

IN THE MATTER OF

ARKLA, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3265. Consent Order, Oct. 10, 1989--Modifying Order, April 5, 1995

This order reopens a 1989 consent order that settled allegations that Arkla's acquisition of natural gas pipeline assets from TransArk Transmission Co. could reduce competition in the transportation of natural gas out of the Arkoma basin and the transmission of gas to consumers in the Russellville, Arkansas, area. This order modifies the consent order by deleting the divestiture requirement, because changed market conditions, such as regulatory changes and new entry in the market, make it no longer necessary.

ORDER MODIFYING ORDER

On December 6, 1994, NorAm Energy Corporation, successor to Arkla, Inc. ("Arkla"), filed a Petition To Reopen and Vacate or Modify Consent Order ("Petition") in Docket C-3265, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. Arkla requests that the Commission reopen the consent order issued on October 10, 1989 ("order"), and set it aside or modify the order by eliminating the requirement to divest. For the reasons discussed below, the Commission has determined to reopen the order and to set aside the divestiture requirement.

I. BACKGROUND

The order, which became final on October 23, 1989, was issued by the Commission to remedy the alleged anticompetitive effects of Arkla's 1986 acquisition of a pipeline and right of way of TransArk Transmission Company ("TransArk Assets"). The Commission's complaint alleged that the acquisition eliminated the TransArk Assets as an actual and a potential competitor in the transportation of gas to consumers in the Russellville-Morrilton-Conway, Arkansas, area and in the transportation of gas out of the Affected portion of the Arkoma

Basin ("APAB"), as defined in the order. The complaint also alleged that entry into the relevant markets "is very difficult or unlikely."

The order requires Arkla, among other things, to divest by April 23, 1991, the TransArk Assets or, in the alternative, at the sole discretion of the Commission, the Arkla Pipeline Assets, as defined in the order.¹ The purpose of divestiture under the order is to remedy the lessening of competition alleged in the complaint. *See Arkla, Inc.*, 112 FTC 509 (1989), modified (March 28, 1994).

II. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").²

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter").³ For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from

¹ The Commission in June 1991 and March 1994 granted requests by Arkla for approval of proposed divestitures of the Arkla Pipeline Assets. Neither of the proposed divestitures was approved by the Federal Energy Regulatory Commission, however, and neither was completed. *See* Petition at 8-12.

² *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

³ Reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. ARKLA'S PETITION

Arkla asserts in its Petition that reopening is required by changed conditions of fact. The changed conditions identified by Arkla are order 636 of the Federal Energy Regulatory Commission ("FERC"),⁴ substantial new entry in the relevant markets and excess capacity in the relevant markets.⁵ Arkla states that FERC order 636 has resulted

⁴ Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 3 FERC Stats. & Regs. (CCH) ¶ 30,939 (1992); order on rehearing, order No. 636-A, 57 Fed. Reg. 36,128, 3 FERC Stats. & Regs. (CCH) ¶ 30,950 (Aug. 3, 1992); order on rehearing, order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (Nov. 27, 1992) (collectively "FERC order 636").

⁵ Petition at 13-26.

in sweeping changes in the pipeline industry, by requiring pipelines to unbundle their services into separate components and to become open access pipelines and by enabling shippers to sell unneeded pipeline capacity through a capacity release program. According to Arkla, these changes have fostered new entry. Arkla also claims that entry has occurred since the order was issued, that other pipeline companies are potential entrants in the markets, and that an incumbent firm has proposed increasing its capacity. Arkla's Petition was placed on the public record for thirty days; no comments were received.

IV. ARKLA HAS SHOWN CHANGED CONDITIONS OF FACT THAT REQUIRE REOPENING

Arkla has shown changed conditions of fact that require reopening to consider whether the order should be modified as requested. FERC order 636, issued in 1992, altered the nature of competition in the natural gas industry. Among other things, FERC order 636 requires interstate pipeline companies to "unbundle" the charges for the services that they provide. Before FERC order 636, a pipeline acted as a merchant of gas, buying gas at the wellhead, gathering and storing it, transporting it through the pipeline, and charging customers a single price for this integrated service. FERC order 636 requires pipeline companies to separate out the charges for each service, and customers may deal with different suppliers for each service. The unbundling required by FERC order 636 enables pipeline companies to compete in providing one or more services without being fully integrated. According to Arkla, FERC order 636 has converted pipelines "from merchants of gas into transporters of gas offering transportation-only service for hire for third parties." Petition at 19. FERC order 636 enables firms to engage in pipeline transportation without incurring the costs of building or acquiring gathering and storage facilities, thus easing conditions of entry. Petition at 35-36. The Commission previously reopened and modified the order to set aside the requirement that Arkla divest gathering facilities associated with pipeline assets, because a pipeline company no longer needs to own gathering facilities to compete.⁶

