

June 27, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: Lubrizol Corporation

Date of Filing: May 2, 2005

Case Number: RC272-00438

Pursuant to Department of Energy (DOE) policy, purchasers of petroleum products had an opportunity until April 30, 1995 to apply to the Office of Hearings and Appeals (OHA) for a refund from crude oil overcharge funds collected by the DOE. *Statement of Modified Restitutionary Policy in Crude Oil Cases*, 51 Fed. Reg. 27899 (August 4, 1986); 60 Fed. Reg. 19914 (June 30, 1995 deadline for submitting applications for refund in the crude oil proceeding). We established refund procedures for these funds, which have been made available through court approved settlements, remedial orders and consent orders entered into by the DOE and numerous firms that sold crude oil during the period of price controls, August 1973 through January 1981.

I. Background

Lubrizol Corporation (Lubrizol) filed an application in the crude oil proceeding on December 22, 1987 (Case No. RF272-20947). Subsequently, on August 12, 2004, OHA issued a Decision and Order regarding Lubrizol's crude oil application. *Lubrizol Corporation*, Case No. RF272-20947 (August 12, 2004) (*Lubrizol*). In *Lubrizol*, the Office of Hearings and Appeals approved a refund for \$557,736 to Lubrizol based upon purchases of 348,585,189 gallons of petroleum products.

This decision was challenged in the U.S. District Court for the District of Columbia by a group of utilities and manufacturers (Utilities) who have previously been granted refunds in the crude oil proceeding. In their complaint, the Utilities claimed that a substantial portion of Lubrizol's petroleum product purchases may have been made outside of the United States and that such foreign purchases of petroleum products would not be eligible for a refund in the crude oil refund proceeding. The Utilities also asserted that OHA improperly granted Lubrizol a refund for purchases of various specific petroleum products that were not eligible for a refund in the crude oil proceeding even if purchased in the United States. The Utilities have also challenged the refund granted to Lubrizol on the basis that Lubrizol essentially was a reseller of petroleum products and as such is not entitled to a refund in the crude oil proceeding.

In order to resolve the District Court litigation, OHA agreed to conduct another review of Lubrizol's original refund application and to conduct further investigation, if needed, of the Lubrizol claim. Lubrizol, in response to our inquiries, has submitted two affidavits from Calvin W. Schroeck, Ph.D. *See* Affidavit from Calvin W. Schroeck (attested on February 23, 2005); Affidavit from Calvin W. Schroeck (attested on May 13, 2005) (*May 13 Affidavit*). During our review of the Lubrizol application, the Utilities have submitted two sets of comments. *See Objections of Utilities and Manufacturers*, Case No. RF272-20947 (March 28, 2005) (*Objections*); *Utilities and Manufacturers' Reply to the Response of Lubrizol Corporation to the Objections of Utilities and Manufacturers*, Case No. RF272-20947 (May 18, 2005) (*Reply*).

After conducting further investigation and review of the original Lubrizol claim, we find for the reasons stated below, that our original decision to grant the Lubrizol claim was correct.

II. The Lubrizol Application and OHA's Decision

Lubrizol's original claim sought a refund based upon purchases of 348,907,223 gallons of numerous different petroleum products. Of these, some of the products (totaling 6,353,684 gallons) were described as "solvents" and the vast majority of the products (totaling 335,623,921 gallons) were described as "base oils." Lubrizol also claimed purchases of 6,929,618 gallons of motor gasoline. In *Lubrizol*, we approved the majority of the claim, 348,585,189 gallons, but excluded 322,034 gallons of nine solvent products we found to be ineligible for refund in the crude oil proceeding. For each of the products, Lubrizol provided purchase schedules for each year of the price control period (August 1973 through January 1981) obtained from company purchase databases.¹

In *Lubrizol*, we recognized the fact that Lubrizol was a specialty chemical company which purchased petroleum products and then created and sold chemicals which contained significant amounts of petroleum products. While OHA considered the possibility that Lubrizol might be considered a "reseller" of petroleum products, and thus not eligible for a refund, OHA made an explicit finding that, in creating the specialty chemicals using the purchased petroleum products, Lubrizol had substantially changed the form of the petroleum products and thus, Lubrizol itself was not a reseller of the petroleum products. *See Lubrizol*, slip op. at 1 *citing* 10 C.F.R. § 212.31 (a "reseller" as defined under the price control regulations was defined as a firm in the business of purchasing covered products and reselling them "*without substantially changing their form*" to purchasers other than ultimate consumers).

¹ Lubrizol did estimate a small percentage of its claim, 8,314,792 gallons for various oils usage at one of its facilities.

