

Interlocutory Orders, Etc.

THE DOW CHEMICAL COMPANY AND ROHM & HAAS

Docket No. C-4323. Order, June 14, 2011

Order denying respondent's petition to reopen the Commission's final order and respondent's request for additional time to divest certain assets related to acrylic acid monomers and latex polymers.

LETTER DENYING PETITION TO REOPEN AND MODIFY COMMISSION
ORDER

Dear Mr. Cary:

This letter responds to the Petition of The Dow Chemical Company To Reopen And Modify Order ("Petition To Reopen") filed by The Dow Chemical Company ("Dow") on February 14, 2011. The Federal Trade Commission ("Commission") has considered Dow's Petition To Reopen, as well as the affidavits filed with it by Dow. For the reasons stated here, the Commission has denied Dow's Petition To Reopen, and has also denied Dow's request for a further extension of time to divest.

On March 31, 2009, the Commission issued the Order by consent to remedy the effects on competition in markets in North America from the acquisition by Dow of Rohm & Haas Company. The Order requires, *inter alia*, Dow to divest assets and businesses relating to the research, development, manufacture, sale, and distribution of acrylic acid monomers and latex polymers to an acquirer approved by the Commission in a manner approved by the Commission. *See generally*, Order ¶¶ III.A. and related definitions. The Order requires Dow to divest these assets and businesses at "no minimum price." *Id.*

The assets that the Order requires Dow to divest include the Torrance Facility located in Torrance, CA. The Torrance Facility is defined by the Order to include "all of [Dow's] right, title and interest in Facility Assets" located at the real property described in Exhibit 5

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to the Order. *See* Order ¶ I.XXX. The Order defines Facility Assets to mean, “all real property interests, including rights, title, and interests to and in owned or leased property,” as well as fixtures, machinery, and equipment located at the facility. *See* Order ¶ I.LL. Generally described, the Torrance Facility includes Dow’s latex polymers plant, but also a parcel leased to Praxair Company (“Praxair”) and three smaller lots not presently used by Dow.

The Order required Dow to complete this divestiture within 240 days after the Commission accepted the Agreement Containing Consent Order for public comment. The Commission accepted the consent agreement for public comment on January 23, 2010. Accordingly, Dow should have divested the acrylic acid monomers and latex polymers assets and businesses by November 29, 2009.

Dow filed an application on August 14, 2009, seeking the Commission’s approval to divest Dow’s acrylic acid monomers and latex polymers businesses to Arkema Inc. (“Arkema”). Dow proposed to lease the latex polymers plant and the real property used for it to Arkema, and retain all ownership and other rights to the Torrance Facility not leased or granted to Arkema. The Commission’s staff and Dow’s counsel discussed the variance between the proposed lease and the Order’s requirement that Dow sell all of its rights to the Torrance Facility.

On November 10, 2009, while Dow’s divestiture application was still pending, Dow filed a petition to reopen and modify the Order to relieve Dow of its obligation to divest outright the Torrance Facility, which would thereby conform the Order to the divestiture Dow had negotiated with Arkema. Dow withdrew this petition on December 11, 2009, and requested instead that the Commission extend the time for Dow to divest the Torrance Facility as required by the Order for at least one year. Dow stated that Dow, “is prepared to divest the

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entire property in order to consummate the divestiture . . . as quickly as possible.”¹

On January 20, 2010, the Commission approved Dow’s application to divest the acrylic acid monomers and latex polymers businesses to Arkema. In its letter informing Dow that it had approved the divestiture, the Commission also extended the time to divest the Torrance Facility, as requested by Dow, to one year from the date Dow closed on the divestiture to Arkema. Dow closed on the divestiture to Arkema on January 25, 2010. Accordingly, under the extension granted by the Commission, Dow was required to divest the Torrance Facility (less the leasehold rights already conveyed to Arkema) by January 25, 2011.

