

Interlocutory Orders, Etc.

IN THE MATTER OF

**DUKE ENERGY CORPORATION,
PHILLIPS PETROLEUM COMPANY,
AND
DUKE ENERGY FIELD SERVICES L.L.C.**

Docket No. C-3932.

Order, September 26, 2007

Order approving the petition of Duke Energy Company, Spectra Energy Corp. and DCP Midstream, LLC to reopen the Decision and Order in this matter and vacate the Order as it applies to Duke Energy. Petitioners present evidence that Duke Energy has exited the relevant markets, and argue that this constitutes a changed condition of fact that justifies the release of Duke Energy from the Order.

ORDER REOPENING AND MODIFYING ORDER

On May 31, 2007, Duke Energy Company (“Duke Energy”), Spectra Energy Corp. (“Spectra Energy”),¹ and DCP Midstream, LLC² (collectively, “Petitioners”) submitted a petition requesting that the Commission reopen and set aside the order in this matter (“Order”) insofar as the Order applies to respondent Duke Energy.³ Petitioners’ stated reason for setting aside the Order as to Duke Energy is that Duke Energy has exited the relevant markets.

The Petition was filed 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. Petitioners assert that changed circumstances eliminate the

¹ Spectra Energy has become the successor to Duke Energy in this matter through its acquisition of Duke Energy’s assets in the relevant markets. *See infra*.

² DCP Midstream, LLC, a respondent in this matter, was known as “Duke Energy Field Services L.L.C.” at the time the Order was issued.

³ *Petition of Duke Energy Company, Spectra Energy Corp., and DCP Midstream, LLC to Reopen and Modify Decision and Order* (“Petition”) at 1.

Interlocutory Orders, Etc.

continuing need for the Order as it relates to Duke Energy.⁴ Petitioners also contend that the requested modification is in the public interest.⁵

The Petition was placed on the Public Record on June 5, 2007. The thirty-day comment period closed on July 5, 2007. No public comments were submitted. The Commission has reviewed the Petition and has determined to reopen and set aside the Order as to Duke Energy.

The Order that Petitioners seek to modify resulted from (a) the merger by Duke Energy and Phillips Petroleum Company of their natural gas gathering and processing businesses into Duke Energy Field Services L.L.C., and (b) the acquisition by Duke Energy of certain gas gathering and processing assets located in central Oklahoma and owned by Conoco Inc. These transactions raised competitive concerns regarding markets for natural gas gathering and processing in certain areas of Kansas, Oklahoma, and Texas.⁶ The Order required Duke Energy and the other respondents to divest certain gas gathering pipelines in those areas.⁷

The Order's remaining operative provisions require that Duke Energy and the other respondents (1) give the Commission prior notice of their mergers and acquisitions in the relevant markets,⁸ (2) file annual reports of their compliance with the Order,⁹ (3) notify the

⁴ Petition at 6-7.

⁵ *Id.* at 7-9.

⁶ Complaint, Docket No. C-3932, at ¶¶ 12, 13, 20, 21, 28, 29, 36, 37, 44, 45, 52, 53, 61 and 62.

⁷ Order, at ¶ II.

⁸ *Id.* at ¶¶ IV and V.

⁹ *Id.* at ¶ VI.B

Interlocutory Orders, Etc.

Commission prior to any corporate changes that may affect compliance obligations arising out of the Order,¹⁰ and (4) permit the Commission access, upon reasonable request, to their records and employees.¹¹ The Order expires on May 5, 2010.¹²

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” require such modification.¹³ 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.¹⁴ The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest

¹⁰ *Id.* at ¶ VII.

¹¹ *Id.* at ¶ VIII.

¹² *Id.* at ¶ IX.

¹³ Section 5(b) provides, in part:

(T)he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

¹⁴ See S. Rep. No. 96-500, 96th Cong., 2nd 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); 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.”).

Interlocutory Orders, Etc.

requires such action.¹⁵ Thus, Section 2.51 of the Commission's Rules of Practice and Procedure, as amended, invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* "satisfactory showing" of a legitimate public interest reason or other reasons justifying the requested modification.¹⁶ In this instance, however, we do not need to assess the sufficiency of Petitioners' public interest showing because Petitioners have made the requisite satisfactory showing that changed conditions of fact require the Order to be reopened and set aside as to Duke Energy.

