CONOCO, INC. AND PHILLIPS PETROLEUM COMPANY

Docket No. C-4058. *Order, November 14, 2011*

Order approving respondent's request to modify lease and asset purchase agreement incorporated into the consent order.

ORDER REOPENING AND MODIFYING ORDER

ConocoPhillips Company filed its "Petition of ConocoPhillips to Reopen and Modify the Decision and Order and for Approval of Amended Agreement" in this matter on June 20, 2011. ConocoPhillips is seeking the modification to allow it to change its license agreement with Holly Corp. (the acquirer of the divested Woods Cross refinery), which will extend the term of the license agreement. ConocoPhillips bases its request to reopen and modify the Order on both changed facts and public interest. For the reasons stated below, the Commission has determined to grant the Petition to reopen and modify the Order.[1]

I. BACKGROUND

Conoco Inc.'s 2002 merger with Phillips Petroleum Company created ConocoPhillips. The Commission reviewed the proposed merger and concluded that it would adversely affect competition in multiple product and geographic markets. The parties agreed to divestitures and other relief to remedy those anticompetitive effects. Of concern here is the remedy in the market for the bulk supply of light petroleum products in northern Utah.[2]

To remedy the likely anticompetitive effects in that market, the Commission ordered ConocoPhillips to divest Phillips' refinery in Woods Cross, Utah, by August 2, 2003. As defined by the order, ConocoPhillips was required to divest the refinery,

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[1] The Commission has also determined to approve the amended agreement and does so in a separate letter to ConocoPhillips from Donald Clark, Secretary, Federal Trade Commission.

[2] *See* Complaint, ¶¶ 20 *et seq*., available at http://www.ftc.gov/os/2002/08/conocophillipscmp.pdf.

an interest in refinery tanks, all crude pipelines connected to the refinery, a refined products pipeline, interests in nearby terminals, loading facilities, and all intellectual property, licenses, plans, agreements and joint ventures relating to the operation of the refinery. The Commission found no anticompetitive effects at the retail gasoline sales level, but to assure the viability of the refinery in the bulk supply market the Commission ordered ConocoPhillips to divest the Phillips 66 retail network that was supplied from the refinery. That included the Phillips-owned gasoline stations in Utah, Wyoming, Idaho, and Montana and all Phillips 66 supply agreements with the independent marketers that supplied the other Phillips 66 brand retailers in those four states.

So that the acquirer could continue to use the Phillips 66 brand name, the order required ConocoPhillips to license the acquirer, on an exclusive basis for ten years, the right to use in those four states all brand names owned by or licensed to Phillips and used in those states as of August 2, 2002, in connection with the sale of gasoline. This would enable the acquirer to continue to supply the stations it acquired in the divestiture as well as the independent marketers. To assure access to the brand beyond the ten years (and beyond the term of the Commission's order), the Commission also required that ConocoPhillips enter into discussion with the Commission-approved acquirer regarding the renewal of the brand licensing agreement at the end of the ninth year.

ConocoPhillips entered into an agreement to divest the required assets to Holly and to license the brand to Holly on an exclusive basis for the ten-year period required in the Order. ConocoPhillips went beyond the provisions of the order and agreed to discuss extension of the agreement at any time during the ten-year term of the license rather than only after the ninth year. Furthermore, ConocoPhillips agreed to use best efforts to negotiate the terms of a renewal for at least a five-year term.[3]

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[3] *See* Exhibit I, Trademark License Agreement, ¶ 7.02. Paragraph II.G. requires that in the event that the acquirer of the Woods Cross Assets ceases to use the Phillips brand in Utah, Idaho, Wyoming and Montana, ConocoPhillips retains the right to use that Phillips brand in Utah, Idaho, Wyoming, and Montana beginning two years after the acquirer ceases to use that Phillips brand in Utah, Idaho, Wyoming, and Montana. Under the Trademark License

ConocoPhillips petitioned the Commission for approval of its proposed divestiture of the Woods Cross assets to Holly in January 2003. The Commission reviewed the proposed divestiture and approved it in May 2003.[4] Holly acquired the assets on June 1, 2003. ConocoPhillips granted the ten-year exclusive license to Holly,[5] and the license agreement complied with all other provisions of the Commission's order.[6] The license agreement expires on June 1, 2013.[7]

