

IN THE MATTER OF

THE B.F. GOODRICH COMPANY, ET AL.

MODIFIED FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9159. Final Order, Mar. 15, 1988—Modified Final Order, July 18, 1989*

This modified final order, issued pursuant to a stipulation between the Commission and B.F. Goodrich and a joint motion granted in the court of appeals, requires Goodrich to divest its Calvert City, Ky. facility, for the production of vinyl chloride monomer (VCM) and ethylene dichloride, instead of the LaPorte VCM plant.

Appearances

For the Commission: *Rhett R. Krulla.*

For the respondents: *Tom D. Smith, Jones, Day, Reavis & Pogue,*
Washington, D.C. *Richard W. Pogue, Jones, Day, Reavis & Pogue,*
Cleveland, OH.

MODIFIED FINAL ORDER

The Commission issued a Final Order in this proceeding on March 15, 1988, and respondent, The B.F. Goodrich Company ("Goodrich"), subsequently filed a petition for review of that Order in the United States Court of Appeals for the Second Circuit. On April 5, 1989, the Commission and Goodrich filed a joint motion asking that court to modify the Commission's Final Order pursuant to a Stipulation between the Commission and Goodrich. The parties expressly agreed that entering into the Stipulation did not "constitute an admission of any liability or of any issue of law or fact." Commissioner Azcuenaga issued the attached dissent to the Commission's entry into the Stipulation, later joined by Commissioner Strenio. On April 25, 1989, the court of appeals granted the parties' joint motion and entered its order modifying the Commission's Final Order of March 15, 1988.

Now therefore, *it is hereby ordered*, that the aforesaid "Final Order" be, and hereby is, modified in accordance with the order of the Court of Appeals to read as follows:

*Complaint, Final Order, etc. previously published at 110 FTC 207 (1988).

FINAL ORDER

I.

DEFINITIONS

It is ordered, That for purposes of this order the following definitions shall apply:

A. "*Goodrich*" means The B.F. Goodrich Company, a corporation organized under the laws of New York with its principal place of business in Akron, Ohio, and its directors, officers, agents, and employees, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. "*Calvert City VCM Plant*" means the manufacturing facility for the production of VCM and ethylene dichloride ("EDC") owned by Goodrich and located at Calvert City, Kentucky, and all of the VCM and EDC assets, titles, properties, interests, rights and privileges, tangible and intangible, located at this facility.

C. "*VCM*" means vinyl chloride monomer, a gaseous, reactive, acyclic intermediate chemical, with chemical identity $\text{CH}_2=\text{CHCl}$, also called chloroethylene or monochloroethylene.

II.

It is ordered, That within twelve (12) months from the date this order becomes final, Goodrich shall divest, absolutely and in good faith, at no minimum price, the Calvert City VCM Plant. At the option of the acquirer Goodrich shall also divest to the acquirer, at an appraised fair market value, up to 58 acres of land adjacent to the Calvert City VCM Plant, as well as all necessary or appropriate easements and rights-of-way. The purpose of the divestiture is to establish the Calvert City VCM Plant as a viable competitor in VCM, by insuring its continuation as an ongoing, viable enterprise in the VCM industry; and to remedy the lessening of competition resulting from the acquisition of certain VCM assets by Goodrich. The divestiture shall be made only to an acquirer or acquirers, and only in a manner, that receives the prior approval of the Federal Trade Commission.

Pending divestiture, Goodrich shall take all measures necessary to maintain the Calvert City VCM Plant in its present condition and to

prevent any deterioration, except for normal wear and tear, of any part of the Calvert City VCM Plant, so as not to impair the Calvert City VCM Plant's present operating viability or market value.

III.

It is further ordered, That at the time of the divestiture required by this order, Goodrich shall provide to the acquirer of the Calvert City VCM Plant, on a nonexclusive basis, all VCM technology (including patent licenses and know-how) used by Goodrich or developed by Goodrich for use, in the Calvert City VCM Plant; and

For a period of one (1) year following the divestiture required by this order, Goodrich shall provide the acquirer of the Calvert City VCM Plant, if the acquirer so requests, such additional know-how as may reasonably be required to enable such acquirer to manufacture and sell VCM. Goodrich shall charge the acquirer no more than its own costs for providing such additional know-how.