FERC order 636 requires virtually all pipelines to be open access carriers, that is, to provide transportation service to and from any

⁶ Arkla, Inc., Docket C-3265, order (March 28, 1994).

point on the pipeline system, and eases the regulatory requirements to build new pipelines. FERC order 636 also altered competition in the pipeline transportation of natural gas by enabling customers that are contractually obligated to take a certain amount of gas on a daily basis (firm commitment customers) to resell unneeded capacity under so-called capacity release programs. In addition, under the flexible receipt and delivery points required by FERC order 636, a buyer of firm commitment capacity need not deliver gas to or receive gas from the same points as its seller but may use any receipt and delivery points along the pipeline system. As a result, firm commitment customers can compete with pipeline companies in offering pipeline transportation services to some customers. According to Arkla, capacity release by shippers is rapidly increasing. Petition at 32.

Significant entry and capacity expansion have occurred in the Affected Area of the Arkoma Basin ("APAB"), as defined in the order.⁷ Ozark Gas Transmission Systems in 1991 converted its pipeline to open access.⁸ Ozark also obtained FERC approval for a capacity expansion (although the project has not been completed). Petition at 15. NOARK Pipeline System in 1992 completed construction of and began operating a pipeline in the APAB.⁹ The Ozark and NOARK pipelines have added capacity to the APAB that is six times the capacity of TransArk; if Ozark completes its planned expansion, the combined capacity will be ten times the capacity of TransArk.

The entry and expansion that have occurred since the order was issued have substantially reduced concentration in the APAB. In 1989, Arkla was the only open access pipeline in the market, and TransArk was a potential competitor.¹⁰ The entry and expansion in the market reduce concentration, as does the availability of capacity

⁷ Cf. Louisiana Pacific Corp., Docket C-2956, letter to John C. Hart, June 5, 1986, at 8 (unpublished) (denying reopening and modification when respondent failed to show changes in structural conditions, such as ease of entry, that might obviate need for divestiture requirement).

⁸ The Ozark pipeline is within 10 miles of the TransArk line through the APAB. Petition at 15.

⁹ NOARK began construction of its pipeline in October 1991 and opened it for service in September 1992. The NOARK pipeline crosses the TransArk pipeline and is within 18 miles of it through the APAB.

¹⁰ Independent entry by TransArk would have reduced the Herfindahl-Hirschmann Index ("HHI") by approximately 1404 points from 10,000 to 8596. The HHI is used by the enforcement agencies "[a]s an aid to the interpretation of market data." See 1992 Horizontal Merger Guidelines ¶ 1.5

under capacity release programs.¹¹ Although the volume of gas shipped by released capacity still is relatively small (8% nationally in 1994),¹² the proportion of capacity that is allocated to firm transportation contracts and, therefore, subject to release is increasing, which increases the potential for capacity release in the future. Petition at 32.

In addition to entry and expansion in the APAB, there has been substantial entry in other parts of the Arkoma Basin. Transok in 1989 began operating a pipeline in the Arkoma Basin and in 1990 built a second pipeline serving the Arkoma Basin. Natural Gas Pipeline of America ("NGPL") in 1991 completed a pipeline in the Arkoma Basin. The NGPL pipeline was completed in about six months after construction began. Petition at 14. Although the Transok and NGPL pipelines are not in the markets alleged in the complaint, their experience shows that entry conditions have eased. In addition, to the extent that Transok and NGPL may be potential entrants in the APAB, their presence in areas adjacent to the APAB helps alleviate the competitive concerns alleged in the complaint.

Entry and expansion coupled with flat production in the area have resulted in excess pipeline capacity. Petition at 25 & 39. In 1992, according to Arkla, most major pipelines in the Arkoma Basin were operating at less than 50% of capacity. Petition at 25. The existence of excess capacity may decrease the possibility of successful collusion, because participants will have incentives to undercut the collusive price. According to Arkla, excess pipeline capacity has increased competition in the Arkoma Basin. The Federal Energy Regulatory Commission, in setting rates for Ozark, said that "[t]he record reflects substantial excess capacity and thus considerable competition in the Arkoma Basin." Petition at 26, citing Ozark Gas Transmission System, 68 FERC ¶ 61,032, at 61,108 (1994). Under

¹¹ Pipeline entry and expansion in the APAB reduces the HHI to 5140. Assigning capacity available for capacity release to the shippers that hold the capacity under contract reduces the HHI to 3346. See Petition at 33 n.22; letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 3.

