plan provides that employees who commence participation at or before age 40 accrue benefits in a manner which satisfies the 133-1/3 percent method and employees who commence participation after age 40 accrue benefits in a manner which satisfies the 3 percent method of determining accrued benefits, the plan would be so structured as to evade the requirement of section 411(b).)" Treas. Reg. 1.411(b)-1(a).

Here, for the employees who commenced participation at or after age 35, the formula for the Coastal employees satisfies the accrual methods by accruing benefits at the uniform rate of 2% per year. But for those who commence participation before age 35 the plan, as Kinder Morgan is now construing it, accrues benefits at rates well below 2% in a way that can only satisfies the fractional rule if it is assumed that the years used in the denominator are different than those used in the normal retirement benefit formula. That position is not expressed in the plan's terms and clearly inconsistent with the "uniformity requirements" in the regulations.

Is this classification "structured as to evade the accrued benefit requirements"? We submit it is because the fractional unit benefit formula with the 30 year maximum already satisfies the accrual tests. *See* IRS Doc. 6390 (rev. 12-98). Keeping the maximum number of years in the normal retirement formula, but using a different definition of definition of years in the denominator with no maximum sets up a different accrual rate for classification of employees who started participation before age 35. Under the same normal retirement benefit formula, they have lower accrual rates compared with the employees who start participation at age 35 and over. If that classification had not been drawn by implying a different denominator, everyone would accrue at the same 2% accrual rate.

Kinder Morgan's February 27, 2020 letter represents that the Plan's actuaries at Mercer have "confirmed" that the benefit formula complies with ERISA and the Code. But the 12/2019 memo from Kevin Bills at Mercer to Chris Noonan at Kinder Morgan, which was subsequently produced to us, actually says that "Mercer is not a law firm and therefore is not permitted to provide legal advice," and also "suggest[s] you [Kinder Morgan] consult with your ERISA attorney on these issues." The memo from Mercer's Kevin Bills in regards to "the November 5, 2019 letter you forwarded us from Stephen R. Bruce" further shows that Mercer had never previously considered how this construction of the accrual formula complies, and has no backup to support it. There is, for example, no mention in the Kevin Bills memo of the Treasury Department's uniformity requirements or in the Treasury regulations on classifications of employees that are "structured as to evade the accrued benefit requirements." According to the Form 5500's for the Coastal and El Paso Plans, Mercer, moreover, did not have any responsibilities with regard to the Coastal Plan before 2001, so Mercer by necessity lacks any personal knowledge with regard to the development or application of the formula before that date.

Kinder Morgan's letter touts favorable determination letters issued by the IRS"that the terms of ... the El Paso Plan, including the Coastal Transition Benefit formula, conform to the requirements of Code Section 401(a)." But as the IRS told El Paso and Kinder Morgan:"Our favorable determination applies only to the status of your plan under the Internal Revenue Code (IRC)." As the IRS further informed El Paso and Kinder Morgan: "[g]enerally, a favorable determination letter does not consider, and may not be relied on with regard to ... certain requirements under IRC section 401(a)(4), including the requirement that the plan be nondiscriminatory in the amounts of ... benefits for highly compensated and nonhighly compensated employees." IRS Publication 794 (Rev. October 2010). In this case, the cover letter to the El Paso Corporation's 2002 Application for Determination asked that the determination letter apply to the Coastal Plan, "which was merged into the Plan effective April 1, 2001." But in response to the question about whether El Paso was requesting a determination regarding the "nondiscrimination safe harbors," which include the uniformity requirements, the answer was "No."[1]

Kinder Morgan's present position that the Plan should be construed in a manner that does not comply with the "uniformity requirements" is also not consistent with the Plan document's terms. The Plan document says "the Plan ... is intended to comply with the Internal Revenue Code of 1986, as amended." Section 10.9 of the Plan further says under"Plan Qualification" that "[a]ny modification or amendment of the Plan may be made retroactive, as necessary or appropriate, to establish and maintain a "qualified plan" pursuant to Section 401 of the Code, and ERISA and regulations thereunder and the exempt status of the Trust under Section 501 of the Code."[2]