IV.

It is further ordered, That at the time of the divestiture required by this order, Goodrich shall assign to the acquirer of the Calvert City VCM Plant all VCM supply, sales, toll, or exchange agreements pertaining to the Calvert City VCM Plant, except for those agreements describing Goodrich's VCM supply arrangements with Occidental Chemical Corporation; and Goodrich shall make available to the acquirer all customer records and files (other than those describing its VCM supply arrangements with Occidental Chemical Corporation) relating to merchant sales of VCM (at any time since January 1, 1985) from the Calvert City VCM Plant, and Goodrich shall deliver to the acquirer such of those records and files as the acquirer may request.

V.

It is further ordered, That if Goodrich has not divested the Calvert City VCM Plant within the twelve-month period provided in paragraph II of this order, the Federal Trade Commission may appoint a trustee to effect the divestiture. The trustee shall be a person with experience and expertise in acquisitions and divestitures. Neither the appointment of a trustee nor a Commission decision not to appoint a trustee under this paragraph V of the order shall preclude the

Commission from seeking civil penalties and other relief available to it including a court-appointed trustee, for any failure by Goodrich to comply with this order.

Any trustee appointed by the Commission pursuant to this paragraph V shall have the following powers, authority, duties, and responsibilities:

A. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest the Calvert City VCM Plant. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission.

B. The trustee shall have full and complete access to the personnel, books, records and facilities of the Calvert City VCM Plant, and Goodrich shall develop such financial or other information relevant to the Calvert City VCM Plant as the trustee may reasonably request. Goodrich shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Goodrich shall extend the time for divestiture under this paragraph V in an amount equal to the delay, as determined by the Commission.

C. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest at no minimum price, and with the purposes of the divestiture as stated in paragraph II of this order, subject to the prior approval of the Commission.

D. The trustee shall serve, without bond or other security, at the cost and expense of Goodrich on such reasonable and customary terms and conditions as the Commission may set. The trustee shall have authority to retain, at the cost and expense of Goodrich, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestiture. The trustee shall account for all monies derived from the divestiture and for all expenses incurred. After approval by the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Goodrich, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in

significant part on a commission arrangement contingent on the trustee divesting the Calvert City VCM Plant.

E. Goodrich shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order, unless the Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, gross negligence, or the willful or wanton acts or bad faith of the trustee.

F. Promptly upon appointment of the trustee and subject to the approval of the Federal Trade Commission, Goodrich shall, subject to the Federal Trade Commission's prior approval and consistent with provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

G. If the trustee ceases to act or fails to act diligently, the Commission may appoint a substitute trustee.

H. The Commission may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

I. The trustee shall have no obligation or authority to operate or maintain the Calvert City VCM Plant.

J. The trustee shall report in writing to Goodrich and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

VI.

It is further ordered, That for a period of ten (10) years from the date the Calvert City VCM Plant is divested, Goodrich shall, at the acquirer's request, contract with the acquirer to provide to the Calvert City VCM Plant such utilities and services as are necessary for the operation of the Calvert City VCM Plant and such commercially reasonable quantities of ethylene and chlorine as the acquirer desires, up to the average 1986-1988 practical production capacity of Goodrich's ethylene and chlorine production facilities located at, or near, Calvert City. The price, terms, and conditions Goodrich shall offer the acquirer of the Calvert City VCM Plant for ethylene and chlorine shall be not greater than the prevailing market price, terms, and conditions for comparable domestic sales of chlorine and ethylene to Gulf Coast EDC/VCM producers, adjusted for a freight differential

to Calvert City (such freight differential for chlorine shall be no greater than the lowest available price for transportation of chlorine by barge from a mid-point location on the Gulf Coast; such per pound freight differential for ethylene shall be no greater than the then current average actual per pound cost which Goodrich incurs for the transportation of propane to Calvert City). The prices, terms, and conditions Goodrich shall offer the acquirer of the Calvert City VCM Plant for utilities and services shall not be greater than an amount that would be sufficient to allow Goodrich to recover its fully allocated costs, including a fair return on its investment. In the event of any dispute between Goodrich and the acquirer over the price, terms, and conditions at which Goodrich shall offer such utilities and services to the Calvert City VCM Plant, Goodrich shall submit to binding arbitration to resolve the dispute. Goodrich shall also supply to the acquirer, f.o.b. Gulf Coast manufacturing location, until November 30, 1991, at Goodrich's acquisition cost, such quantities of EDC as requested by the acquirer for use in the Calvert City VCM Plant.

