

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of)
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)
THE B.F. GOODRICH COMPANY,) Docket No. 9159
a corporation,)
)
DIAMOND SHAMROCK CHEMICALS COMPANY,)
a corporation,)
)
and)
)
DIAMOND SHAMROCK PLASTICS CORPORATION,)
a corporation.)
)
)

ORDER REOPENING AND MODIFYING ORDER

On August 23, 1996, The Geon Company ("Geon") filed a Petition to Reopen and Modify Order ("Petition") in this matter. Geon was formed by respondent The B.F. Goodrich Company ("Goodrich") in 1993, and became the wholly-owned subsidiary of Goodrich into which Goodrich placed its vinyl chloride monomer ("VCM") and polyvinyl chloride ("PVC") resin and compound businesses. Goodrich subsequently sold all of its shares of Geon in two public offerings. As a result, Geon is currently the owner and operator of Goodrich's former operations in the VCM industry. Geon is joined in its Petition by respondent Goodrich.¹ In its Petition, Geon asks that the Commission reopen and modify the Modified Final Order issued on July 18, 1989, in Docket No. 9159 ("Order") to delete the prior approval provision set forth in Paragraph IX of the Order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure,

¹ Goodrich has joined in Geon's Petition by stating in an affidavit by Jon V. Heider, Goodrich's Executive Vice President and General Counsel, that it does not object to the modification sought by Geon.

16 C.F.R. § 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").² Should the Commission determine that deletion of the prior approval requirement would be inconsistent with the public interest, Geon requests that the Commission modify Paragraph IX to remove the prior approval requirement and replace it with a prior notice requirement.³ In the alternative, Geon requests that the Commission determine that the Order does not apply to Geon.⁴ The thirty-day public comment period on the Petition ended on September 30, 1996. No comments were received.

The Order for which Geon seeks reopening and modification arises from the Commission's 1988 decision that Goodrich's acquisition of the VCM business of respondent Diamond Shamrock Chemicals Company violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.⁵ On appeal from the Commission's decision and final order, the Commission and Goodrich stipulated to a modification of the Commission's final order which substituted divestiture of Goodrich's Calvert City, Kentucky, VCM plant ("Calvert City VCM plant") for divestiture of the La Porte, Texas, VCM plant originally ordered by the Commission to be divested. The order was further modified to require Goodrich to provide the acquirer with raw material feedstocks and services necessary for operation of the Calvert City VCM plant. On July 18, 1989, the Commission entered its Modified Final Order, which became final on July 25, 1989.

On February 21, 1990, the Commission approved Goodrich's divestiture of its Calvert City VCM plant to Westlake Monomers Corporation ("Westlake") in compliance with its divestiture obligations under Paragraph II of the Order. In connection with the divestiture, Goodrich, among other things, provided Westlake

² 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

³ Petition at 2.

⁴ Id. Geon states that, although it does not believe the Order applies to it, it is concerned that the Commission or its staff might take a contrary view. See Petition at 1.

⁵ The B.F. Goodrich Co., 110 F.T.C. 207 (1988), order modified, 112 F.T.C. 83 (1989) (entered pursuant to stipulation between Commission and Goodrich during appeal of Commission decision and final order).

with VCM technology and certain agreements pertaining to the Calvert City VCM plant, entered into agreements to supply or exchange raw material feedstocks and to supply necessary services and utilities, and granted Westlake a right of first refusal on the purchase of its retained ethylene plant, chlorine plant and utilities and services facilities ("Calvert City Assets") located adjacent to the Calvert City VCM plant, pursuant to the requirements of Paragraphs III, IV, VI, VII and VIII of the Order.

Following divestiture of the Calvert City VCM plant up until 1993, Goodrich's remaining VCM business and its PVC resin and compound businesses were conducted by Goodrich through its Geon Vinyl Division. Goodrich's remaining VCM operations consisted of its VCM plant located at La Porte, Texas, which is the plant designated for purposes of the feedstock exchange requirements set forth in Paragraph VII of the Order. Goodrich also continued to own and operate the Calvert City Assets which are the subject of the supply agreements with Westlake pursuant to Paragraph VI of the Order, as well as the right of first refusal pursuant to Paragraph VIII of the Order.

In 1993, Goodrich assigned all of the assets of its Geon Vinyl Division, including Goodrich's remaining VCM and PVC resin and compound businesses, to Geon, then a newly-formed subsidiary corporation wholly-owned by Goodrich. By the end of 1993, Goodrich had sold off all of the voting securities of Geon through two public offerings. As a result of its divestiture to Westlake and its spinoff of Geon, Goodrich no longer operates in the VCM industry and has no equity interest in Geon.⁶ Goodrich's former operations in the VCM industry are now owned and operated entirely by Geon.⁷ However, Goodrich continues to own and operate the Calvert City Assets, and to supply Westlake pursuant to agreements entered into at the time of divestiture pursuant to Paragraphs VI and VII.⁸

Paragraph I.A. of the Order defines respondent "Goodrich" to mean The B.F. Goodrich Company as well as, among other things, "its . . . successors, and assigns." The Commission believes

⁶ Petition at 1.

⁷ Id.

⁸ Goodrich's ongoing Order obligations, including supply agreements with Westlake entered pursuant to the Order, continue in effect for a period of ten years from the date of divestiture to Westlake.

that Geon, by virtue of its acquisition and operation of Goodrich's remaining VCM business, is a successor under the Order for purposes of the prior approval obligations of Paragraph IX.⁹ For the reasons discussed below, Geon's Petition to modify the Order by setting aside the prior approval requirement in Paragraph IX is granted.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. § 18a, to protect the public interest in effective merger law enforcement.¹⁰ The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements."¹¹

Narrow prior approval or prior notification requirements may be appropriate in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."¹² The need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

⁹ Geon may be a successor, or may in the future become a successor, to other ongoing obligations under the Order.

¹⁰ Prior Approval Policy Statement at 2.

¹¹ Id.

¹² Id. at 3.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order."¹³ The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement.¹⁴

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. No facts have been presented that overcome this presumption, and nothing in the record, including the Complaint and Order, suggests that the exceptions described in the Prior Approval Policy Statement are warranted.¹⁵ The Commission has therefore determined to reopen the proceeding in Docket No. 9159 and modify the Order to set aside the prior approval requirement set forth in Paragraph IX.¹⁶

Accordingly, IT IS HEREBY ORDERED that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that the Commission's order issued on July 18, 1989, be, and it hereby is, modified, as of the effective date of this order, to set aside Paragraph IX of the Order.

¹³ Id. at 4.

¹⁴ Id.

¹⁵ In its Petition, Geon states:

The industry covered by the Order -- the production and sale of VCM -- is at least national in scope and manufacturing facilities are expensive to acquire. It is unlikely that the acquisition of any competitively significant VCM plant in the United States could be completed without the parties first filing an HSR Form.

Petition at 2.

¹⁶ This modification applies both to respondent Goodrich and to successor Geon.

By the Commission.

Donald S. Clark
Secretary

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ISSUED: December 12, 1996