Dow still has not completed the divestiture of the Torrance Facility as required by the Order, notwithstanding the one year extension granted by the Commission on January 20, 2010. In the months prior to the expiration of the extended divestiture deadline, the Commission’s staff alerted Dow many times that if Dow intended to seek a modification of the Order’s divestiture obligation or a further time extension it should do so before the January 25, 2011, extended divestiture deadline.

On February 14, 2011, Dow filed its Petition To Reopen. Dow asks the Commission to reopen and modify the Order pursuant to Rule 2.51 of the Commission’s Rules of Practice to relieve Dow of its obligation to divest, or in the alternative, to extend again the time to divest the Torrance Facility, this time for an additional three years. Dow contends that the Order should be reopened and modified on grounds of both changed circumstances and the public interest. Dow’s Petition To Reopen fails to make the required showing that

¹ Dow also had represented in the Agreement Containing Consent Order that Dow “can accomplish the full relief contemplated by” the Order. *See* Agreement Containing Consent Order ¶ 11. Dow’s representation that it could accomplish the relief required by the Order included its ability successfully to divest the Torrance Facility.

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the Order should be reopened either due to changed conditions of fact or law or on public interest grounds. Dow also fails to show good cause why the Commission should grant it another extension of time to divest.

STANDARD FOR REOPENING AND MODIFYING FINAL COMMISSION ORDERS

Section 5(b) of the FTC Act, 15 U.S.C. § 45, provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 4, 1986), at 4; *See* S.Rep. No. 96-500, 96th Cong. 2d Sess. 9 (1979)(significant changes or changes causing unfair disadvantage); *Phillips Petroleum Co.*, Docket No. C-1088, 78 F.T.C. 1573, 1575 (1971)(no modifications for changes reasonably foreseeable at time of consent negotiations); *Union Carbide Corp.*, Docket No. C-2902, 111 F.T.C. 748, 751 (1988)(must show changes in statutory or decisional law that have the effect of bringing the provisions into conflict with existing law, so that to continue the order would work an injustice, citing, *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)).²

² In an earlier petition to reopen and modify by *Union Carbide Corp.*, the Commission had refused to reopen and modify its order prohibiting Union Carbide from engaging in exclusive dealing arrangements, on the basis of a change in law, because exclusive dealing arrangements always were considered under the rule of reason and “Carbide’s asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing.” 108 F.T.C. 184, 186 (1986).

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The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Thus, Rule 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* "satisfactory showing" of a legitimate public interest reason or other reasons justifying the requested modification.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the requisite satisfactory showing to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why the public interest requires that the order should be modified³. If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981)(strong public interest considerations support repose and finality).

³ The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

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**DOW'S PETITION TO REOPEN FAILS TO SHOW
CHANGED CIRCUMSTANCES THAT REQUIRE
REOPENING AND MODIFYING THE ORDER**

Dow represents in its Petition To Reopen [redacted] is a changed circumstance from a year earlier. Petition To Reopen at 17. However, the circumstances [redacted] have not changed significantly, [redacted].

[redacted]

[redacted]

[redacted]⁴

[redacted]⁵ [redacted]⁶ [redacted]

[redacted] This changed circumstance is insufficient to support reopening the Order.

[redacted]

[redacted]⁷

[redacted]⁸ [redacted], Dow has not made the requisite showing to support reopening the Order under Rule 2.51. [redacted]

⁴ [redacted]

⁵ [redacted]

⁶ [redacted]

⁷ [redacted]

⁸ [redacted]

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[redacted]⁹ [redacted]

The Commission is not obliged to reopen and modify the Order unless Dow identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. [redacted]

[redacted] Moreover, Dow has nowhere asserted that any of these changes make the Order's divestiture obligation "harmful to competition," as stated in Section 5 of the F.T.C. Act.

[redacted] In any event, what is relevant is the change in circumstances since the Order issued (March 31, 2009), and not a year prior to the date the Petition To Reopen was filed (February 14, 2010). Dow has failed to establish that a significant change in circumstances eliminates the need for the Order or makes its continued application inequitable.