The position on the construction of the denominator to the Plan's accrual formula that Kinder Morgan is advancing also inexorably leads to a violation of ERISA's disclosure rules. ERISA §102(a), 29 U.S.C. §1022(a), requires disclosures of the plan's terms "written in a manner calculated to be understood by the average plan participant." *See also* 29 C.F.R. 2520.102-2(a). The ERISA §204(h) notices of significant reductions in the rate of future benefit accrual, such as the 2007 "Notice to Certain Participants and Alternate Payees Regarding the El Paso Corporation Pension Plan," are likewise subject to the standard of being "written in a

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[1] Your letter also refers to a favorable determination letter from the IRS dated November 8, 1996. If you have that Application for Determination and related correspondence, please provide it. Otherwise it may not be relied upon.

[2] Consistent with El Paso's Plan, Section 12.12 of Coastal's Plan says: "ERISA and Approval Under Code. The Plan and Trust are intended to qualify as a Plan and Trust meeting the requirements of Sections 401(a) and 501(a) of the Code, as now in effect or hereafter amended, so that the income of the Trust Fund may be exempt from taxation under Section 501(a) of the Code and contributions of the Company under the Plan may be deductible for federal income tax purposes under Section 404 of the Code. Any modification or amendment of the Plan or Trust may be made retroactively, as necessary or appropriate, to establish and maintain such qualification and to meet any requirement of the Code or ERISA."

manner calculated to be understood by the average plan participant," including being calculated to understandably disclosing the elimination or reductions of early retirement benefits and reductions that "affect different classes of participants differently." ERISA §204(h)(2); Treas. Reg. 54.4980F-1, Q&A-6 and 11. It is obviously confusing for the "average plan participant" to be told that his or her normal retirement benefit is a 2% of final pay benefit up to a maximum of 30 years, when in reality the years for accrual of that benefit can be as many as 45 years such that the actual rate of accrual is as low as 1.33% per year. Plan participants look to the summary plan description (SPD) for an explanation of any such unusual features. It is doubly confusing to the average plan participant when this lower fractional accrual rate only applies to participants who commence participation before age 35, which is a totally arbitrary classification. We know of no participant who understood from the El Paso or Kinder Morgan SPDs that for employees hired before age 35, the rate of benefit accrual was far less than 2% per year, even though the plan's benefit formula promised 2% per year of final average monthly earnings.

Whether the plan provisions on the denominator are "clear," as Kinder Morgan now contends, or ambiguous, ERISA requires understandable disclosures of how the Plan is actually being operated. SPDs cannot "render obscure" or "minimize""[a]ny description of exception, limitations, reductions, and other restrictions of plan benefits" and for pension and welfare benefit plans, the SPD must "clearly identify[] circumstances which may result in ... loss, forfeiture, suspension, offset, [or] reduction ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits ...." 29 C.F.R. 2520.102-2(b); 2520.102-3(l).

The 2002 to 2011 SPDs that we possess and have cited before do not reflect any circumstances in which the 2% per year benefit may be reduced to a far lower accrual rate. The February 27, 2020 letter from the Kinder Morgan Claims Administrator now disavows those SPDs on the basis that "the terms of these plans are clear." But whether the terms of the plan documents are "clear" or ambiguous, ERISA affirmatively requires understandable disclosure of the reductions or restrictions in the Plan's benefits. *See Pearce v. Chrysler Grp. LLC Pension Plan*, 615 Fed.Appx. 342 (6th Cir. 2015), and 893 F.3d 339 (6th Cir. 2018) (SPD was directly inconsistent with plan on requirements for 30 and out benefits; "inequitable conduct," not intent to defraud, is required for equitable relief). [3]

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[3] *Pearce* rules that a "claim for equitable relief" where there is "a material conflict between the SPD and the Pension Plan" is "in accord" with its past decisions in *Edwards v. State Farm Mut. Aut. Ins.*, 851 F.2d 134, 136 (6th Cir. 1988) ("it is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then proclaim that any inconsistencies will be governed by the plan"); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 250 (6th Cir. 1996) ("it would make no sense for Congress to

2. ERISA's anti-cutback rule requires the Retirement Plan to allow Mr. Pedersen and other ANR employees to "grow into" early retirement eligibility based on continuing service with ANR and its successors.