VII.

It is further ordered, That, at the acquirer's request, and on fourteen (14) months' notice prior to the expiration of Goodrich's then current supply contract(s) for ethylene and/or chlorine for use in VCM manufacture at its La Porte, Texas plant, Goodrich shall exchange with the acquirer on a pound-for-pound basis with no differential payment by either party, such quantities as the acquirer may designate (not to exceed the amount under the contract then expiring and in total not to exceed the average 1986-1988 practical production capacity of Goodrich's ethylene and/or chlorine (as applicable) production facilities located at, or near, Calvert City) of ethylene, chlorine or both, by delivery by Goodrich to the Calvert City VCM Plant in exchange for delivery by the acquirer, or by such person(s) as the acquirer may designate, to Goodrich's La Porte VCM Plant. The length of such exchange shall be commercially reasonable, but in any event no less than the length of the common practice in the industry and shall not extend more than ten (10) years from the date of divestiture without Goodrich's consent. Goodrich shall notify the acquirer of the termination date(s) and quantities of each of its ethylene and chlorine supply contracts, subject to, in all instances, appropriate confidentiality agreements negotiated between Goodrich

and the acquirer. In the case of an ethylene or chlorine supply contract that by its term requires Goodrich to give notice in order for the contract to terminate, the acquirer may give the notice required by this paragraph six (6) months prior to any date such notice by Goodrich may be given. Goodrich's obligation to effect an exchange pursuant to such notice by the acquirer shall commence on the date the underlying contract would expire if Goodrich gave timely notice of cancellation to its supplier.

VIII.

It is further ordered, That Goodrich shall take all reasonable measures necessary to maintain in good operating condition the ethylene, chlorine, utilities, and service facilities that it owns and that are located at, or near, the Calvert City VCM Plant so long as Goodrich has any supply obligations pursuant to paragraphs VI or VII of this order; *provided, however,* Goodrich shall have no obligation to maintain in good operating condition the particular facilities used to provide ethylene, chlorine, utilities, and services if the acquirer permits the utilities contract(s), service contract(s), supply contract(s) or exchange agreement(s) pertaining to that particular utility, service, or feedstock to lapse without requesting renewal or if the acquirer does not, at the time of the divestiture, enter into utilities contract(s), service contract(s), supply contract(s), or exchange agreement(s) pertaining to that particular utility, service, or feedstock. Goodrich shall give the acquirer a right of first refusal on the purchase of the aforesaid ethylene facilities, chlorine facilities, utilities and service facilities located at or near the Calvert City VCM Plant; and Goodrich shall take no action that may unreasonably interfere with any plan, or attempt, by the acquirer to build or acquire ethylene, chlorine, utilities, service, or any other facility related to the production, sale, or distribution of VCM at or near the Calvert City VCM Plant.

IX.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Goodrich shall not directly or indirectly acquire—other than the acquisition of manufactured product in the ordinary course of business—all or any part of the stock or assets of, or any interest in, any producer of VCM located in the United States without the prior approval of the Federal Trade Commission.

X.

It is further ordered, That Goodrich shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of paragraph II of this order, submit in writing to the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with that provision. Such compliance reports shall include, among other things that may be required from time to time, a full description of all contacts and negotiations relating to the divestiture of the Calvert City VCM Plant, including the name and address of all parties contacted, copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture; and

Goodrich shall submit such further written reports of its compliance as the staff of the Commission may from time to time request in writing.

XI.