III. Analysis

1. Origin of Lubrizol's Purchases

a. National origin of product purchases

In their original complaint in the U.S. District Court, the Utilities raised the possibility that a significant portion of Lubrizol's petroleum product purchases may have originated from outside of the United States. In this regard, the Utilities have pointed out that one of Lubrizol's websites and several corporate reports state that a majority of Lubrizol's manufacturing plants and a majority of Lubrizol's commercial sales are located outside of the United States. *See Reply*, Exhibit A and B (May 18, 2005); Letter from Roberta J. Major, Lubrizol counsel, to Richard T. Tedrow, Deputy Director, Appendices A, B and C – 1974, 1975 and 1977 Lubrizol annual reports) (July 2, 1992). If Lubrizol's claim included purchases of petroleum products from outside of the United States, such purchases would not be eligible for a refund in the crude oil proceeding since foreign petroleum product purchases were not subject to the petroleum price regulations. *See, e.g., Christian Haaland A/S*, 19 DOE ¶ 85,191 (1989).

In the *May 13 Affidavit*, Dr. Schroeck states that he has reviewed the schedule of purchases that Lubrizol submitted to OHA. By reviewing the product identifying codes associated with each product in the submitted schedule and the available records and purchasing specification sheets for the products at Lubrizol, he stated he can certify that the source of all of the claimed products were refineries located in the United States. *See May 13 Affidavit* at ¶¶ 11-14. Lubrizol has also submitted the specification sheets for each of the oil products for which it has requested a refund.

In its submissions, the Utilities have not presented any additional evidence which would indicate that Lubrizol's purchases originated from refineries outside of the United States or cause us to doubt the accuracy of the *May 13 Affidavit*. As the Utilities' claim raised only a suspicion and, given the additional evidence that Lubrizol has presented, especially the detailed May 13 affidavit from Dr. Schroeck, we conclude that there is sufficient evidence in the record to conclude that all of Lubrizol's petroleum product purchases were made in the United States and that there is no reason to reject Lubrizol's claim based upon the alleged foreign origin of the claimed products.

b. Origin of the Lubrizol petroleum products purchases

The Utilities have claimed that there is insufficient evidence in the record for us to conclude in *Lubrizol* that each of the claimed petroleum products in Lubrizol's claim is in fact a product eligible for a refund in the crude oil refund proceeding. OHA's standard for determining whether a particular petroleum product is eligible for a refund in the crude oil refund proceeding is as follows. OHA will presume that a claimant incurred a crude oil overcharge in the purchase of a product during the relevant period if either that product was named as a covered product in regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, or (a) was purchased from a crude oil refinery or (b) originated in a crude oil refinery and was purchased from a reseller who did not substantially change its form. 57 Fed. Reg. 30731 (July

10, 1992). It will be the burden of the applicant to establish that a product not within the definition of covered products under the EPAA was in fact produced at a crude oil refinery. *Id.*

In their submissions concerning the Lubrizol application for refund, the Utilities point out that Lubrizol has not provided OHA with any documentation such as invoices or contemporaneous purchase records identifying the source of the petroleum products Lubrizol purchased. *Objections* at ¶ 6. Responding to the Utilities' objection, Dr. Schroeck, in the *May 13 Affidavit*, examined the purchase schedule submitted for Lubrizol's claim and has certified that each of the petroleum products claimed was in fact purchased at refineries in the United States. Dr. Schroeck further states in the affidavit that the descriptions on the specification sheets indicate the products were obtained at refineries. For example, Dr. Schroeck states the composition of one of the products as listed on the product's specification sheet, "conventionally refined, solvent extracted, MEK dewaxed, hydrofinished paraffin oil from Mid-Continent crude," describes the refining process that was used to create the particular petroleum product and thus provides additional evidence that the product was obtained directly from a refinery. *May 13 Affidavit* at ¶ 15. Further, our examination of the corresponding specification sheets for each product indicates that the products were purchased from oil companies and not petrochemical firms. In view of the evidence that these products were obtained from a refinery, we affirm our conclusion that each of the products listed on Lubrizol's purchase schedule (excluding the solvents specifically determined to be ineligible in *Lubrizol*) qualifies as an eligible product in the crude oil refund proceeding.

2. End-User Status of Lubrizol

The Utilities have raised an objection to our approval of a refund for Lubrizol based on the fact that Lubrizol's finished end products which it sold to consumers contained significant proportions themselves of the petroleum products Lubrizol purchased. Because some volumes of Lubrizol products were sold to oil companies which, in turn, added the Lubrizol products to the petroleum products they sold, the Utilities contend that Lubrizol should be considered a "reseller" of petroleum products and thus not eligible for a refund in the crude oil refund proceeding. Further, allowing Lubrizol to claim a refund for its purchases of petroleum products along with claims from the ultimate users of petroleum products where Lubrizol petroleum containing products have been added would result in the double counting of petroleum product gallonage for refund purposes.