The "detailed" calculation that Kinder Morgan provided on October 11, 2019 says Mr. Pedersen "terminated before obtaining early retirement eligibility" and is only entitled to a "Vested Termination Benefit." ERISA requires, however, that former ANR employees like Mr. Pedersen must be permitted to "grow into" early retirement eligibility if they continue to work with ANR until age 55. Kinder Morgan's application of El Paso's "Ninth Amendment" to cut off Mr. Pedersen's ability to "grow into" early retirement eligibility with continuing ANR employment violates the anti-cutback protection in ERISA §204(g)(2), 29 U.S.C. §1054(g)(2), which is also set forth in Section 3.2 of the Plan.

Section 3.2 of El Paso's Plan provides that an employee will become early retirement eligible if he "terminates employment after attaining age 55 and completing ten (10) Years of Service." Under this provision, an ANR employee like Mr. Pedersen "terminates employment" only when he or she separates from service from ANR. *Gillis v. Hoechst Celanese Corp*., 4 F.3d 1137, 1147 (3d Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) ("an employee is not separated from service if the employee continues on in the same job for a successor employer"). Pursuant to ERISA §204(g)(2), Section 3.2's early retirement provision must therefore continue to apply even after El Paso sold ANR to TransCanada on February 22, 2007.

Effective March 1, 2007, El Paso nevertheless adopted the "Ninth Amendment" which purported to amend the early retirement requirement to provide that only those ANR employees who were age 53 or more on the date of the sale could be eligible for early retirement. Under the Ninth Amendment, employees like Mr. Pedersen, who was age 49 in 2007, could not grow into eligibility, even if he continued to work for ANR after the sale past age 55.

As a part of the 1984 Retirement Equity Act, Congress added ERISA §204(g)(2) in order to provide that for purposes of ERISA's anti-cutback protection, a plan amendment that has the effect of "eliminating or reducing an early retirement benefit ... with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." Under Section 204(g)(2), a participant who is not eligible for early retirement at the time of the change must be allowed to "grow into" eligibility for the early retirement benefits under the preamendment terms of the plan. *See Alcantara v. Bakery & Confectionary Union & Indus. Int'l*

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require employers to provide clear, simple, complete descriptions of benefits plans if the employee were expected to also know and understand every clause in the voluminous, complex, and legalistic document the SPD was intended to accurately describe").

Pension Fund, 751 F.3d 71, 78 (2d Cir. 2014); *Bellas v. CBS, Inc.*, 221 F.3d 517, 527 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001); Revenue Ruling 85-6 (January 1985). Accordingly, former ANR employees like Mr. Pedersen must be allowed to "grow into" early retirement eligibility by continuing to work for ANR until age 55 – just as they would have been allowed if El Paso had not adopted the Ninth Amendment.

Consistent with ERISA §204(g)(2), both El Paso and Kinder Morgan continued for a period of 12 years to let the ANR employees who reached age 55 while still working with ANR obtain early retirement benefits, and they continued to provide benefit projections to Mr. Pedersen and others showing them as eligible for early retirement benefits if they reached age 55 while working work for ANR. Mr. Pedersen worked for ANR until November 2015 when he was age 58. However, in August 2019, Kinder Morgan suddenly changed his termination date for this purpose to March 22, 2007. Under ERISA §204(g)(2) and the pre-amendment terms of Section 3.2 of the Plan, Mr. Pedersen is eligible for an early retirement benefit commencing at age 58 or any age thereafter. Kinder Morgan's sudden change to that in August 2019 violates ERISA's protection of early retirement benefit against amendments that have the effect of eliminating or reducing those benefits.

