

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson**

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|----------------------------------|---|-------------------|
| In the Matter of |) | |
| |) | |
| DTE Energy Company, |) | |
| a corporation, |) | Docket No. C-4691 |
| |) | |
| Enbridge Inc., |) | |
| a corporation, and |) | |
| |) | |
| NEXUS Gas Transmission LLC, |) | |
| a limited liability corporation. |) | |

ORDER REOPENING AND MODIFYING ORDER

DTE Energy Company (“DTE”) submitted a petition to the Commission on September 21, 2021, to request that the Decision and Order (“Order”) in this matter be set aside as to it, and continue as to its successor, DT Midstream, Inc. DTE bases its request on the fact that it spun off its non-utility natural gas pipeline, storage, and gathering business, including its ownership interest in Respondent NEXUS Gas Transmission, LLC (“Nexus”), to DT Midstream. DTE no longer has any natural gas pipeline transportation assets or business in the area addressed by the Order, i.e., Lucas, Ottawa, and Wood counties in northwest Ohio (“Relevant Area”). DT Midstream, a standalone publicly traded company, acknowledges itself as successor of DTE for purposes of complying with the Order.

DTE’s petition was available for public comment for thirty days until November 5, 2021, and no public comments were filed. For the reasons stated below, the Commission has determined to grant DTE’s petition and reopen and modify the Order as requested.

BACKGROUND

The Commission issued the Order on November 21, 2019, to remedy the anticompetitive effects resulting from Nexus’s acquisition of Generation Pipeline LLC (“Generation”) from North Coast Gas Transmission LLC (“NCGT”) and its joint owners. DTE held a 50% ownership interest in Nexus at the time of the transaction. The Commission did not find the transaction to

substantially lessen competition in natural gas pipeline transportation. However, the Commission found that a non-compete provision in the parties' purchase agreement unreasonably restrained trade by prohibiting NCGT from competing for new natural gas pipeline transportation business in the Relevant Area three years post-close.

Nexus, along with its parents at the time, DTE and Enbridge, were named as Respondents to the Order. The Order addressed the concern relating to the non-compete by requiring the parties to remove the provision from the purchase agreement, and the parties to the agreement executed an amendment that eliminated the non-compete prior to closing of Nexus's acquisition of Generation. The Order also prohibits Respondents from entering into, enforcing, or soliciting any agreements with a "Pipeline Competitor" that restrict competition for natural gas pipeline transportation in the Relevant Area, absent prior Commission approval. The Order defines "Pipeline Competitor" as a firm that owns, operates, or markets capacity on a natural gas pipeline in the Relevant Area. The Order further requires Respondents to provide prior notice of intent to acquire an interest in NCGT's pipeline or another natural gas transportation pipeline in the Relevant Area, and to file annual compliance reports. The Order terminates on November 21, 2029.

STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in Section 5(b) of the Federal Trade Commission Act and Section 2.51(b) of the Commission's Rules of Practice and Procedure.¹ Section 5(b) and Commission Rule 2.51(b) provide that the Commission must reopen an order to consider whether it should be modified if the respondent makes either "a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside" or if the public interest so requires.² A satisfactory showing sufficient to require reopening is made when a request demonstrates in detail the nature of the changed conditions and the reasons why these changes eliminate the need for the order or make continued application of it inequitable or harmful to competition, or provides specific reasons why the public interest would be served by the requested modification.³ The requester's showing must be supported by evidence that is credible and reliable. Commission Rule 2.51(b) requires, for example, affidavits setting forth admissible facts, and that all information and material that the requester would like the Commission to consider be contained in the request at the time of filing.⁴ The requester's burden is not a light one given the broad public interest in the finality of Commission orders.⁵

¹ 15 USC §45(b); 16 C.F.R. 2.51(b).

² *Id.*

³ 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.").

⁴ 16 C.F.R. § 2.51 (b).

⁵ See, e.g., *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

DTE'S PETITION

DTE's petition establishes that DTE experienced a significant change in circumstances after the Order was issued. DTE exited the natural gas pipeline transportation business in the Relevant Area pursuant to its spin-off of DT Midstream on July 1, 2021. Therefore, DTE no longer holds an ownership interest in Respondent Nexus or in Generation, nor does it hold an ownership interest in DT Midstream.⁶ DTE's Senior Vice President and Chief Legal Officer, who has been responsible for overseeing DTE's compliance with the Order, affirms in an affidavit that DTE is no longer a competitor for natural gas pipeline transportation in the Relevant Area and has no plans to re-enter the market that it has recently exited.⁷

As a result of the spin-off of DT Midstream, DTE's petition explains that requiring DTE to continue to comply with the Order's obligations is not needed to protect the public interest.⁸ The potential harm that the Order seeks to prevent is related to agreements that may restrict competition for natural gas pipeline transportation in the Relevant Area. DTE, however, no longer has any natural gas pipeline transportation assets or business in the Relevant Area; DT Midstream has assumed this business. DT Midstream acknowledges and agrees to assume the Order's obligations as DTE's successor.⁹

THE ORDER WILL BE REOPENED AND MODIFIED

DTE has made the requisite showing that changed conditions and the public interest support setting aside the Order as to DTE. DTE's spin-off of its non-utility natural gas assets, including its ownership interest in Respondent Nexus, to DT Midstream is a material change of fact. DT Midstream is successor to DTE under the Order and is in the best position to fulfill the continuing obligations of the Order. Further, DT Midstream acknowledges and agrees to assume DTE's obligations under the Order. DTE has no ownership interest in DT Midstream or in any natural gas pipeline transportation assets or business in the Relevant Area, and as such, does not have the ability or incentive to interfere with the remedial purposes of the Order. Neither the interests of the Commission nor the public interest requires DTE to remain subject to the Order. Setting aside the Order as to DTE, but not as to DT Midstream, is consistent with past Commission rulings on similar petitions.¹⁰

⁶ DTE Petition at 5.

⁷ DTE Petition at Exhibit 4; DTE Petition at 5.

⁸ DTE Petition at 8.

⁹ DTE Petition at Exhibit 5.

¹⁰ *See, e.g.*, Pfizer Inc., et al., Docket No. C-4267, Order Reopening and Modifying Order (Apr. 6, 2016); AEA Investors 2006 Fund L.P., et al., Docket No. C-4297, Order Reopening and Modifying Order (Apr. 30, 2013); Duke Energy Corp., et al., Docket No. C-3932, Order Reopening and Modifying Order (Sept. 26, 2007); and Entergy Corporation, et al., Docket No. C-3998, Order Reopening and Modifying Order (July 8, 2005).

Accordingly,

IT IS ORDERED that the Order in Docket No. C-4691 be, and hereby is, reopened; and

IT IS FURTHER ORDERED that the Order be, and it hereby is, set aside as to DTE Energy Company but not as to DTE Energy Company's successor, DT Midstream, Inc.

By the Commission.

April J. Tabor
Secretary

SEAL
ISSUED: November 23, 2021