

Order

IN THE MATTER OF

ENTERGY CORPORATION

ORDER REOPENING AND SETTING ASIDE ORDER

On March 3, 2005, Entergy Corporation (“Entergy”) and Entergy-Koch, LP (“EKLP”), respondents named in the consent order issued by the Commission on January 31, 2001, in Docket No. C-3998 (“Order”), filed their Petition of Entergy and EKLP to Reopen and Set Aside Order in this matter (“Petition”). Entergy and EKLP ask the Commission to reopen and modify the Order in its entirety 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 and Procedure, 16 C.F.R. § 2.51, thereby relieving them of Entergy’s and EKLP’s reporting and posting obligations, which comprise the only ongoing performance obligations under the Order and which otherwise will continue until January 31, 2007. Respondents contend, inter alia, that significant changed circumstances eliminate the continuing need for the Order’s requirements. Petition at 2, 8-9. The Petition was placed on the public record for thirty days pursuant to Section 2.51(c) of the Commission’s Rules. No comments were received. For the reasons stated below, the Commission has determined to grant the Petition.

The Complaint issued with the Order in Docket No. C-3998 states that, on May 26, 2000, Entergy and Koch Industries, Inc. (“Koch”) entered into an agreement to form EKLP, a limited partnership owned equally by Entergy and Koch, and that each contributed certain assets to EKLP. (Complaint ¶ 12). Among other things, EKLP acquired Gulf South Pipeline Company LP (“Gulf South”), a major supplier of natural gas pipeline transportation in Louisiana and Mississippi, from Koch (Complaint ¶¶ 6, 12, 19). Entergy, in turn, acquired a fifty percent interest in Gulf South through EKLP, including the right to fifty percent of EKLP’s profits. (Complaint ¶ 10). At the same time, Entergy also owns regulated utilities that supply electricity to

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consumers in Louisiana and western Mississippi, and that distribute natural gas to consumers in New Orleans and Baton Rouge, Louisiana. (Complaint ¶¶ 2, 13-18). Further, Gulf South is capable of supplying all of Entergy's regulated utilities in those states with natural gas transportation. (Complaint ¶ 19).

The Complaint alleges that, as a result of Entergy's fifty percent ownership of Gulf South, it would "have the incentive and ability . . . to pay EKLP prices for natural gas transportation [for its regulated utilities that are subject to state regulator's rules governing the recovery of the cost for delivery of natural gas] above prevailing market prices and to purchase a level of service above what is necessary for effective operation of Entergy's facilities." (Complaint ¶ 21). Moreover, the Complaint alleges, it would be more difficult for state and local regulators in Louisiana and western Mississippi to detect whether Entergy had improperly incurred inflated costs of natural gas transportation in its purchase from its affiliates, and to challenge such costs as having been imprudently incurred, for several reasons, including that "the process by which Entergy purchases gas transportation is not transparent." (Complaint ¶ 22). Thus, the prices of retail electricity in Louisiana and western Mississippi, and for natural gas in New Orleans and Baton Rouge, would likely increase "as a result of Entergy passing on inflated costs for natural gas transportation to consumers and the difficulties that regulators will have in reviewing and challenging Entergy's purchases of natural gas transportation." (Complaint ¶¶ 29, 35). The Order issued to prevent Entergy from paying such inflated prices by establishing procedures that Entergy and EKLP were required to implement and follow to assure the transparency of Entergy's natural gas purchases.

The Petition states that, on December 29, 2004, Entergy sold its interest in Gulf South to TGT Pipeline, LLC ("TGT"), a subsidiary of Loews Corporation and an entity unrelated to either Entergy or EKLP. Petition at 2. Since that time Entergy no longer has any ownership or financial interest in or control over Gulf South, and, therefore, no longer has any incentive to pay

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inflated prices for natural gas transportation. *Id.* Absent this incentive, according to the Petition, the Order's purpose to establish a transparent process for purchasing natural gas transportation no longer applies and its procedures to assure continued transparency are no longer necessary. *Id.* Moreover, according to the Petition, with the sale of Gulf South, EKLK no longer can comply with the specific posting requirements the Order imposes. *Id.* at 8-9. There is, therefore, no longer any factual basis for the concerns expressed in the Complaint and addressed by the Order. *Id.* The elimination of Entergy's ownership in Gulf South should therefore constitute a substantial change in conditions that justifies reopening and setting aside the Order. *Id.* at 9.

The Order may be reopened on the grounds set forth in Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), 16 C.F.R. § 2.51(b). Section 5(b) provides that the Commission shall reopen an order to consider whether it should be set aside if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.¹ 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.² Where changed circumstances do not require reopening, Section

¹ See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, announced August 15, 2001, ("Amendment").

² 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"). 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.").

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5(b) further provides that the Commission may reopen and set aside an order when it determines that the public interest so requires. Entergy and EKLP's Petition also addresses the public interest standard, which requires that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. In this instance, however, we do not need to assess the sufficiency of Entergy's and EKLP's public interest showing because the Commission has determined that Entergy and EKLP have made the requisite satisfactory showing that changed conditions of fact require the Order to be reopened and set aside.

Upon consideration of Entergy's and EKLP's Petition and other information, the Commission has determined that the factual premise underlying the concerns that led to entry of the Order, with its detailed reporting and posting obligations, arose specifically from the acquisition of Entergy's ownership interest in Gulf South through its joint venture, EKLP. The sale of Gulf South constitutes a substantial change that eliminates the continuing need for the Order's requirements. Further, the sale of Gulf South substantially changes EKLP's ability to comply with its ongoing obligations regarding Gulf South's postings.

Entergy and EKLP, having initiated and complied to date with all the procedures, postings, and record keeping set forth in the Order, now seek relief from continuing to perform those procedures, which are no longer necessary and with which EKLP can no longer comply. For these reasons, the Commission finds that changed conditions of fact warrant reopening and setting aside the Order.

Accordingly,

IT IS ORDERED THAT this matter be, and it hereby is, reopened; and

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IT IS FURTHER ORDERED THAT the Commission's Order issued on January 31, 2001, hereby is set aside, as of the date of issuance of this Order.

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IN THE MATTER OF

NESTLÉ HOLDINGS, INC.

ORDER REOPENING AND MODIFYING ORDER

On March 23, 2005, Dreyer's Grand Ice Cream Holdings, Inc., and Dreyer's Grand Ice Cream, Inc. (collectively, "Respondents") filed their "Request to Reopen Proceedings and Modify Decision and Order" ("Request"). Respondents seek to modify certain terms of the divestiture agreements with CoolBrands International Inc. ("CoolBrands") at the request of CoolBrands. Specifically, Respondents seek to modify the Order in Docket No. C-4082 ("Order") to allow Respondents to continue to provide Administrative Services to CoolBrands for an additional one year beyond the twenty-one months provided in Paragraph II.H. of the Order.¹ Respondents also seek prior Commission approval to modify the divestiture agreements to correspond to the requested modifications. Commission approval is required because Respondents were required to divest pursuant to a divestiture agreement that received the prior approval of the Commission. For the reasons stated below, the Commission has determined to grant the Request and has reopened and modified the Order and granted approval to the modifications to the divestiture agreements.²

¹ Respondents had previously sought and received an extension of this provision from one year to twenty-one months.

² In connection with the Request, Respondents requested that the Commission eliminate the public comment period on the Request. Respondents provided no compelling reason for the Commission to vary from its normal procedures. A press release was issued shortly after the Request was filed. The Commission has determined to deny the request to eliminate the comment period.