February 14, 2011

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: Cole Distributing, Inc.

Date of Filing: December 13, 2010

Case No.: TEE-0073

On December 13, 2010, Cole Distributing, Inc. (Cole) filed an Application for Exception with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The firm requests that it be permanently relieved of the requirement to prepare and file the Energy Information Administration (EIA) Form EIA-782B, entitled "Resellers'/Retailers' Monthly Petroleum Product Sales Report." As explained below, we have determined that Cole's request should be denied. [1]

I. Background

The DOE's Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.[2] The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress determined that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to the oil crisis. It therefore authorized the DOE to collect data on the supply and prices of petroleum products. This information is used to analyze trends within petroleum markets. Summaries of the information and the analyses are reported by EIA in publications such as "Petroleum Marketing Monthly." This information is used by Congress and state governments to project trends and to formulate national and state energy policies. Access to this data is vital to the nation's ability to anticipate and respond to potential energy shortages.[3]

Form EIA-782B is a monthly report, pursuant to which resellers and retailers report the volume and price of sales of motor gasoline, No. 2 distillates, propane, and residual fuel oil. In order to

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[1] OHA Exception Decisions issued since July 5, 1995, are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

[2] 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).

[3] See H.R. Rep. NO. 373, 96th Con., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 1764, 1781 (H.R. Report 373).

minimize the reporting burden, the EIA periodically selects a relatively small sample of companies to file Form EIA-782B[4] and permits reporting firms to rely on reasonable estimates.[5]

II. Exception Criteria

OHA has the authority to grant exception relief where the reporting requirement causes a "serious hardship, gross inequity or unfair distribution of burdens."[6] Since all reporting firms are burdened to some extent by reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from similar reporting firms.

When considering a request for exception relief, we must weigh the firm's difficulty in complying with the reporting requirement against the nation's need for reliable energy data. Thus, mere inconvenience does not constitute a hardship warranting relief.[7] Similarly, the fact that a firm is relatively small or has filed reports for a number of years does not constitute a hardship warranting relief.[8] If firms of all sizes, both large and small, are not included in the survey, the estimates and projections generated by EIA's statistical sample will be unreliable.[9]

OHA has granted relief from the reporting requirement under various circumstances. For example, we have granted relief where: the firm's financial situation is so precarious that the additional burden of meeting the DOE reporting requirements threatens the firm's continued viability;[10] the firm's only employee capable of preparing the report is ill and the firm cannot afford to hire outside help;[11] extreme or unusual circumstances disrupt a firm's activities;[12] or, a combination of factors resulting from unavoidable circumstances makes completing the form impracticable.[13]

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[4] Firms that account for over five percent of the sales of any particular product in a state or do business in four or more states, designated as certainty firms, are always included in the sample of firms required to file the form. A random sample of other firms is also selected. This random sample changes approximately every 24 to 30 months, but a firm may be reselected for subsequent samples. A firm that has been included in three consecutive random samples will generally not be included in a fourth consecutive sample, but may be included in a later sample.

[5] Form EIA-782B requires that the firm make a good faith effort to provide reasonably accurate information that is consistent with the accounting records maintained by the firm. The firm must alert the EIA if the estimates are later found to be materially different from actual data.

[6] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b) (2).

[7] *Glenn Wagoner Oil Co.*, 16 DOE ¶ 81,024 (1987).

[8] *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990).

[9] *Id*.

[10] *Mico Oil Co.*, 23 DOE ¶ 81,105 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co.*, 16 DOE 81,206 (1987) (firm in bankruptcy).

[11] *S&S Oil & Propane Co.*, 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Midstream Fuel Serv.*, 24 DOE 81,203 (1994) (three month extension of time to file reports granted when two office employees simultaneously on maternity leave); *Eastern Petroleum Corp.*, 14 DOE ¶ 81,011 (1986) (two month extension granted when computer operator broke wrist).

[12] *Little River Village Campground, Inc.*, 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,025 (1979) (hurricane); *Meier Oil Serv*. 14 DOE ¶ 81,004 (1986) (three month extension granted where disruptions caused by installation of new computer system left the firm's records inaccessible).

[13] *Ward Oil Co.*, 24 DOE ¶ 81,002 (1994) (ten month extension granted where long illness and death of a partner resulted in personnel shortages, financial difficulties and other administrative problems).

III. The Application for Exception

Cole is a seller of petroleum products based in Shelby, Ohio. Cole is a "noncertainty" firm and has filed form EIA-782B since November 2009. *See* Electronic Mail Message from Maureen Klein, EIA, to Valerie Vance Adeyeye, OHA (January 14, 2011). In its application, Cole requests that it be relieved of the obligation to file Form EIA-782B. *See* Letter from Rodney Cole, Cole Distributing, to OHA (December 13, 2010) (Application for Exception). Cole maintains that the company has submitted surveys for the 12 months prior to December 2010 and requests relief from completing the survey.

Based upon a review of the Application, we concluded that there was not sufficient information to permit us to act favorably on the request. Therefore, we contacted Cole to give the company an opportunity to discuss its request for relief. *See* Memorandum of Telephone Conversation between Rodney Cole, Cole Distributing, Inc., and Valerie Vance Adeyeye, OHA, (January 14, 2011). According to Cole, the company has recently lost two key employees from its five-person full time office staff. One full-time employee retired, and one part-time employee only works six hours per week. The owner is in the field all day, and cannot devote time to completing this report. Further, under current business conditions, he cannot afford to replace the employee who has retired. *Id.* Therefore, Cole requests that it be permanently relieved of the obligation to file form EIA-782B.

IV. Analysis

Upon careful examination of Cole's Application for Exception, we have determined that exception relief is not warranted. Every reporting firm is burdened to a certain extent by the reporting requirement. Exception relief is appropriate where the reporting requirement adversely affects the applicant firm to a significantly greater degree than it affects other firms. See 42 U.S.C. § 7194; 10 C.F.R. §1003.25(b) (2). *See also B & B Marine, Inc*., OHA Case No. TEE-0072 (November 15, 2010).

Cole has recently experienced a reduction in its full-time clerical staff that cannot be remedied under current business conditions. While we can appreciate that Cole has a limited staff and heavy workload, the reliability of the reporting sample would be compromised if we were to grant an exception to all firms experiencing heavy workloads or other issues associated with maintaining a business. *See Monroe Oil Co.,* Case No. TEE-0071 (June 11, 2010). Cole has not established that it is experiencing the level of distress that has justified our previous grants of exception relief, such as extreme personnel shortages, bankruptcy, or natural disaster. Accordingly, we find that exception relief is not warranted in this case and, therefore, the Application for Exception should be denied.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Cole Distributing, Inc., OHA Case No. TEE-0073, be, and hereby is, denied.

(2) Administrative review of this Decision and Order may be sought by any persons aggrieved or adversely affected by the denial of exception relief. Such review shall be commenced by filing a petition for review with the Federal Energy Regulatory Commission within 30 days of the date of this Decision and Order pursuant to 18 C.F.R. Part 385, Subpart J.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 14, 2011