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November 5, 2019

BY PRIORITY MAIL

Kinder Morgan Fiduciary Committee
Kinder Morgan Benefits Service Center
P.O. Box 10361
Des Moines, IA 50306-0361

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

Dear Members of the Kinder Morgan Fiduciary Committee:

I represent Curtis T. Pedersen, who is a participant of the Kinder Morgan Retirement Plan A. Mr. Pedersen is about to turn age 62 on November 11, 2019 and wants to commence his retirement benefits under the 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 turns age 62. As explained below, the "detailed" calculation that Kinder Morgan provided to Mr. Pedersen on October 11, 2019 would, in violation of the ERISA and the Retirement Plan's terms, decrease 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 explain in detail below why this is wrong.

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.

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 then intends to apply 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*** will count 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. 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. Mr. Pedersen's 2% of pay per year normal retirement benefit for each of 30 years would thereby be effectively decreased to ***1.382%*** of his pay for each of his 26.75 years. 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, by contrast, $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 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 the "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 has limited to 30 years.

The only place I have located a "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 does not, however, contain 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 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).

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.

The "detailed" calculation that Kinder Morgan provided on October 11th goes on to say that 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) ("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 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 amended 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.

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." In accordance with Section 204(g)(2), a participant who is not eligible for early retirement at the time of the change must be permitted to "grow into" eligibility for the early retirement benefits under the terms of the old plan. *See 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). Accordingly, former ANR employees like Mr. Pedersen must be permitted 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), and very tellingly, 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. In accordance with ERISA §204(g)(2) and Section 3.2 of the Plan, Mr. Pedersen was eligible for an early retirement benefit commencing at age 58 or any age thereafter under the terms of Section 4.3(c) of Appendix X of the Plan.

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, which also may not be taken away by "reinterpretation."

Mr. Pedersen is also entitled to an unreduced retirement benefit *at age 62* regardless of whether he is eligible for early retirement under Section 3.2 of the Plan. Appendix X of the El Paso Plan sets out provisions applicable to participants who, like Mr. Pedersen, were employees of Coastal on January 28, 2001, and also were employees of ANR Pipeline prior to December 1, 1986. Those provisions also provide that Mr. Pedersen is entitled to an unreduced 100% retirement benefit beginning at age 62.

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." It 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.

Likewise, Section 17 of Appendix X on the "Coastal Transition Benefit Reduction for Early Retirement" amends 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 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."

Thus, two plan provisions 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 are 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 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 Mr. Pedersen. Since 2006, Mr. Pedersen has secured multiple projections from Mercer's online calculator showing that 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 paying these unreduced retirement benefits to all former ANR employees who were similarly situated to Mr. Pedersen.

Kinder Morgan's October 11, 2019 "detailed" calculation nevertheless would 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).

4. The Plan provisions for using an old and 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 states 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 current rates are less than 4%) would produce 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), if 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"). Thus, ERISA requires that if 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).[1]

Kinder Morgan's use of an old and outdated mortality table and interest rate in the October 11 calculation would decrease the early retirement benefits to much less than the

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[1] The violations of ERISA's "actuarial equivalence" requirements from the use of "old and outdated" interest rate and mortality assumptions have been the subject of ten recent class action lawsuits, two of which have already withstood motions to dismiss. *See 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); *Torres, et al. v. American Airlines*, C.A. 18-983 (N.D. Tex.), 8/7/19 Order (Dkt.#31) (denying motion to dismiss claims against use of "older mortality tables" "developed over thirty years ago when people had shorter life expectancies").

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 that is 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.

Conclusion

In accordance with ERISA's minimum standards and the terms of the Retirement Plan, Mr. Pedersen is entitled to an unreduced early retirement benefit of $3,679.98 per month commencing on the first of the month after he reaches age 62. Although exhaustion is not required for claims for ERISA statutory violations, *see, e.g., Richards v. General Motors Corp.*, 991 F.2d 1227, 1235 (6th Cir. 1993), I am submitting this claim on Mr. Pedersen's behalf to provide an opportunity for the members of the Fiduciary Committee to correct Kinder Morgan's October 11, 2019 detailed calculations and ensure that Mr. Pedersen receives the full retirement benefits he is due under ERISA's standards and the terms of the Plan.

Please consider Mr. Pedersen's claim on behalf of all others similarly-situated and please provide Kinder Morgan's response in writing within 30 days, i.e., on or before December 5, 2019. Regardless of your response, Mr. Pedersen requests that his retirement benefits commence on December 1, 2019. As you know, the Plan may not condition payment of any undisputed part of his retirement benefits on acceptance of any positions as to the disputed parts.

