

owner; and (2) Duke Energy's acquisition of certain natural gas gathering and processing assets from Conoco, Inc. ("Conoco") and Mitchell Energy & Development Corporation ("Mitchell"), which were consolidated into DEFS. Under the Order, Duke Energy and DEFS were required to divest approximately 2,780 miles of gas gathering pipeline in certain "Relevant Areas" in Kansas, Oklahoma, and Texas, and to notify certain future acquisitions of natural gas gathering and processing assets or interests in the Relevant Areas. At all times since the entry of the Order, Duke Energy and DEFS have complied with the Order in all respects.

In December 2006, Respondents Duke Energy and DEFS notified the Commission that Duke Energy intended to spin off its natural gas businesses, including its 50% interest in DEFS, to Spectra Energy, a newly formed, independent company (the "Spin-off Transaction"). The Respondents also notified the Commission that, in connection with the Spin-off Transaction, DEFS would be renamed DCP Midstream, LLC. The Spin-off Transaction was completed in January 2007. As a result, Duke Energy no longer holds, directly or indirectly, an interest in DEFS or in any other company that owns natural gas assets in the Relevant Areas, nor does it otherwise own any natural gas assets in the Relevant Areas. Spectra Energy has succeeded to Duke Energy's obligation under the Order; Spectra Energy and DCP are the appropriate Respondents under the Order.

In light of this changed condition of fact, Respondents hereby petition the Commission to reopen and modify the Order to relieve Duke Energy of all continuing obligations under the Order. Respondents also believe that such relief is in the public interest.

I. BACKGROUND

A. Initial Transaction and Complaint

This matter was initiated in January 2000 with the simultaneous filings, under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the “HSR Act”), on two transactions involving Duke Energy: (1) the merger of the midstream natural gas businesses of Duke Energy and Phillips into DEFS; and (2) Duke Energy’s acquisition of certain midstream natural gas assets of Conoco and Mitchell. The Commission’s HSR Act review focused on the merger’s potential competitive effects in natural gas gathering, i.e., the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or natural gas processing plant.

In March 2000, the Commission furnished Duke Energy, Phillips, and DEFS with a copy of a draft Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would have charged Duke Energy, Phillips, and DEFS with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleged that the Phillips and Conoco/Mitchell transactions resulted in a substantial lessening of competition in natural gas gathering in the Relevant Areas. Also in March 2000, counsel for Duke Energy, DEFS, and Phillips, and counsel for the Commission, executed an agreement containing the Order, as a means of resolving the issues identified in the Complaint. On March 31, 2000, the Commission accepted the agreement containing the Order and published it for public comment. Soon thereafter, Respondents Duke Energy, Phillips, and DEFS consummated the related transactions

B. The Order

On May 5, 2000, the Commission, in conformity with procedures described in § 2.34 of its Rules, entered the Order. To address the concern that DEFS would be able to substantially lessen competition in natural gas gathering in the Relevant Areas, the Order was designed to reduce concentration in the market. Paragraphs II and III of the Order seek to accomplish this through a number of divestitures. These divestitures were completed, following Commission approval, during 2000.

Other provisions of the Order impose certain notification and reporting requirements on the Respondents, including the requirements to notify certain acquisitions affecting the Relevant Areas (§§ IV and V), to report annually on compliance (§ VI), and to notify changes in any Respondents that may affect compliance (§ VII).

C. Respondents' Compliance with the Order

At all times since the entry of the Order, the Respondents have been in compliance with the Order. The Respondents filed their previous Annual Reports of Compliance with the Decision and Order in May 2001, May 2002, May 2003, May 2004, May 2005, and May 2006. Pursuant to Paragraph VI(A), the Respondents had previously filed three interim compliance reports dated March 24, 2000; April 24, 2000; and July 5, 2000. In each instance, the Commission has accepted the Compliance Report filed by the Respondents and has issued a letter stating that no compliance action is indicated. In addition, Spectra Energy and DCP filed their latest compliance report on May 8, 2007, and Duke Energy filed its latest joint compliance report on May 15, 2007.

D. Duke Energy's Spin-off Transaction

On December 21, 2006, Duke Energy notified the Commission of its intention to spin off most of its natural gas business, including its 50% interest in DEFS, to Spectra Energy, a newly formed, independent company. *See* Exhibit 2. Spectra Energy became a publicly traded, stand-alone company on January 2, 2007. *See* Spectra Energy News Release, January 2, 2007, attached as Exhibit 3. The common stock began regular-way trading January 3, 2007 on the New York Stock Exchange under the symbol SE. The Spin-off Transaction was completed in January 2007.

As a result, Duke Energy's former natural gas businesses -- the former Duke Energy Gas Transmission business and Duke Energy's 50-percent ownership interest in DEFS, renamed DCP Midstream, LLC -- are now part of Spectra Energy. The Spin-off Transaction leaves Duke Energy with:

- (a) no direct or indirect interest in Spectra Energy,
- (b) no direct or indirect interest in DCP, and
- (c) no direct or indirect interest in any other company with assets in the Relevant Areas that are or have been engaged in gathering and processing, transmission and storage, and distribution of natural gas.

See Declarations of Marc Manly of Duke Energy and Brent Backes of DCP, attached as Exhibits 4 and 5, respectively.

Duke Energy has no plans or present intention to reacquire any of the assets divested pursuant to the Order, to reacquire any direct or indirect interest in Spectra Energy or DCP, or otherwise to enter the midstream natural gas business in the Relevant Areas. *See* Declaration of

Marc Manly, attached as Exhibit 4, at ¶6. This statement should be of limited importance in this case: Duke Energy no longer has a relationship with DCP or Spectra Energy, such that entry by Duke Energy into midstream natural gas in the Relevant Areas would not create a need for coverage under the Order but, instead, would be unambiguously procompetitive.