Our reply to February 27, 2020 letter:

The Kinder Morgan Claims Administrator's February 27, 2020 letter does not directly address the anti-cutback protection in ERISA §204(g)(2). Instead, it tries to avoid it by saying that the Ninth Amendment was merely "to clarify the procedures for becoming and ceasing to be a participating employer in the plan." In the next paragraph, the Administrator says "The [2007] Notice specifically addresses that the amendment may reduce future accruals under the Plan." Thus, this contemporaneous Notice said there was an "amendment" and it said nothing about any clarification, in direct contradiction to the assertion in the previous paragraph that the "Ninth Amendment" was just a clarification.

The February 27, 2020 letter next asserts that ERISA §204(g)(2)'s anti-cutback protection "does not prohibit an employer from terminating employees, either individually or in connection with the sale of a subsidiary." It is true that the anti-cutback protections does not prohibit an employer from terminating employees (although ERISA §510 provides relief if the purpose of the termination is to interfere with the attainment of benefits). But it is a completely novel theory that "the sale of a subsidiary" is the same as "terminating employees." In this case, ANR was named in the El Paso Plan as an employer with whom service counts for early retirement eligibility. Mr. Pedersen's service with ANR did not terminate upon El Paso's sale of ANR. Indeed, the value that El Paso received as a result of that sale undoubtedly reflected the value of Mr. Pedersen's and others' continued service with this subsidiary.

Furthermore, by the time the ANR subsidiary was sold in 2007, no one with Coastal or ANR was continuing to accrue additional benefits. March 31, 2006, was the end of the five-year transition period for the Coastal Transition Benefit under the Seventh Amendment to the El Paso Plan. Thus, even if there had been no sale in 2007 to TransCanada, participation under the traditional defined benefit plan had already stopped. The only purposes for which service continued to count were for vesting and early retirement eligibility.

The Ninth Amendment was entirely separate from the Seventh Amendment. On its face, the Ninth Amendment stopped the counting of service for early retirement benefits for ANR employees after the date of its adoption. But under ERISA §204(g)(2), this was an amendment that eliminated or reduced early retirement benefits from which participants are to be protected. *See, e.g.*, *Costantino v. TRW*, 13 F.3d 969, 977-78 (6th Cir. 1994) ("anti-cutback" rule "prohibit[s] employers from amending their plans to eliminate or decrease early retirement benefits or retirement-type subsidies").

As both the terms of ERISA 204(g)(2) and now-Justice Alito's concurring opinion in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d at 1150, show, ERISA's protection of early retirement benefits must be extended to any participant who "satisfies (either before or after the amendment) the preamendment conditions for the [early retirement] subsidy." *Accord, Alcantara v. Bakery & Confectionary Union & Indus. Int'l Pension Fund*, 751 F.3d 71, 78 (2d Cir. 2014); *Bellas v. CBS, Inc.*, 221 F.3d 517, 527 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001); Revenue Ruling 85-6 (January 1985). This statutory protection thus allows participants to "grow into" eligibility by "satisf[ying]... the pre-amendment conditions for the subsidy" after the amendment, including the age and service requirements. Here, the Plan document named ANR as an "Affiliated Company" for whom employment counted for early retirement eligibility, and, after the sale to TransCanada, ANR continued to exist and to employ Mr. Pedersen. As a result, Mr. Pedersen and other ANR employees had to be allowed to continue to satisfy the pre-amendment conditions for the subsidy after the Ninth Amendment by continuing to work for ANR until age 55 – just as they would have been allowed to do if El Paso had not adopted the Ninth Amendment. Again, we are only talking about growing into eligibility for early retirement benefits already earned, and not accruing additional benefits which had already stopped. The other option to allowing these participants to grow into eligibility for early retirement eligibility would have been to make them all eligible as of the sale date. *See* Revenue Ruling 85-6, 1985 IRB LEXIS 389, at *6.