During the period of federal price control regulations, August 1973 through January 1981, the term "reseller" was defined by the price control regulations as:

"Reseller" means a firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products, and reselling them without substantially changing their form to purchasers other than ultimate consumers.

10 C.F.R. §212.31. In the crude oil proceeding, we have determined that resellers and retailers of petroleum products during the price control period are generally not eligible for a crude oil refund because firms were in a position to pass on improper overcharges to their consumers and

thus would not have been injured by violations of the petroleum price regulations. *See, e.g., Bic Corporation*, 21 DOE ¶ 85,219 (1991) (*Bic*). We have used the definition in section 212.31 to determine whether an applicant was a reseller or retailer for purposes of the crude oil refund proceeding. *See Bic*, 21 DOE at 88,700; *Chesebrough-Pond's USA Co.*, Case No. RF272-97101 (July 29, 1997).

In the *May 13* affidavit, Dr. Schroeck describes the nature of Lubrizol's products as follows:

The bulk of Lubrizol's application related to Lubrizol's purchase of oils that were used by Lubrizol to make chemical components of additive packages. The additive packages are then sold to Lubrizol's customers, who blend the additive packages with other oils that the customer has made or purchased to make a finished lubricant product.

At one time refiners were able to make a lubricating oil that would meet the lubrication needs of end users. Over time, it was discovered that chemical additives needed to be combined with the lubricating oil from the refinery to make a finished lubricant product.

Lubrizol is a specialty chemical company, and during the period being considered in this matter [the petroleum price control period], Lubrizol was engaged in the making of chemical additives that were sold to companies to be blended with oil to form a finished lubricant product. Additives include such things as: (a) dispersants and detergents, which are chemicals that neutralize combustion by products and hold the products in oil; (b) antioxidants, which prevent oxidation and oil degradation; (c) friction modifiers and antiwear ingredients, which are chemicals that coat the surfaces that are being lubricated to reduce friction and wear; (d) pour point depressants, which are chemicals that allow better properties for the lubricant at colder temperatures; and (e) viscosity modifiers, which are chemicals that control the viscosity and viscosity change of the lubricant under various conditions. Some of the chemical components are mixtures of chemicals and oil. For those, oil is an integral part of their manufacture. The concentrated formulation of chemical components that Lubrizol makes and then sells is often called an "additive package." While Lubrizol does sell some components by themselves, the bulk of Lubrizol's sales are additive packages. The additive package is not a finished lubricant product and not something refiners make.

May 13 Affidavit ¶¶ 5-7 (paragraph numbers omitted.)

From the *May 13 Affidavit* and the other information provided by Lubrizol, we affirm our finding in *Lubrizol* that the firm should be considered an end-user of petroleum products. Lubrizol substantially changed the nature of the petroleum products it purchased by adding various chemicals to different types of petroleum products to produce "additive packages." The additive packages were then sold not as petroleum products themselves but as a product which when added to a purchaser's oil would produce a change in the physical and chemical properties of the purchaser's oil. Lubrizol, in creating its products by adding chemicals to the petroleum products

it purchased from refineries, substantially changed the form of the petroleum products it purchased. Consequently, we find that Lubrizol was not a reseller but an end-user of petroleum products. Lubrizol is thus eligible to receive a refund based upon the petroleum products it purchased during the consent order period.

We reach this conclusion notwithstanding the arguments that the Utilities have presented to us. The Utilities note that the DOE adopted a “volumetric” methodology to determine how crude oil refunds were to be distributed. The volumetric methodology uses the available monies for crude oil refunds and divides them by the 2,020,997,335,000 gallons of petroleum products purchased during the crude oil price control period in order to get a volumetric per gallon refund amount for refund claims. Consequently, the Utilities argue that only one volumetric end-user claim should be possible for each gallon of petroleum product purchased during the price control period. *Reply* at 4. The Utilities argue that to allow Lubrizol to receive a refund for the petroleum products it uses would result in situations where two refunds would be granted for the same gallon of petroleum products. To illustrate this, the Utilities present the following hypothetical. Lubrizol adds one gallon of base oil to one gallon of chemical resulting in an additive package of two gallons. An oil company then purchases the two gallon additive package from Lubrizol and adds it to two gallons of a base oil to create a “fully formed lubricant” and then adds the four gallons of fully formed lubricant to 20 gallons of gasoline to create 24 gallons of treated gasoline which is then sold to a end-user. If Lubrizol were allowed to receive a crude oil refund, the cumulative result would be that Lubrizol would receive a refund for one gallon of petroleum product it purchased, the oil company would receive a refund for the 2 gallons base oil with which it mixed the Lubrizol product and the end-user would receive a refund for the 24 gallons of treated gasoline (consisting 1 gallon of base oil + 1 gallon of chemicals from Lubrizol + 2 gallons of the oil company’s base oil + 20 gallons of gasoline) it received. OHA would then be granting refunds for 27 gallons (1 gallon from Lubrizol + 2 gallons from the oil company + 24 gallons by the end-user) of petroleum products when in reality only 24 gallons should be claimed by the ultimate end-user. *See Reply* at 3-4.