It is further ordered, That Goodrich, upon written request and on reasonable notice, for the purpose of securing compliance with this order, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Commission or of the Director of the Bureau of Competition:

A. Reasonable access during the office hours of Goodrich, which may have counsel present, to inspect and copy books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in the possession or control of Goodrich that relate to any matter contained in this order; and

B. Subject to the reasonable convenience of Goodrich, an opportunity to interview officers or employees of Goodrich, who may have counsel present, regarding such matters.

XII.

It is further ordered, That Goodrich shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation, which may affect compliance with the obligations arising out of this order.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission now joins, by a vote of 3 to 2, in a settlement to resolve the appeal of the B.F. Goodrich Co. from the Commission's order in this matter, which required a divestiture to restore competition in the vinyl chloride monomer ("VCM") market. Under the settlement, B.F. Goodrich will divest its Calvert City, Kentucky, VCM plant instead of divesting the LaPorte, Texas, VCM plant, as required by the Commission's order. I dissent.

With this settlement, the Commission relinquishes a procompetitive divestiture for a substantially less efficacious remedy. Indeed, the Calvert City plant is unlikely to be an independent competitive force in the industry for the long term, primarily because Goodrich will control essential raw materials. In agreeing to this settlement, the Commission also casts aside a substantial investment of time and resources, both public and private, in litigating and adjudicating this case, for no compelling reason and in haste.

This settlement perversely secures the worst of two worlds. On one hand, the settlement is insufficient to eliminate the competitive concerns at the heart of this case. On the other hand, the settlement, which requires detailed Commission review of complex pricing decisions for an extended time, is highly regulatory and usually would be rejected on that ground alone. The settlement establishes the Commission as a kind of "Office of Price Administration," intrusively monitoring and policing pricing decisions for years.

What is the rationale for this extraordinary "compromise"? Nothing has changed since the Commission issued its opinion and final order except that the case has been briefed and argued before the court. Does the Commission have second thoughts about its opinion and order? (One of the three commissioners who now supports the relief imposed by the settlement found no violation of law on which to predicate any relief whatsoever when the Commission issued its opinion and order.¹ Presumably, this commissioner now believes that Goodrich has indeed violated the law.) If we made a mistake in fact or in law, vacating the order would be the appropriate remedy. If we continue to believe that we have applied the law correctly, then

¹ See Separate Statement of Chairman Daniel Oliver in *The B.F. Goodrich Co.*, FTC Docket No. 9159.

prosecution of the appeal, rather than evisceration of the order, would seem to be consistent with the public interest.

I believe that the Commission's original opinion and order with respect to the VCM market are correct. Acceptance of this settlement with its inadequate remedy and regulatory format most assuredly is not in the public interest.²

² I also dissent from the decision to file the settlement under seal.

IN THE MATTER OF
MIDCON CORP., ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9198. Complaint, Sept. 19, 1985—Final Order, July 18, 1989*

This final order adopts the initial decision in full, dismissing the complaint because of a failure to prove the likelihood of a substantial lessening of competition in a section of the country.

Appearances

For the Commission: *Marc G. Schildkraut and Robert Cheek.*

For the respondents: *Paul E. Goldstein, Philip R. Telleen, Priscilla A. Mims & Jane DiRenzo Segraves, Lombard, II. and James H. Sneed, Nathalie F. P. Gilfoyle, Carolyn Kay Weeder & Amy E. Hancock, McDermott, Will & Emery, Washington, D.C.*

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 2, 1987

I. HISTORY OF THE PROCEEDING

On September 19, 1985, the Federal Trade Commission issued a complaint charging that the acquisition of United Energy Resources, Inc. ("United")¹ by MidCon Corp. ("MidCon") violates Section 7 of

*Complaint previously published at 107 FTC 48 (1986).

¹ Abbreviations of the company names referred to in this decision are:

<u>Company</u>	<u>Abbreviation</u>
Midcon Corp.	MidCon
United Energy Resources, Inc.	United (or UER)
Natural Gas Pipeline Company of America	NGPL
United Gas Pipe Line Company	UGPL
High Island Offshore System	HIOS
U-T Offshore System	UTOS

(footnote cont'd)