Sincerely,

Stephen R. Bruce

Encl.

cc: Curtis T. Pedersen

KINDER MORGAN

Kinder Morgan Benefits Service Center
P.O. Box 10361, Des Moines, IA 50306

October 11, 2019

CURTIS PEDERSEN
8000 DRIFTWOOD DRIVE
FENTON, MI, 48430

Re: Kinder Morgan Retirement Plan A – Calculation Detailed Summary

Dear Mr. Pedersen:

Per your phone call to the Kinder Morgan Benefits Service Center, we have enclosed a detailed calculation for your retirement on December 1, 2019. We recommend that you keep a copy of this calculation detail along with your retirement election paperwork. Please call us at (866) 301-2359 if you have any questions. Customer Service Representatives are available Monday through Friday from 8:30 a.m. to 5:00 p.m. Central Time.

Sincerely,

Kinder Morgan Benefits Service Center

Enclosure

Coastal Transition Benefit

The Coastal Transition Benefit is a transition benefit for certain former participants in the Pension Plan for Employees of The Coastal Corporation ("Coastal Plan").

Important Note: You will receive the greater of the Total Coastal Transition Benefit or the Cash Account Benefit when you decide to commence your retirement.

Coastal Transition Benefit Formula

The formula used to calculate your Coastal Transition Benefit single life annuity payable at age 65 is as follows:

Part 1: 2% × Final Average Monthly Earnings (FAME) × Credited Service Projected to Age 65 (maximum of 30 years);
Part 2: 1.5% × Primary Social Security Amount × Credited Service Projected to Age 65 (maximum of 33.333 years)
Part 3: Credited service at termination (or March 31, 2006, if earlier) divided by credited service projected to age 65

[Part 1 – Part 2] x Part 3 = Single Life Annuity at Age 65

Final Average Monthly Earnings (FAME)

Final Average Monthly Earnings means the highest average monthly earnings received by the participant during any 60-consecutive-month period within the last 120 months prior to the date of termination or March 31, 2006, whichever occurred first.

Primary Social Security Amount

The Primary Social Security Amount means the lowest estimated amount which would be available at age 65, determined as of the earlier of your termination date and March 31, 2006, as a monthly old age benefit for the participant, exclusive of benefits for relatives or dependents, under the Social Security Act, whether or not payment of such amount is delayed, suspended, or forfeited because of failure to apply, other work, or for any other reason.

Data Used in Calculation

Final Average Monthly Earnings (FAME)	$8,446.78
Primary Social Security Amount	$1,882.00
Credited Service at Termination (or March 31, 2006, if earlier)	26.75
Credited Service Projected to Age 65	43.4167

Actual Calc Detail for Retirement on December 1, 2019

Coastal Transition Benefit Formula

Part 1: 2% × Final Average Monthly Earnings (FAME) × Credited Service Projected to Age 65 (maximum of 30 years);

Part 1 - 2% × $8,446.78 × 30 = $5,068.07

Part 2: 1.5% × Primary Social Security Amount × Credited Service Projected to Age 65 (maximum of 33.333 years)

Part 2 - 1.5% × $1,882.00 × 33.333 = $940.99

Part 3: Credited service at termination (or March 31, 2006, if earlier) divided by credited service projected to age 65

Part 3 - 26.75/43.4167 = 0.61612

Coastal Transition Benefit = ($5,068.07 – $940.99) × 0.61612 = $2,542.78

ANR Grandfather Benefit

An additional Coastal Transition Benefit for a participant who was an "employee" of a participating employer in the American Natural Resources System Companies Employees' Retirement Plan ("ANR Plan").

ANR Grandfather Benefit Formula

The formula used to calculate your ANR Grandfathered Benefit single life annuity payable at age 65 is as follows:

0.3% × Final Average Monthly Earnings (FAME) × Credited Service prior to 1986

Data Used in Calculation

Final Average Monthly Earnings (FAME)	$8,446.78
Credited service at 1/1/1986	6.50

Actual Calc Detail for Retirement on December 1, 2019

ANR Benefit Formula

0.3% × Final Average Monthly Earnings (FAME) × Credited Service prior to 1986

0.3% × $8,446.78 × 6.50 = $164.71

Total Coastal Transition Benefit at Normal Retirement Date

Coastal Transition Benefit + ANR Grandfather Benefit

$2,542.78 + $164.71 = $2,707.49

Coastal Transition Benefit Reduction for Early Commencement

Since you terminated before obtaining early retirement eligibility, you will receive a Vested Termination Benefit. The Vested Termination Benefit is your total Coastal Transition Benefit reduced actuarially using the GAM83 mortality table and an 8% interest rate for commencement prior to Normal Retirement Date.

Vested Termination Reduction Factor at Age 62 = 0.7142

Benefit at Normal Retirement Date × Vested Termination Reduction Factor at Commencement Date = Benefit Due at Benefit Commencement Date

Total Coastal Transition Benefit Due at December 1, 2019

$2,707.49 * 0.7142 = $1,933.69

The benefit you will receive is the higher of the Total Coastal Transition Benefit and the Cash Account Benefit. The Cash Account Benefit on December 1, 2019 is $1,804.21, therefore making the winning benefit the Total Coastal Transition Benefit.