The Utilities’ argument is simply too speculative. We have no evidence indicating what percentage of Lubrizol products were sold to oil companies. Further, it is uncertain how or in what proportions oil companies mixed their Lubrizol products as alleged in the hypothetical. The only evidence in the record that the Utilities point to in support of the validity of the hypothetical is information that indicates that Lubrizol is a “leading supplier to the petroleum industry of chemical additives for lubricants and fuels” and that “major domestic oil companies . . . are also significant customers of Lubrizol.” *See Objections* at 6 (citing a Lubrizol 1974 annual report and a September 19, 1988 affidavit from Lucy M. Miller). This evidence is not sufficient for us to conclude that granting Lubrizol a refund as an end-user would result in significant double counting of petroleum product gallons for refund purchases.

In any case, it is also important to realize that the crude oil refund proceeding represents a balance between the equitable distribution of the overcharge monies and administrative efficiency. This balance does not contemplate the strict one gallon - one refund claim principle that the Utilities assert underlies the volumetric refund methodology we adopted for the crude oil refund proceeding. In adopting the volumetric refund methodology in this crude oil proceeding, OHA recognized that some double counting may occur. Specifically, OHA rejected proposals to

subtract from the 2 trillion gallon figure referenced above the volumes of petroleum product claims from parties that received refunds pursuant to specific escrow funds set up pursuant to the Stripper Well Settlement Agreement (and who were then not eligible to receive a crude oil refund). We stated:

[A]lthough this type of adjustment has some appeal, it would be too difficult to implement as a practical matter. All of the volumes that passed through petroleum product resellers and retailers were ultimately consumed by end-users, some of whom may apply for themselves, and this could produce double or triple counting of volumes. Because of these difficulties, accurately adjusting the number of gallons in the denominator [the 2 trillion gallon figure] might delay the crude oil refund process for several years. That result would defeat one of the principal purposes of the settlement: achieving an expeditious resolution of all crude oil refund claims.

Crude Oil Refund Procedures, 6 Fed. Energy Guidelines ¶ 90,512 at 90,711 n.2 (52 Fed. Reg. 11737 at 11740 n.2 (April 10, 1987)). To now insist that Lubrizol be forced to provide additional specific data concerning to whom it sold its products and how they were used by the purchaser in order that a further analysis concerning potential double counted gallonage could be made would be inappropriate given the purpose of this proceeding and the ground rules announced at the outset of the proceedings in 1987. This consideration is even more significant given the fact that OHA has already announced procedures for the conclusion of the crude oil refund proceeding. *See* 69 Fed. Reg. 29300 (May 21, 2004). Consequently, we find that the determination of whether an applicant is a reseller is most appropriately made using the definition of “reseller” as provided in 10 C.F.R. § 212.31. Using this definition, we find that Lubrizol is not a reseller but an end-user of the petroleum products it purchased.

IV. Conclusion

In reviewing the evidence before us, Lubrizol has submitted records documenting its purchases of petroleum products. For each of the products it purchased, Lubrizol has submitted sufficient evidence that it purchased each of the claimed products at a domestic refinery and that the products it purchased are products eligible for a refund in the crude oil proceeding. Consequently, we will affirm our decision in *Lubrizol* granting Lubrizol a refund of \$557,736.

It Is Therefore Ordered That:

- (1) The Decision issued on August 12, 2004 regarding the Application for Refund filed by the Lubrizol Corporation, Case No. RF272-20947, redesignated, Case No. RC272-00438, in the crude oil special refund proceeding is hereby affirmed.
- (2) The determinations made in this Supplemental Order are based upon the presumed validity of the statements and documentary materials submitted by the applicant. This Supplemental Order and the underlying refund may be revoked or modified at any time upon a determination that the basis supporting the refund application is incorrect.

(3) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 27, 2005

