April 14, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: Lykins Oil Company

Date of Filing: January 12, 2006

Case No.: TEE-0030

On January 12, 2006, Lykins Oil Company (Lykins) 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 relieved of the requirement to prepare and file the Energy Information Administration (EIA) Form EIA-782B, entitled "Resellers'/Retailers' Monthly Petroleum Product Sales Report," for the months August 2005 through September 2006. As explained below, we have determined that the Lykins request should be granted in part.

I. Background

The DOE's Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.[1] The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress found 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

[1] 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).

ability to anticipate and respond to potential energy shortages.[2]

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, and propane. In order to minimize the reporting burden, the EIA periodically selects a relatively small sample of companies to file Form EIA-782B[3] and permits reporting firms to rely on reasonable estimates.[4]

EIA designates some companies as "certainty" firms. A company is designated as such because it either (a) sells five percent or more of a particular product sales category in a state in which it does business, or (b) does business in four or more states. All certainty firms are included in the survey sample on a continuing basis because of their impact on the market. EIA examines the data that these companies submit more closely and considers the data more instructive in gauging market trends than data submitted by smaller firms. The continuity of the surveys cannot be maintained by replacing a certainty firm with a similar company since all companies of this kind are already survey participants.

II. Exception Criteria

OHA has authority to grant exception relief where the reporting requirement causes a "special hardship, inequity, or unfair distribution of burdens."[5] 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

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

[3] Firms that account for over five percent of the sales of any particular product in a state 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.

[4] Form EIA-782B stipulates that the firm must 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.

[5] 42 U.S.C. § 7194(a); *see* 10 C.F.R. § 1003.25(b)(2).

reporting requirement in a way that differs significantly from similar reporting firms.

The following examples illustrate some of the circumstances that may justify relief from the reporting requirement. We have granted exceptions where: the applicant's financial condition is so precarious that the additional burden of meeting the DOE reporting requirements threatens its continued viability;[6] the only person capable of preparing the report is ill and the firm cannot afford to hire outside help;[7] extreme or unusual circumstances disrupt a firm's activities;[8] a combination of factors render the reporting requirement an undue burden.[9]

On the other hand, 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. Inconvenience alone does not constitute a hardship warranting relief.[10] Neither does the fact that a firm is relatively small or that it has filed reports for a number of years constitute grounds for exception relief. If firms of all sizes, both large and small, are not included, the estimates and projections generated by the EIA's statistical sample will be unreliable.[11]

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[6] ***Mico Oil Co.*, 23 DOE ¶ 81,015 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co.*, 16 DOE ¶ 81,026 (1987) (firm in bankruptcy).**

[7] ***S&S Oil & Propane Co.*, 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Midstream Fuel Serv.*, 24 DOE ¶ 81,023 (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 months relief granted when computer operator broke wrist).**

[8] ***Little River Village Campground, Inc.*, 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,205 (1979) (hurricane); *Meier Oil Serv.*, 14 DOE ¶ 81,004 (1986) (three months where disruptions caused by installation of a new computer system left firm's records inaccessible).**

[9] ***Ward Oil Co.*, 24 DOE ¶ 81,002 (1994) (exception relief for 10 months was granted where personnel shortages, financial difficulties, and administrative problems resulted from the long illness and death of a partner).**

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

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

III. Lykins' Application for Exception

Lykins filed its exception application in January 2006.[12] 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 Lykins to give the firm an opportunity to discuss the request.[13] In a February 28, 2006 letter, Lykins supplemented its application.[14]

Lykins is a seller of petroleum products headquartered in Milford, Ohio. Lykins has filed Form EIA-782B each month since 1999.[15] Lykins states that prior to August 2005, it had eight employees in its accounting department.[16] Lykins states that the two employees, who prepared Form EIA-782B, abruptly left the firm.[17] The firm further states that a third employee needed temporary leave from work to care for an ill family member.[18] The firm states that, as a result, it has not been able to file Form EIA-782B. Finally, the firm states that it is in the process of hiring additional employees, one of whom will be assigned responsibility for the reporting requirement.[19]

In the course of considering the Lykins application, we also contacted a representative from the Energy Information Administration (EIA) and obtained the following information. Lykins Oil Company is a "certainty firm" -- a firm that (i) sells 5 percent or more of a particular product sales category in a state in which it does business or (ii) does business in four or more states.[20] Certainty firms are of great importance to the accuracy of the data samples because of the size and extent of their

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[12] Lykins Oil Company Application for Exception, submitted to OHA on January 12, 2006.
[13] Letter from Ronald D. Hester, OHA to Mr. Robert J. Manning, Lykins Oil Company, dated February 13, 2006.
[14] Letter from Julie Jump c/o Mr. Robert J. Manning to Ronald D. Hester, OHA, dated February 28, 2006.
[15] Conversation between Ronald D. Hester, OHA and Tammy Heppner, EIA on January 13, 2006.
[16] Letter from Julie Jump c/o Mr. Robert J. Manning to Ronald D. Hester, OHA, dated February 28, 2006.
[17] *Id.*
[18] Lykins Oil Company Application for Exception, submitted to OHA on January 12, 2006.
[19] *Id.*
[20] Conversation between Ronald D. Hester, OHA and Tammy Heppner, EIA on January 13, 2006.

operations.[21] Accordingly, in order for a certainty firm to receive an exception, the firm must make a compelling showing that the filing requirement imposes a "serious hardship, inequity, or unfair distribution of burdens."

IV. Analysis

We have carefully examined the Lykins Application for Exception and have concluded that exception relief is warranted. The firm has experienced an abrupt, significant loss of personnel and is attempting to correct that situation. Retroactive exception relief (i.e. for the months August 2005 through March 2006) is not, however, appropriate. We grant retroactive exception relief with respect to these filing requirements only when the burden and hardship are outside the realm of ordinary business conditions experienced by those firms required to complete Form EIA-782B. For example, we granted retroactive relief where a condemnation action greatly disrupted a firm's business activities and ultimately required the divestiture of most of its business.[22] In contrast, Lykins has experienced a temporary staffing shortage. Accordingly, relief will be limited to a temporary prospective exception for the months April 2006 through September 2006.

IT IS THEREFORE ORDERED THAT:

(1) The Application for Exception filed by Lykins Oil Company, Case No. TEE-0030, be, and hereby is, granted in part as set forth in Paragraph (2) below.

(2) Lykins Oil Company is relieved of the requirement to file the EIA-782B report for the months April 2006 through September 2006.

(3) To the extent that the Application is denied, administrative review of this Decision and Order may be sought by any person who is 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

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[21] ***Id.***

[22] ***See, e.g., W. Gordon Smith Company,*** **Case No. VEE-0037 (1997),** http://www.oha.doe.gov/cases/eia/vee0037.htm

of this Decision and Order pursuant to 18 C.F.R. Part 385, Subpart J.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 14, 2006