Since that time, according to Holly, Holly has been successfully operating the refinery.[8] It increased capacity at the refinery in 2008 and is in the process of constructing a pipeline from Salt Lake City to Las Vegas, which will improve its ability to supply Las Vegas from the refinery. Although Holly sold the 25 company-owned stations to independent dealers, it has continued to serve the majority of them from the Woods Cross refinery.[9] It has also continued to serve the marketers whose contracts it acquired in the divestiture. It has devoted more resources to developing and expanding its presence in Utah and Idaho than it has in Wyoming and Montana, but it has continued to serve its customers in Wyoming and Montana. ConocoPhillips views Holly as a successful supplier.[10]

Beginning last year, several of the Phillips 66 retailers that Holly supplies began expressing concern to Holly about

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Agreement, Phillips retains ownership of the trademarks.

[4] *See* Petition at http://www.ftc.gov/os/2003/01/conocopetition.pdf (hereinafter "Petition"); *see* Press Release, May 23, 2003, at http://www.ftc.gov/opa/2003/05/fyi0334.shtm.

[5] *See* Exhibit I, Trademark License Agreement, ¶¶ 2.01 and 7.01 and Exhibit L, Branded Ancillary Products Purchase Agreement, ¶ 6.

[6] *See* Exhibit I, Trademark License Agreement Opening Paragraph.

[7] The Order terminates February 13, 2013.

[8] *See* Declaration of Gregory A. White, Vice President, Holly Refining & Marketing Company LLC (hereinafter "Holly Declaration"), ¶ 4.

[9] Holly Declaration, ¶ 3.

[10] Petition at 4; Holly Declaration, ¶ 5.

post-2013 supply. Holly, thus, sought to negotiate an extension to its license agreement with ConocoPhillips as early as possible. Consistent with the order and the license agreement, ConocoPhillips entered into negotiations with Holly in 2009 to extend the terms of the license agreement. These negotiations led to a signed letter of intent in July 2010 and an executed license extension in February 2011.

The new agreement will extend the license to Holly for an additional seven years in the four states beginning when the current license expires in June 2013, on a non-exclusive basis, with a mutual option to extend for an additional five years. In return for the extension now in the four-state area, Holly agreed to modify the divestiture agreement to give up exclusivity in Wyoming and Montana as soon as the Commission approves the modification, rather than retaining it until June 2013 as required by the Order. ConocoPhillips agreed not to attempt to rebrand any of the retailers currently served by Holly in those two states until June 2013, but ConocoPhillips will obtain the right to brand any other retailers in those two states as soon as the agreement is effective. Holly will retain exclusivity in Utah and Idaho until June 2013 as required by the Order. Because the elimination of exclusivity in Wyoming and Montana prior to June 2013 would be inconsistent with the Commission's Order, ConocoPhillips has requested that the Commission reopen and modify the order to allow the modification.

II. CONOCOPHILLIPS' PETITION

Paragraph II.C.1.a. of the Order requires ConocoPhillips to grant a ten-year exclusive license for use in the four states, and ConocoPhillips is now in compliance with that obligation. A modification to the license agreement that eliminates exclusivity in Wyoming and Montana prior to the end of the ten-year period in June 2013 would be inconsistent with the Commission's Order.

ConocoPhillips, thus, proposes adding the following proviso to Paragraph II.C.2. of the Commission's order:

> *Provided, however,* that Respondents and the acquirer may agree, prior to the end of the ninth year and subject to the

Commission's prior approval, to modify the terms of the agreement entered pursuant to Paragraph II.C.I. in order to provide a nonexclusive license in Montana and Wyoming for the remainder of the ten-year period, notwithstanding the provisions of Paragraphs II.C.I. and II.G, as long as the modification is consistent with the purpose of the Order.

With the above modification to the Commission's Order, ConocoPhillips asserts that the proposed amendment to the license will not violate the Order.

ConocoPhillips maintains that the proposed amendment and modification will be pro-competitive, will not adversely affect the refinery's viability, and will thus serve the public interest. Holly will continue to supply exclusively in Idaho and Utah through June 2013. Although Holly will give up exclusivity immediately in Wyoming and Montana, ConocoPhillips will agree not to compete for the stations Holly currently supplies in those two states through the initial contract period. Thus, Holly will continue to supply all the stations it currently supplies, maintaining the same level of service as it currently has with no impact on its viability. On the other hand, ConocoPhillips could begin competing in Wyoming and Montana immediately, thereby injecting additional competition into those states.