The record shows that in January 2007, Duke Energy divested most of its natural gas business to Spectra Energy.¹⁷ As a result of that transaction, Duke Energy no longer has any gas gathering or processing assets in the relevant markets.¹⁸ Spectra Energy, through its counsel, has acknowledged and agreed that it would continue to comply with the obligations of the Order as Duke Energy's successor to the requirements of the Order.¹⁹ Further, Duke Energy has stated that it has no present intention to re-enter the relevant markets.²⁰

The exit of Duke Energy from the relevant markets eliminates the continuing need for the Order's remaining requirements to apply

¹⁵ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d at 1376-77.

¹⁶ See Requests to Reopen, Supplementary Information, 65 Fed. Reg. 50,636, 50,637 (Aug. 21, 2001) *amending* 16 C.F.R. § 2.51(b).

¹⁷ See Petition at Appendix 3 (Spectra Energy News Release).

¹⁸ Declaration of Marc Manly at ¶ 5 (Appendix 4 to Petition) ("Manly Declaration"); Declaration of Brent Backes at ¶ 5 (Appendix 5 to Petition).

¹⁹ See *also* Petition at 2.

²⁰ Manly Declaration, at ¶ 6.

Interlocutory Orders, Etc.

to Duke Energy, and, thus, is a changed circumstance sufficient to support the setting aside of the Order as to Duke Energy.²¹ Setting aside Paragraph IV and V of the Order (the prior notification requirement) as to Duke Energy is also consistent with the *Statement of the Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions*, issued June 21, 1995 (“Prior Approval Policy Statement”).²² There is no evidence that a prior notification provision is needed as to Duke Energy as Duke Energy does not own any gas gathering and processing assets in the relevant markets identified in the Order.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened; and that the Commission’s Order issued on May 5, 2000, be, and it hereby is, set aside as to respondent Duke Energy as of the effective date of this Order, but will continue in effect with respect to Duke Energy’s successor Spectra Energy and with respect to the other respondents.

By the Commission, Commissioner Rosch recused.

²¹ *Koninklijke Ahold, N.V.*, Dkt. No. C-4027, Order Reopening and Modifying Order (July 10, 2007) (“Bruno’s no longer owns or operates supermarkets in Baldwin and Washington Counties, Georgia, the relevant areas that are the subject of the Order’s remaining operative provisions.”); *Koninklijke Ahold, N.V.*, Docket No. C-4027, Order Reopening and Modifying Order (July 21, 2006) (“Ahold no longer owns or operates supermarkets in Baldwin and Washington Counties, Georgia, the relevant areas that are subject of the Order’s remaining operative provisions”). See also *Entergy Corporation, et al.*, Docket No. C-3998, Order Reopening and Setting Aside Order (July 1, 2005) (“the factual premise underlying the concerns that led to entry of the Order, . . . arose specifically from the acquisition of Entergy’s ownership interest in Gulf South. . . . The sale of Gulf South constitutes a substantial change that eliminates the continuing need for the Order’s requirements”); *Union Carbide Corporation*, 108 F.T.C. 184 (1986) (order modified because respondent had clearly exited a business covered by the order and had demonstrated it had no intention of re-entering the business).

²² 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

Interlocutory Orders, Etc.

IN THE MATTER OF

**SERVICE CORPORATION INTERNATIONAL
AND
ALDERWOODS GROUP, INC.**

Docket No. C-4174. Order, September 26, 2007

Letter approving the petitions of SCI to divest certain assets to O'Hair & Riggs Funeral Services, Inc., Ivers & Alcorn Atwater Funeral Services, Inc., and Ivers & Alcorn Merced Funeral Services, Inc.

COMMISSION LETTER APPROVING DIVESTITURE

Dear Mr. Schwartz:

This is in reference to the Petition for Approval of Proposed Divestitures to O'Hair & Riggs Funeral Services, Inc. ("ORFS"), filed by Service Corporation International ("SCI") and received on June 8, 2007 ("Petition"), and the Petition for Approval of Proposed Divestitures to Ivers & Alcorn Atwater Funeral Services, Inc. ("I&AAFS") and Ivers & Alcorn Merced Funeral Services, Inc. ("I&AMFS"), filed by SCI and received on June 18, 2007. Pursuant to the Decision and Order in Docket No. C-4174, SCI requests prior Commission approval of its proposal to divest certain assets to ORFS, I&AAFS, and I&AMFS.

After consideration of SCI's Petitions and other available information, the Commission has determined to approve the proposed divestitures as set forth in both of these Petitions. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI, ORFS, I&AAFS, and I&AMFS in connection with SCI's Petitions and has assumed them to be accurate and complete.

By direction of the Commission.