Accordingly, Dow has not made the requisite showing required by Section 5 of the F.T.C. Act or Rule 2.51 of the Commission's Rules of Practice to warrant reopening and modifying the Order based on changed circumstances.

**DOW'S PETITION TO REOPEN DOES NOT SHOW THAT
THE ORDER SHOULD BE MODIFIED ON PUBLIC
INTEREST GROUNDS**

Dow argues in its Petition To Reopen that [redacted] the public interest requires that Dow be allowed to retain ownership of it and manage it. However, Dow's Petition To Reopen and the accompanying affidavits also suggest that almost any buyer could manage the Torrance Facility properly because the owner's day-to-day responsibilities at the Torrance Facility are minimal. Dow asserts that it has no day-to-day responsibilities at the Torrance Facility

⁹ [redacted]

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because Arkema provides necessary services to itself and other site occupants. Petition To Reopen at 11-12. Dow states that its only responsibilities are to maintain two environmental permits, and to make sure that property users don't interfere with each other's property rights. *Id.* [redacted]¹⁰ Petition To Reopen at 17-19. [redacted] Therefore, Dow has not made the satisfactory showing required by Rule 2.51 that the public interest requires Dow to continue to operate the Torrance Facility.

Dow also argues that its limited role as landlord at the Torrance Facility has eliminated the need for the Order's requirement that Dow divest the Torrance Facility. However, the Commission's rationale for issuing an Order that requires Dow to divest absolutely the Torrance Facility remains valid today. If it becomes necessary for Dow to maintain or construct easements across the portion of the property where Arkema operates the divested latex polymers plant, Dow may well do this work in a manner that would affect adversely Arkema's operation of the plant. Should Arkema seek an expansion of the capacity of utility easements or other infrastructure at Torrance to support adding capacity to Arkema's latex polymers plant, Dow might cooperate less willingly with its competitor in the Complaint market than would a third party owner of the property who could only benefit from Arkema's expansion of the latex polymers plant. For these reasons, leaving in place the Order's requirement for Dow to divest the Torrance Facility promotes achieving the Order's remedy.

Dow has not made the requisite showing that Dow is the only potential owner of the Torrance Facility with the resources and experience necessary to operate the property in a manner to achieve the Order's purposes. Dow also has failed to establish that there is less risk today than when the Commission issued the Order that Dow,

¹⁰ Dow states that it is willing to employ a third party manager to manage the site to make sure that Dow would operate it properly. Petition To Reopen at 22. If Dow could hire a manager to manage the site, so could any of the other potential purchasers.

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as Arkema's landlord, may interfere with Arkema's ability to optimize its use of the Torrance plant to compete in the Complaint market. Dow has not made an adequate showing of legitimate public interest to support reopening and modifying the Order to relieve Dow of its obligation to divest the Torrance Facility.

In addition, the public interest in the repose and finality of Commission Orders is particularly strong in this case. In order to get Commission approval of its acquisition of Rohm & Haas, Dow consented to an Order requiring divestiture of the entire Torrance parcel. Dow then negotiated a divestiture to Arkema that retained Dow's ownership of the parcel and filed a petition to reopen asking the Commission to relieve Dow of its divestiture obligation. When it was unsuccessful in obtaining Commission's staff's support for the divestiture to Arkema with the right to keep this property, Dow withdrew its petition, representing that it was prepared to divest the entire Torrance Facility after it completed the divestiture to Arkema. Having obtained Commission approvals for the Arkema divestiture and for a one-year extension of the time to divest the Torrance Facility, Dow once more asks the Commission to relieve Dow of its obligation to sell the Torrance Facility that Dow twice before has told the Commission that it would and could sell. Absent strong countervailing reasons, the public interest is not well-served by permitting a respondent repeatedly to seek to reopen and modify a final Commission Order to obtain relief from a divestiture to which the respondent consented.