In addition, ConocoPhillips asserts that changed facts and circumstances require approval of the modification and amended agreement and that approval will further the purposes of the order. After operating in the market for over eight years, Holly has determined that exclusivity in Wyoming and Montana is not necessary to maintain viable operations at the refinery. Extending the license agreement for up to 12 additional years now, however, will enable Holly to give its retailers and marketers the assurances they are seeking and further enhance the refinery's viability. Enhancing the refinery's viability will further the objectives of the Commission's order.

ConocoPhillips filed its Petition on June 20, 2011. It was available for public comment for thirty days until July 27, 2011. No public comments were filed.

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(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.[11] 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.[12] The Commission's Rule 2.51(b) requires such "satisfactory showing" to include affidavits setting forth admissible facts.[13]

Second, Section 5(b) provides that the Commission may also reopen and 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.[14] In the case of "public interest" requests, Rule 2.51(b) requires an initial "satisfactory showing" of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

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[11] *See also Supplementary Information*, Amendment to the Commission's Rules of Practice § 2.51(b), 16 C.F.R. 2.51(b) (August 15, 2001).

[12] 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.").

[13] 16 C.F.R. § 2.51(b).

[14] Hart Letter at 5; 16 C.F.R. § 2.51.

A "satisfactory showing" requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a "satisfactory showing" if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.[15] This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. Just as for petitions based on changed conditions, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[16] and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of the Commission's orders.[17] All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.[18]

IV. THE ORDER WILL BE REOPENED AND MODIFIED

The Commission has determined to reopen and modify the Order as requested by ConocoPhillips. Reopening the Order to eliminate the exclusive licensing requirement in the manner that ConocoPhillips proposes will relieve ConocoPhillips of a specific

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[15] 16 C.F.R. § 2.51.

[16] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[17] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[18] 16 C.F.R. § 2.51(b).

obligation in the Commission's Order; the Commission must thus determine whether reopening the Order is warranted. In this case, it is clear that elimination of the requirement in the manner proposed by ConocoPhillips will not affect the viability of Holly's refinery operations and thus the effectiveness of the Commission's remedy, but it will instead have two immediate procompetitive consequences.

First, it will inject immediate competition into Wyoming and Montana without jeopardizing Holly's operations. And, second, and perhaps more important, in exchange for the immediate elimination of exclusivity in these two states, ConocoPhillips has agreed to provide Holly additional rights by extending the brand licensing agreement in the entire four-state area for up to 12 more years. This will enable Holly to assure its customers now of post-2013 supply, further enhancing Holly's viability and further benefitting competition. The resulting benefits to competition justify reopening the Order and modifying it to eliminate that obligation now.

The Order was premised on the Complaint's allegation that the merger of Conoco and Phillips would be unlawful in the bulk supply of light petroleum products in Northern Utah.[19] As the Order explicitly states:

> The purpose of this Paragraph is to ensure that the Phillips Woods Cross Assets remain in the market and to remedy the lessening of competition in the refining, terminaling and bulk supply of Motor Fuels and other petroleum products resulting from the proposed Merger as alleged in the Commission's Complaint. A further purpose of this Paragraph is to ensure that the acquirer of the Phillips Woods Cross Assets has the same capabilities and incentives as did Phillips prior to the Merger to expand and develop alternative sources of Motor Fuels and other light petroleum products for the Northern Utah market as alleged in the Commission's Complaint and is able to take control of the assets and, with minimal additional

[19] The Complaint alleges: "After the Merger, the combined firm could effectively coordinate to reduce supply, slow growth of supply, and raise prices in the market for LPP bulk supply in Northern Utah." Complaint, ¶ 30.

investment, compete as aggressively as did Phillips prior to the Merger.[20]

To remedy the anticompetitive effects alleged in the Complaint, the Commission ordered divestiture of the refinery supplying the relevant geographic market. But to assure the viability of the refinery and to enable the acquirer to "compete as aggressively as" Phillips had prior to the merger, the Commission also ordered divestiture of the marketing assets supplied from the refinery and a ten-year exclusive brand license covering the four-state area supplied from the refinery.