¹² According to Arkla, "[a]s much as 90% of Ozark's total capacity was released through capacity release," driving pipeline rates down. Petition at 33. Rates for firm pipeline capacity consist of two parts: a demand or reservation charge, which must be paid whether or not the capacity is used; and a usage charge. According to Arkla, a firm shipper has incentives to sell its unused capacity rights to defray the demand or reservation charge. Petition at 22. According to the Energy Information Administration of the Department of Energy, although firm commitment customers theoretically could make a profit on released capacity, "[i]n practice so far . . . released capacity has sold at a discount." Energy Information Administration, *Natural Gas 1994: Issues and Trends* 49 (July 1994), Petition Exhibit Q.

conditions of excess capacity, Arkla is selling its services in the Arkoma Basin "at a considerable discount under the rates authorized by the FERC." Petition at 40.

Pipeline entry and expansion also have affected the Russellville-Morrilton-Conway ("RMC") corridor. Both the Ozark and NOARK pipelines are near the TransArk pipeline in the RMC corridor and could provide cost-effective hook ups for customers in the corridor. *See* Petition at 38 n.27. Therefore, Arkla has shown changed conditions that require reopening to consider whether the order should be modified as requested.

V. THE ORDER SHOULD BE MODIFIED

Arkla has shown significant changes in circumstances such that there is no further need for the order's requirement to divest. The changes in competitive conditions in the relevant markets resulting from FERC order 636 and the entry and expansion that have occurred since the order was issued eliminate the need for divestiture that was required by the order.

Arkla has not shown that the prior approval requirement of the order should be set aside. Paragraph V of the order, in relevant part, requires Arkla, for ten years, to obtain the approval of the Commission before acquiring certain pipeline interests in the relevant markets. Arkla claims that the prior approval requirement rested on the presumption that any pipeline acquisition by Arkla "would impermissibly augment [Arkla's] perceived ability to exercise market power in the relevant markets."¹³ Arkla fails to show that there is no longer a continuing need for prior approval of acquisitions by Arkla in the relevant markets.

The relevant markets identified in the complaint still are highly concentrated, and Arkla still is a substantial competitor in the relevant markets. The conclusion that the requirement to divest the TransArk assets should be set aside in light of changed conditions does not imply that any subsequent acquisition by Arkla would not raise competitive concerns. For example, an acquisition by Arkla of either NOARK or Ozark, the two pipelines that compete directly with Arkla in both the APAB and the RMC corridor, would eliminate a significant, direct competitor, increase concentration substantially and likely raise antitrust concerns that would warrant further

¹³ Letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 4.

examination. Under the circumstances, the prior approval clause should not be set aside. See *Damon Corporation*, Docket C-2916 (March 29, 1983) (denying request to set aside prior approval clause when respondent had not shown that acquisitions "would no longer pose any antitrust concern");¹⁴ see also *Canada Cement Lafarge, Ltd.*, 111 FTC 590 (1989) (prior approval clause not set aside when respondent failed to show that no acquisition that it might make would raise competitive concerns).

VI. CONCLUSION

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the order in Docket C-3265 be, and it hereby is, modified to set aside paragraphs II, III and IV, as of the effective date of this order.

Commissioner Starek concurring only in the result.

¹⁴ Letter to Joel Hoffman, reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207, at 22,585.

IN THE MATTER OF

NINZU, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3566. Complaint, April 7, 1995--Decision, April 7, 1995*

This consent order requires, among other things, the Maryland-based marketers to possess and rely upon competent and reliable scientific substantiating evidence to support any performance, benefits, efficacy, or safety claims they make for any weight loss or weight control product or program or any acupressure device they market in the future.

Appearances

For the Commission: *Richard L. Cleland.*

For the respondents: *Michael B. Metzger*, President, Baltimore, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc., corporations; and Michael Metzger, individually and as an officer and director of said corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Ninzu, Inc. is a Maryland corporation doing business under its own name and under the names Davish Enterprises and Davish Health Products. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Davish Merchandising, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.