II. MODIFICATION OF THE ORDER IS JUSTIFIED BY CHANGED CONDITIONS OF FACT AND PUBLIC INTEREST CONSIDERATIONS

A. Changed Conditions of Fact

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.51(b), provide that the Commission may reopen and modify an order if the respondent makes a satisfactory showing that changed conditions of law or fact require the rule to be altered, modified, or set aside, or that the public interest so requires.

With respect to changed conditions of law or fact, a 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); *In re Culligan, Inc.*, 113 F.T.C. 367, 369 (1990) (citing *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)); *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445, 1448-49 (9th Cir. 1985) (discussing legislative history). If the Commission determines that the respondent 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. *In re Stop and Shop Companies, Inc.*, Docket No. C-3649, Order Reopening and Modifying Order (1997).

Duke Energy's spin-off of Spectra Energy constitutes a changed condition of fact that justifies the Commission to reopen and modify the Order to relieve Respondent Duke Energy of its obligations under the Order, because the Spin-off Transaction leaves Duke Energy with no direct or indirect interest in any midstream company owning natural gas assets in the Relevant Areas, which was not the case at the time of the Order. This entirely eliminates the basis for the Commission's concern regarding Duke Energy's involvement with midstream natural gas in the relevant areas. Requiring Duke Energy to continue to abide by these restrictions, without any offsetting benefits through the protection of competition, would be inequitable.¹

Duke Energy has no natural gas assets in the Relevant Markets and has no continuing legal access to DCP information. It must still, however, comply with the Order by, for example, issuing annual compliance reports. Because Duke Energy has no relationship with DCP, its involvement in such matters intrudes on the confidential decisions and actions of an unrelated company and contributes nothing to the Commission's interests or the public interest.

B. Public Interest

In addition to changed conditions of fact, the Respondents meet the public interest requirement of Section 2.51(b) because "the order in whole or in part is no longer needed." To meet the public interest requirement of Section 2.51(b), the requester must:

¹ While Duke Energy has no plans or present intention to enter the midstream natural gas business in the Relevant Areas, the possibility of entry by Duke Energy into such markets does not suggest a need for coverage under the Order; instead, such entry would be unambiguously procompetitive. This case is distinguished from several prior cases in which the Commission required a demonstration by petitioner that it has a present intention not to re-enter the relevant market. For example, in *Time Warner, et al.*, Docket C-3709, the Commission required such a demonstration because *any* re-entry by acquisition would have recreated conditions that gave rise to the underlying prediction of anticompetitive effects. This threat does not exist here: an acquisition by Duke Energy of any unrelated relevant assets would increase competition. Nevertheless, Duke Energy has declared its lack of intent to re-acquire divested assets or interests in the Relevant Markets or otherwise to re-enter the Relevant Markets. See Declaration of Marc Manly, attached as Exhibit 4.

Make a *prima facie* showing of a legitimate “public interest” reason or reasons justifying relief. [T]his 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 in 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.

Requests to Reopen, 65 Fed. Reg. 50,636, 50,637 (Aug. 21, 2000), *amending* 16 C.F.R. § 2.51(b).

When the Order was issued on May 5, 2000, the Commission was concerned that the combination of natural gas gathering operations of Duke Energy with those of Phillips, Conoco, and Mitchell might substantially lessen competition in certain counties in Kansas, Oklahoma, and Texas. As a result of the spin-off transaction, Duke Energy no longer owns any interests in natural gas assets in the Relevant Areas. Therefore, the Order is no longer needed as applied to Duke Energy. *In re Bendix Corp.*, 107 F.T.C. 60 (1986) (reopening and terminating provisions of order requiring prior approval because respondent divested or sold all product lines that gave rise to the order, and the Commission’s concerns leading to the order were no longer applicable).

Finally, continuation of the Order’s notice and reporting provisions are not needed to protect the public interest. *See Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases*, 60 Fed. Reg. 39,745, 39,746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241 (limiting prior approval and notice provisions to narrow circumstances). Since Duke Energy has exited the Relevant Areas -- and indeed, has divested its interests in midstream natural gas operations, generally -- there is no credible risk that, but for the Order, Duke Energy would engage in an otherwise unreportable

anticompetitive acquisition. *Id.* at 39,746. DCP, which remains a competitor in the Relevant Areas, would remain subject to the Order.

III. CONCLUSION

For the reasons listed above, Respondents Duke Energy, Spectra Energy, and DCP respectfully request that the Commission reopen and vacate the Order as it applies to Duke Energy, or to otherwise modify the Order to relieve Duke Energy of any continuing obligations thereunder. Such a modification is justified by the changed conditions of fact, and is consistent with the public interest and the underlying purposes of the Order. The attached Declarations and other accompanying exhibits set forth and support the specific facts described herein and demonstrate why the requested modification of the Order is appropriate.

For the reasons given above, Respondents Duke Energy, Spectra Energy, and DCP respectfully request that the Commission grant this Petition to Reopen and Modify the Order as described herein.

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Respectfully submitted,



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Exhibits

- Exhibit 1: Decision & Order in Docket No. C-3932
(excluding schedules and other related documents)
- Exhibit 2: Notice Letter dated December 21, 2006
(excluding attachment)
- Exhibit 3: Spectra Energy News Release, dated January 2, 2007 (“New Natural Gas Midstream Company Launched in Houston”)
- Exhibit 4: Declaration of Marc E. Manly, Duke Energy
- Exhibit 5: Declaration of Brent L. Backes, DCP