The Kinder Morgan Claims Administrator's letter ignores the statutory protection for any participant who "satisfies (either before or after the amendment) the preamendment conditions for the [early retirement] subsidy." Instead of addressing the statutory language, the Claims Administrator relies on a 1990 "General Counsel Memorandum." The Claims Administrator's reliance on that old GCM fails. Although the Claims Administrator's letter selects quotes from the GCM that may sound relevant, the GCM is about a different subject and a different statutory section and language. The GCM is about the permissibility of distributions under IRC §401(a) after a sale or other disposition. It does not relate to the statutory issue of "growing into" early retirement eligibility by satisfying the pre-amendment conditions for early retirement under ERISA. As explained in *Gillis*, which was decided three years *after* this GCM, the considerations on growing into eligibility under the terms of ERISA §204(g)(2) are different than for distributions under IRC §401(a). The GCM on which the Claims Administrator relies does not deal with the issue of "satisf[ying] the pre-amendment conditions for the subsidy." The GCM also does not take into account that ERISA's definition of the "employer" is a broad definition based on "economic realities," and not based on corporate controlled group formalities like whether an employee is now part of a different corporate group. When an employer terminates its participation in a plan, and an employee continues to work for the same "employer" under ERISA's broad definition, the pre-amendment conditions for early retirement must be satisfied within the meaning of ERISA §204(g)(2).

The February 27, 2020 letter alternatively suggests that the Ninth Amendment's reduction of early retirement benefits for ANR employees like Mr. Pedersen might not be a violation because another part of the same amendment "expanded" eligibility for participants who were age 53 as of the date of the sale. However, under Treasury regulations that became effective on August 12, 2005, *see* 70 Fed. Reg. 47109, if there are "two amendments with the same applicable amendment date," the amendments violate the anti-cutback rule when "the net dollar amount of any early retirement annuity with respect to the accrued benefit of any participant is lower than it would have been without the two amendments." Treas. Reg. 1.411(d)-3 (b)(iii). In this case, Mr. Pedersen's early retirement annuity is "lower than it would have been without the two amendments" because the amendment related to participants who are age 53 as of the date of the sale did not "expand" his eligibility for early retirement benefits, but the amendment related to ANR decreased the factors used to determine his early retirement annuity, even after he satisfied the "pre-amendment conditions" for the benefit.

3. Even if Mr. Pedersen was held to only be eligible for a vested termination benefit, Sections 4.1(c)(iv) and 4.3(c) of the Plan provide that at age 62, he is eligible for an "unreduced" 100% benefit.

Mr. Pedersen is also entitled to an "unreduced" retirement benefit at *age 62* pursuant to Sections 15 and 17 of Appendix X of the El Paso Plan. Appendix X sets out provisions applicable to participants who, like Mr. Pedersen, were employees of the Coastal Corporation on January 28, 2001, and were employees of ANR Pipeline prior to December 1, 1986.

Section 15 of Appendix X, which appears as Appendix LX12 of the Kinder Morgan Plan A, added Section 4.1(c)(iv) to the Plan entitled "ANR Grandfather." This Section provides that for "a Participant who was an employee of a participating employer in the [ANR Plan] prior to December 1, 1986," the benefit "shall be the amount determined under Section 4.1(c)(i) [the "Coastal Transition Benefit"] plus the amount equal to 0.3% of Final Average Monthly Earnings multiplied by years of credited service under the ANR Plan prior to 1986. This additional ANR grandfathered benefit is subject to the early retirement reduction in Section 4.3(c) or the Vested Termination Benefit reduction in Section 4.5(c), whichever applies, *in the event benefits commence prior to age 62*." There is ***no*** reduction if benefits commence at or after age 62.

