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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: Kirby Oil Company, Inc.

Date of Filing: June 16, 2009

Case No.: TEE-0061

On June 16, 2009, Kirby Oil Company, Inc. (Kirby Oil) 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 the 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. 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b). 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. *See* H.R. Rep. No. 373, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 1764, 1781 (H.R. Report 373).

Form EIA-782B is a monthly report of the volume and prices of motor gasoline, No. 2 distillates, propane, and residual fuel oil sold by resellers and retailers. In order to minimize the reporting burden, the EIA periodically selects a relatively small sample of companies to file Form EIA-782B. 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, designated as non-certainty firms, is also selected. This random sample changes periodically, but a firm may be

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 assessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

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. In order to reduce the burden on reporting firms, EIA also permits the firms to rely on reasonable estimates.²

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.” 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2). 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. *Glenn Wagoner Oil Co.*, 16 DOE ¶ 81,024 (1987). 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. *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990). 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. *Id.*

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, *see e.g., 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); the firm’s only employee capable of preparing the report is ill and the firm cannot afford to hire outside help, *see e.g., S&S Oil & Propane Co.*, 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Eastern Petroleum Corp.*, 14 DOE ¶ 81,011 (1986) (two-month extension granted when computer operator broke wrist); extreme or unusual circumstances disrupt a firm’s activities, *see e.g., 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); or a combination of factors resulting from unavoidable circumstances makes completing the form impracticable, *see e.g., 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

Kirby Oil is a seller of petroleum products based in Lake City, Florida. The firm is designated as a non-certainty firm by the EIA. *See* E-mail from Tammy Heppner, EIA, to Kimberly

² 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.

Jenkins-Chapman, OHA, July 29, 2009. The firm, reporting in its third sample, has filed Form EIA-782B since approximately February 1999.

In its Application, Kirby Oil requests that it be permanently relieved of the obligation to file Form EIA-782B. *See* Letter from Garland Kirby, Kirby Oil, to OHA, June 16, 2009 (Application for Exception). Kirby Oil maintains that completing the form has become burdensome in light of the difficult economic times. *Id.* The firm states that the clerk who completes the report “only works two days per week” and, therefore, “it is a burden for our office to continue participating [in filing the form].” *Id.*

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 Kirby Oil to give the company an opportunity to discuss its request for relief. *See* Memorandum of Telephone Conversation between Garland Kirby, Kirby Oil, and Kimberly Jenkins-Chapman, OHA, July 29, 2009. Kirby Oil states that the company has 11 employees, two of which perform administrative tasks. *Id.* The company president states that his administrative staff employees are responsible for completing Form EIA-782B and that they may retire in the near future. *Id.* He further states that when his administrative employees retire he will be left with the task of completing the form which is burdensome. *Id.* It takes Kirby Oil administrative staff employees approximately one hour to compile the necessary information to complete Form EIA-782B. *Id.*

IV. Analysis

The Form EIA-782B reporting requirement requires common information on pricing and inventory changes for various refined petroleum products. The EIA estimates that it should normally take a firm approximately two and one-half hours per month to complete the form. *See* Section 10 of General Instructions to Form EIA-782B. As mentioned above, the burden of the requirement can be substantially reduced by the use of estimates. *See* Section 7 of the General Instructions for Form EIA-782B. Every reporting firm is burdened to a certain extent by the reporting requirement. Exception relief is appropriate only where the reporting requirement poses a serious hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2). In other words, relief is appropriate where the reporting requirement adversely affects the firm to a significantly greater degree than it affects other firms.

In this case, Kirby Oil does not claim that it is adversely affected by the reporting requirement to a greater degree than other similar firms. To the contrary, it takes an administrative staff employee approximately one hour each month to compile the necessary data for the form, significantly less than EIA’s estimated time. *See* Memorandum of Telephone Conversation between Garland Kirby, Kirby Oil, and Kimberly Jenkins-Chapman, OHA, July 29, 2009. Kirby Oil bases its request solely on the unsupported assertion that compiling the data for the form has become burdensome. In fact, we find that one hour is a short amount of time to complete the form. Kirby Oil’s contention that the company’s administrative employees might be retiring in the near future and the task of completing Form EIA-782B would be left to the company president, absent any showing of serious hardship, inequity, or unfair distribution of burdens, is insufficient to warrant relief.

As the foregoing indicates, Kirby Oil has not shown that the requirement to complete Form EIA-782B is burdensome to the firm in a manner that distinguishes it from other similarly affected firms. 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 Kirby Oil Co., Inc., Case No. TEE-0061, be, and hereby is, denied.

(2) Administrative review of this Decision and Order may be sought by any person who is aggrieved or adversely affected by the denied of exception relief. Such review shall be commenced by the filing of 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 835, Subpart J.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: August 4, 2009