

sistence fees; and that (3) need not be decided now because the hearing examiner does not intend to issue any subpoena *duces tecum* at the request of SOUP that will require any charge by the respondent or any advertising agency. If this does become an issue, the hearing examiner intends to make a recommendation with respect thereto.

Upon consideration the Commission has determined to adopt the hearing examiner's recommendations as to (1) and (3). The Commission has further determined not to rule upon the hearing examiner's recommendation as to (2) at this time, pending a determination by the Comptroller General as to the Commission's authority to pay the fees referred to therein. Accordingly,

It is ordered, That the hearing examiner's recommendations as to (1) and (3) be, and they hereby are, adopted.

It is further ordered, That the hearing examiner's recommendation as to (2) be held in abeyance, pending a determination of the Commission's authority to pay the fees referred to therein.

PHILLIPS PETROLEUM COMPANY, ET AL.

Docket C-1088. Order and Opinion, March 4, 1971

Order denying respondent's petition for reconsideration of Commission's denial for an extension of time to comply with the provision of the order to construct a plant for the manufacture of low density polyethylene resin.

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

On July 13, 1970, respondent Phillips Petroleum Company ("Phillips") filed with the Commission an application for modification of the consent order entered herein on August 2, 1966 [70 F.T.C. 456]. Phillips sought an extension of nine additional months within which to effect compliance with Paragraph III of the order.¹ Respondent also requested an additional period of five years within which to comply with Paragraph IX of the order, which required Phillips to construct a plant for the manufacture of low density polyethylene resin (LDPE) within five years from the effective date of the order.²

¹ Paragraph III of the order states:

It is further ordered, That, within three (3) years from the date of divestiture of the Monument Plant as ordered by Paragraph II of this order (if such divestiture is accomplished within the two (2) year period therein specified), Phillips shall construct, or cause one of its subsidiaries to construct, facilities for the production of polypropylene resin with a minimum annual rated capacity of 35 million pounds.

² Paragraph IX of the order provides:

It is further ordered, That, within five (5) years from the effective date of this order, Phillips shall enter independently into the production of low density polyethylene resin at a newly constructed plant with a minimum annual rated capacity of 140 million pounds. Phillips shall promptly initiate the steps necessary for construction of said plant, and shall continue to use its best efforts to construct such plant and to bring it into production at the earliest possible date.

By order issued December 14, 1970, the Commission granted Phillips' request for an additional nine months to comply with Paragraph III of the order, and denied its requested extension of time to comply with Paragraph IX. The Commission's order stated that Phillips had not adduced any new facts in support of its requested five year extension since its execution of the consent order and that the modification was not required by the public interest.

Phillips now petitions the Commission for reconsideration of its refusal to grant the requested modification of Paragraph IX of the order, urging that the Commission erred by stating in the December 14 order that "respondent has not shown any new facts which were not reasonably known or knowable to it at the time it signed the consent order," without providing respondent an opportunity to argue whether it should have known the facts in question; and that the relevant pleadings raised "substantial factual issues" and therefore required the Commission to set the matter for evidentiary hearing pursuant to Section 3.72(b) (3) of the Rules of Practice.

In 1966 the Commission served a complaint on Phillips alleging that it had entered into an illegal joint venture agreement with National Distillers for the production of low density polypropylene, which was alleged to have removed Phillips as a potential *de novo* entrant into the LDPE market and which reduced competition between Phillips and National in the sale of propylene-based products. In 1966 Phillips voluntarily consented to the entry of an order disposing of this complaint in which Phillips agreed to liquidate the joint venture arrangement and, in the now disputed Paragraph IX, to enter into the production of LDPE at a newly constructed plant with a minimum annual capacity of 140 million pounds. The paragraph which was agreed to by Phillips provided a five year period in which to accomplish this. This five year period expires in August, 1971. Respondent's petition asserts that it has already constructed a plant for the manufacture of LDPE, but that a third production line will have to be added to the two now in existence in order to increase the plant's annual production capacity to the amount required by the order.

Rule 3.72(b) of the Commission's Rules of Practice provides that a respondent subject to an order which has become final may petition the Commission for its modification if changed conditions of fact or law or the public interest so requires. Subparagraph (3) of the rule provides that the Commission may in its discretion decide the matter on the papers filed or, if the pleadings raise substantial factual issues, set the matter down for such hearings as it may deem appropriate.

In its original petition for a modification of this paragraph to grant it an additional five years within which to comply, Phillips detailed the many start up costs and operations and time needed for each,

but did not at any point argue actual physical impossibility to complete the agreed to enlargement of the LDPE plant. Rather it argued that the LDPE market was "in balance" and that the additional new capacity would upset this "balance."

Paragraph IX of the order was clearly central to the relief agreed to by Phillips as well as to the Commission's willingness to dispose of the complaint by consent order. Its purpose is to require Phillips to enter into the production of LDPE as a significant competitive force (enter with a capacity to produce 140 million pounds), and thus to provide additional competition in the highly concentrated LDPE market.

The type of changed circumstances urged by Phillips in support of its petition concern the status of the LDPE market condition as Phillips views it and Phillips' contention that this market is not likely to enable it to obtain what it would consider a satisfactory return on investment.

Phillips agreed in the order to expand its LDPE plant to a specified capacity. It agreed further in 1966 that this expansion would be effected by 1971. No provision was made that the expansion should be conditioned on the state of the market. Indeed the expansion to which Phillips agreed was absolute. Clearly, it is not unreasonable to suppose that it could have been anticipated by both parties at the time of these negotiations that the LDPE market in 1971 might be different from what it was at the time of the negotiations. Yet the order was silent on the relevance of this factor. Instead it provided simply that Phillips should expand its LDPE capacity by 1971.

Agreement to such an order provision necessarily implies that both the respondent and the Commission have made a careful projection of market conditions for at least this far in the future, subject to allowances for predictive error. Subsequent changes in factual circumstances, if falling within the range of contingencies which were reasonably foreseen or foreseeable at the time of consent negotiations, clearly do not constitute the kind of changed conditions which are substantial and material enough to require modification of the order. To conclude otherwise would mean that a negotiated consent agreement could never operate with any finality to require compliance at a fixed future date—a result which would rob the consent procedure of much of its usefulness.

We hold that the current state of the market described by Phillips is not a circumstance which is material to the agreed to obligation contained in Paragraph IX to complete the plant expansion by 1971, and does not present the type of factual issue or changed circumstance required by the rule as a predicate for a petition to modify.