Section 17 of Appendix X on the "Coastal Transition Benefit Reduction for Early Retirement" likewise amended Section 4.3(c) of the Plan to provide a 4% reduction "per year by which the commencement date precedes the first day of the month following *the date the Participant will attain age 62*." Under this early retirement transition provision, as under the ANR Grandfather, there is no reduction for retirement at age 62 or after. When El Paso acquired Coastal, Coastal employees were specifically told in a 2001 presentation that the "Coastal Transition Benefit" would be "Unreduced at age 62 for ANR participants employed as of 12/1/86."

Two plan provisions in Appendix X thus provide that longtime former ANR/Coastal employees like Mr. Pedersen are at least entitled to an unreduced 100% benefit at age 62, even if they were not eligible for early retirement under the terms of Section 3.2. Neither of those provisions were modified by El Paso's "Ninth Amendment," or by any subsequent amendment. The Ninth Amendment only modified Section 3.2 on "Early Retirement Date"; it did not amend any of the other provisions in Appendix X.

Consistent with the terms of Sections 15 and 17 in Appendix X, El Paso and later Kinder Morgan both interpreted these Plan provisions from 2001 forward to provide an unreduced 100% benefit at age 62 for former ANR employees like Curtis Pedersen. Presentations stated that benefits would be "Unreduced at age 62 for ANR participants employed as of 12/1/86." And since 2006, Mr. Pedersen has obtained multiple projections from Mercer's online calculator showing he is entitled to an unreduced benefit if he begins payments at or after age 62. By its own admission, Kinder Morgan was until January 2019 not only projecting but paying these unreduced retirement benefits to all former ANR employees who were similarly situated to Mr. Pedersen. And by its own admission, Kinder Morgan continues to pay those unreduced retirement benefits to former ANR employees similarly situated to Mr. Pedersen.

Kinder Morgan's October 11, 2019 "detailed" calculation nevertheless would now apply a "Vested Terminated Reduction Factor" of "0.7142" to Mr. Pedersen's benefit age 62, rather than provide the unreduced 100% benefit due him at that age. This "reinterpretation" of the terms of the plan set forth in Appendix X contravenes those terms and violates ERISA's anti-cutback rule. *See, e.g.*, *Cottillion v. United Refining Co.*, 781 F.3d 47, 55 (3d Cir. 2015).

Our reply to February 27, 2020 letter:

As the February 27, 2020 letter from Kinder Morgan's Claims Administrator states:

> "The Plan provides that a participant with a Coastal Transition Benefit who terminates after attaining age 55 and completing 5 years of service ("Early Retirement Criteria") shall receive an "Early Retirement Benefit," which is equal to the vested Coastal Termination Benefit, unreduced for commencement between ages 62 and 65 and reduced 4% for each year the benefit commencement date precedes age 62."

After we brought this up, Kinder Morgan conceded that Section 15 of the Appendix L-X to the Kinder Morgan Retirement Plan provides that the benefit "shall be the amount determined under Section 4.1(c)(i) [the "Coastal Transition Benefit"] plus the amount equal to 0.3% of Final Average Monthly Earnings multiplied by years of credited service under the ANR Plan prior to 1986" and that "[t]his additional ANR grandfathered benefit is subject to the early retirement reduction in Section 4.3(c) or the Vested Termination Benefit Reduction in Section 4.5(c), whichever applies, in the event benefits commence prior to age 62." This requires that there be no early retirement reduction prior to age 62 for any ANR employee "who was an employee of a participating employer in the [ANR Plan] prior to December 1, 1986."

Since Kinder Morgan is granting the ANR Grandfather on an unreduced basis based on Section 4.1(c)(iv), the next question is how can the benefit to which it is added be provided on a reduced basis at the same time? The plan provision covers the amount determined under Section 4.1(c)(i), which is the Coastal Transition Amount, plus the amount equal to 0.3%. And it says "[t]his additional ANR grandfathered benefit is subject to the early retirement reduction in Section 4.3(c)" because that is the rule for the Coastal Transition Benefit established by Section 17. While it might be arguable to read Section 15 to apply only to that "portion," that is because the other portion is already subject to the same provision under Section 17. However, even though we raised it, Kinder Morgan's letter never addresses Section 17 of the Appendix on the Coastal Transition Benefit, which parallel to Section 15 provides for a 4% reduction "per year by which the commencement date precedes the first day of the month following the date the Participant will attain age 62." That unreduced benefit is to be provided to all "former participants in the Pension Plan for Employees of The Coastal Corporation." Sections 15 and 17 are in the same Appendix so they have to be interpreted consistently with one another.