Eight years later, it is clear that the Order has achieved its remedial objectives in this regard. Divestiture of the refinery to Holly was intended to replace the competition lost in the bulk supply of light petroleum products in Northern Utah as a result of the merger of Conoco and Phillips, and it did so. Divestiture of the marketing assets and the four-state ten-year exclusive license was intended to enhance the viability of the refinery to assure effective relief in that market, and it did so as well. The inclusion of the marketing assets and the exclusive license in all four states has served its purpose. Holly has effectively operated the refinery for eight years and has now determined that continued exclusivity in Montana and Wyoming is not necessary for viable operations of the refinery. The proposed agreement, although eliminating exclusivity in Montana and Wyoming immediately, will preserve Holly's footprint there by prohibiting ConocoPhillips from competing for the stations that Holly currently serves in those two states through June 2013. On the other hand, by eliminating Holly's exclusivity in Montana and Wyoming now, the modification will enable ConocoPhillips to compete for additional marketers in those two states thereby injecting additional competition immediately without jeopardizing the effectiveness of the remedy.

In addition, ConocoPhillips has agreed to extend the license agreement throughout the entire four-state area for up to 12 years if Holly agrees to the elimination of exclusivity in Montana and

[20] Order, ¶ II.M.

Wyoming immediately and if the Commission reopens and modifies the Order to allow the change. Thus, by reopening and modifying the Order as ConocoPhillips requests, the Commission will facilitate the valuable benefit that Holly will obtain by being able to assure the retailers and marketers that it presently serves in the four-state area that it will be able to supply them for up to another 12 years. The assurance now that Holly will remain a viable supplier in this market will enhance its competitiveness and thus assure the effectiveness of the Commission's remedy.[21]

Accordingly, the Petition satisfies the standard for reopening and modifying the Order under the "public interest" provision of Rule 2.51(b) of the FTC Rules of Practice and Section 5 of the FTC Act. ConocoPhillips has established that reopening the Order is in the public interest in light of the pro-competitive benefits that will be obtained. ConocoPhillips has also shown that the Order should be modified as it proposes by demonstrating

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[21] Reopening and modifying this Order is consistent with the Commission's action in Solvay S.A., Docket No. C-4046, Order Reopening and Modifying Order at: http://www.ftc.gov/opa/2003/04/solvayord.pdf., in which the Commission reopened the final hold separate order and eliminated a two-year ban on hiring a named employee, finding that the Hold Separate Order had been effective in facilitating the acquirer's efforts to retain necessary employees. Based on those facts, the Commission concluded:

> In determining whether to modify the Hold Separate Order, the Commission must consider and balance all the reasons for and against the modification. Although the Hold Separate Order's two year ban on Solvay employing the Solvay Fluoropolymers Business promoted the important goal of encouraging the employees of the divested business to accept employment with Dyneon, its decision not to hire Mr. Mularski renders the employment ban obsolete and unnecessary. The employment ban now imposes an unintended harm to Mr. Mularski's personal financial and employment interests because the employment ban prevents Solvay from hiring Mr. Mularski. In balancing and weighing the reasons for and against modifying the Hold Separate Order, it appears that Mr. Mularski will suffer personal harm if the Hold Separate Order is not modified, but that declining to modify the Hold Separate Order will not promote any competitive or public purpose.

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that the modification will have no impact on Holly's viability but will instead inject additional competition into the market.[22]

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4058 be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and it hereby is, modified by making the following changes to Paragraph II.C. 2.:

(Deletions noted with strike through and new text bold and underlined)

~~at~~ **on or before** the end of the ninth year after the Effective Date of Divestiture of the Phillips Woods Cross Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement;

and by adding the following proviso to Paragraph II.C.2.:

Provided, however, that Respondents and the acquirer may agree, prior to the end of the ninth year and subject to the Commission's prior approval, to modify the terms of the agreement entered pursuant to Paragraph II.C.I. in order to provide a nonexclusive license in Montana and Wyoming for the remainder of the ten-year period, notwithstanding the provisions of Paragraphs II.C.I. and II.G, as long as the modification is consistent with the purpose of the Order.

By the Commission.

[22] Having determined that ConocoPhillips' Petition satisfies the public interest test, the Commission need not consider whether the Petition has made a satisfactory showing of changed conditions of fact.

Interlocutory Orders, Etc.

CONOCO, INC. AND PHILLIPS PETROLEUM COMPANY