

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosb
Edith Ramirez
Julie Brill

In the Matter of

Conoco Inc.,
a corporation

and

Phillips Petroleum Company,
a corporation.

Docket No. C-4058

ORDER REOPENING AND MODIFYING ORDER

ConocoPhillips Company filed its "Petition of ConocoPhillips to Reopen and Modify the Decision and Order 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

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.

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.

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, an interest in refinery tanks, all crude pipelines connected to the refinery, a refined products pipeline, interests in nearby terminals, loading facilities, and 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 Phillips 66 supply agreements with the independent marketers that supplied the other Phillips 66 brand dealers 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, its right to use the Phillips 66 brand name in Utah, Wyoming, Idaho, and Montana. (by)Tj 0 0.00

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

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 Agreement, Phillips retains ownership of the trademarks.

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 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 I.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 I.C.2. of the Commission's order:

Provided, however, that Respondents and the Applicant 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 I.C.1. in order to provide a non-exclusive license in Montana and Wyoming.

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

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 investment, compete 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 purchase the

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.

²⁰ Order, ¶ II.M.

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 Wyoming immediately and if the Commission r

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/solvayrd.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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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.

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