The "error" which led to both parts being granted for the past 12 years also points to the correct interpretation of Sections 15 and 17. But Kinder Morgan has never responded to the point that the supposed "error" directly conformed with the terms of Sections 15 and 17, and also with the presentation to employees that their retirement benefits would be:

* ***Unreduced at age 62 for ANR participants employed as of 12/1/86***

The presentations on unreduced early retirement benefits at age 62 and over completely undermine the position that there was simply an "error" in the "online pension estimate tool" that was discovered 12 years after the fact. In light of the presentations and the payments of unreduced benefits to annuitants for the past 12 years, this obviously wasn't just an error in coding an online estimation tool.

Kinder Morgan has made a lot of factual representations about this "error," e.g., that it was just an error in a pension estimate tool, but it has offered no proof and no relevant documents in support of this being an "error." *Kushner v. Nationwide Mut. Ins. Co.*, 2019 WL 4696306, 2019 U.S. Dist. LEXIS 164977 (S.D. Ohio 9/26/2019) concerned a "mistake" discovered 10 years later, which the district court determined was not a mere clerical error when responsibility for it did not fall squarely on any third-party and the "source and cause of the error" remained "unknown."

The letter that Kinder Morgan sent on April 22, 2020 to the annuitants who retired under this "error" says that they are going to be able to keep their monthly benefits unreduced for retirement at age 62, with no refunds or future reductions, and that the IRS issued a determination letter specifically approving this. Mr. Pedersen has commenced his benefits and is thus now an annuitant, but he received no such letter, nor has he or anyone who is not yet an annuitant received any explanation about why their benefits are not being protected under the IRS's determination letter if the only error was in an "online pension estimate tool." In response to our request, Kinder Morgan has refused to produce the application to the IRS or any of the correspondence with the IRS as "not relevant" (see response to Para. 6 in April 17, 2020 letter). An inference can be drawn from this that there is something in this material that is not helpful to Kinder Morgan's position.[4]

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[4] We have requested that the IRS provide the determination letter, application, and related correspondence, all of which should already have been produced as "relevant" documents to Mr. Pedersen's claim.

4. The Plan provisions for using an outdated "GAM83 mortality table and an 8% interest rate" for a vested termination benefit violate ERISA's "actuarial equivalent" requirement.

Kinder Morgan's October 11th "detailed" calculation openly state that because Mr. Pedersen "terminated before obtaining early retirement eligibility," his "vested termination benefit" will be "reduced actuarially using *the GAM 83 mortality table and an 8% interest rate* for commencement prior to Normal Retirement Date." Use of this obviously outdated mortality table and old interest rate (when interest rates are currently less than 4%) produces a retirement benefit for Mr. Pedersen at age 62 that is only equal to 71.4% of the benefit at age 65, in violation of ERISA's requirement for at least "actuarially equivalent" early retirement benefits.

Under ERISA §204(c)(3), 29 U.S.C. 1054(c)(3), when a retirement benefit is "determined as an amount other than an annual benefit commencing at normal retirement age," "the employee's accrued benefit ... shall be the actuarial equivalent of such benefit." *See also* the parallel Internal Revenue Code provision at 26 U.S.C. §411(c)(3) and Treas. Reg. 1.411(c)-1(e) (accrued benefit "determined as an amount other than an annual benefit commencing at normal retirement age ... shall be the actuarial equivalent of such benefit, as determined by the Commissioner"). ERISA thus requires that when a plan allows a participant to retire early with a reduced monthly benefit, the value of that reduced benefit must be at least actuarially equivalent to the participant's monthly pension beginning at age 65. Treas. Reg. 1.411(a)-4(a) likewise provides that "adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable" in violation of ERISA §203(a), 29 U.S.C. 1053(a), and IRC §411(a).

Kinder Morgan's use of outdated mortality table and interest rate in the October 11 calculation decreases the early retirement benefits to less than the actuarial equivalent of the benefit beginning at age 65. Applying a reasonable interest rate of 4% and the mortality table currently prescribed by IRC §417(e)(3), and ERISA§205(g)(3), an "actuarial equivalent" benefit at age 62 must be at least 81% of the retirement benefit commencing at age 65. Thus, even if Mr. Pedersen was not due an unreduced early retirement benefit and was only due a vested termination benefit actuarially reduced for "commencement prior to Normal Retirement Date," his benefit at age 62 should be at least $2,980.78 ($3,679.98 * 0.81), instead of the $1,933.69 in Kinder Morgan's October 11th calculation.

Our reply to February 27, 2020 letter:

The Claims Administrator's February 27, 2020 letter does not dispute the early retirement reduction factors based on an 8% interest rate and the 83 GAM mortality table need to be updated to maintain "actuarial equivalence." Instead, the letter says "[t]here is no current legal requirement under ERISA or the Code that the Plan's early retirement factors be updated." However, ERISA §204(c)(3), IRC §411(c)(3), and Treas. Reg. 1.411(c)-1(e), all require actuarial equivalence. To maintain actuarial equivalence, the interest rates and mortality factors must necessarily be updated. That is why the §417(e) interest rates and mortality tables change every year. If this is a matter of what Kinder Morgan might be able to get away with, no plan sponsor or fiduciary has prevailed relying on the argument that actuarial assumptions do not have to be updated in order to maintain actuarial equivalence of benefit options, including early retirement benefits. *Smith v. Rockwell Automation, Inc.*, 2020 U.S. Dist. LEXIS 22406, *8 (E.D. Wisc. 2/10/2020), rejected the argument that even if the actuarial assumptions that form the basis for early retirement factors later became unreasonable, the plan sponsor and fiduciaries are not obligated to amend the plan to maintain actuarial equivalence. *See also Smith, et al. v. U.S. Bancorp*., C.A. 18-3405, 2019 WL 2644204, *3 (D. Minn. 6/27/19) (denying motion to dismiss claims that defendant's early commencement factors are not "based on current prevailing interest rates and life expectancies" in conformity with ERISA).

The February 27, 2020 letter also says "the IRS has issued multiple favorable determination letters that the terms of the Plan and the El Paso Plan meet applicable qualification requirements." But there has been no determination on this issue and IRS Publication 794 states that "[a] determination letter is limited in scope" and "does not consider whether actuarial assumptions are reasonable."

At the end, the Claims Administrator's letter again points a finger at Kinder Morgan as though the fiduciaries who Kinder Morgan has appointed have no responsibility to the participants. But under ERISA, fiduciaries must apply plan terms in accordance with title I of ERISA. The plan sponsor has a duty to comply with the law, too, but it is a conjunctive duty, not an exclusive one. If persons with fiduciary responsibility have no authority, then there would be no point in ever exhausting internal administrative processes.

Conclusion

In accordance with ERISA's statutory standards and the terms of the Retirement Plan, Curtis Pedersen is entitled to unreduced early retirement benefits of $3,679.98 per month commencing on the first of the month after he reached age 62. Please consider Mr. Pedersen's claim on behalf of all others similarly-situated and provide Kinder Morgan's final response in writing within 30 days, i.e., on or before July 20, 2020.

I reserve the right to reopen and amend this submission if more information becomes available that should have been produced as "relevant" documents under 29 C.F.R. 2560.503-1(h)(2)(iii).

Sincerely,

Stephen R. Bruce

cc: Curtis T. Pedersen
Beverly Leutloff
Randall Schmidgall