The public interest in the finality and repose of the Order in this matter is clear. Dow has repeatedly affirmed that it is willing and able to divest the entire Torrance Facility. The Commission approved the Agreement Containing Consent Order and Dow's petition to divest the acrylic acid monomer and latex polymers businesses to Arkema, at least in part, based on that promise. Dow has not shown how its ability to compete in any market would be harmed by the required divestiture, nor how competition in any other respect would be injured. Under these circumstances, the public interest in the finality

of Commission Orders would not be promoted by relieving Dow of its obligation to divest the entire Torrance Facility.

Rule 2.51 of the Commission's Rules of Practice requires Dow to establish facts by affidavit to show a sufficient legitimate public interest to overcome the public interest in the repose and finality of Commission orders. Dow has failed to establish any legitimate public interest in Dow's continued ownership of the Torrance Facility, and failed to establish that the concerns that prompted the divestiture requirement no longer exist. Dow's interest in maintaining ownership of the Torrance Facility does not overcome the public interest in the finality of Commission Orders.

**DOW HAS NOT SHOWN GOOD CAUSE FOR A FURTHER
EXTENSION OF TIME TO DIVEST**

Dow's Petition To Reopen seeks the alternative relief of a three-year extension of time to divest the Torrance Facility if the Commission denies its petition to eliminate its obligation to divest the Torrance Facility. Petition To Reopen at 23. Rule 4.3(b) of the Commission's Rules of Practice provides that, "the Commission, for good cause shown, may extend any time limit prescribed . . . by order of the Commission. [W]here a motion to extend is made after the expiration of the specified period, the motion may be considered where the untimely filing was the result of excusable neglect." The "good cause" standard is not defined by the Rules of Practice, and provides the Commission with flexibility to extend the time provided by Commission Orders for respondents to act. However, the request to extend the time period presumptively must be filed before the period expires. *See* Rule 4.3(b); *see also*, 42 Fed. Reg. 30,150 ("This rule amendment deals with the situation where a motion to extend a time limit is itself filed out of time. In such a situation a movant will have to show that there was excusable neglect for the late filing."), and *In the Matter of General Mills, Inc.*, 86 F.T.C. 687 (1975) (absent excusable neglect and substantial prejudice, extension denied where request filed late).

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Dow first requested an extension of time to divest the Torrance Facility on December 11, 2009, after it negotiated an agreement with Arkema to lease rather than sell the Torrance latex polymers plant. At that time Dow requested an extension of at least one year to divest the remaining property. *See* Letter (December 11, 2009) from George S. Cary/Dow to Donald Clark at 2. The Commission extended the divestiture period to one year from the date that Dow closed on the divestiture to Arkema. *See* Letter (January 20, 2010) from Donald S. Clark to George S. Cary/Dow. Dow closed on the divestiture to Arkema on January 25, 2010, and so Dow should have divested the Torrance Facility by January 25, 2011.

Dow's request to extend the time for divestiture essentially argues [redacted]. The Order requires, however, that Dow divest the assets "at no minimum price." Order ¶ III.A.

Dow has therefore not made a sufficient showing of good cause to extend the time for divestiture of the Torrance Facility. Dow has argued that the Torrance Facility is harder to sell than it expected. It has not, however, offered any support for that assertion or explained what it will be able to do to sell the assets in the coming year that it could not have done in the past year. [redacted]¹¹ However, Dow appears unwilling or unable to negotiate the sale of the property despite the extension of time already granted by the Commission that extended the divestiture period from November 27, 2009, to January 25, 2011. Dow has had an adequate opportunity to divest the

¹¹ As a separate matter, Dow filed its request for an extension of time about three weeks after the end of the divestiture period. Rule 4.3(b) of the Commission's Rules of Practice provides that the Commission may extend any time limit prescribed by an Order "for good cause shown," except that when a motion to extend is made after the expiration of the specified period, the requester must also show "excusable neglect" for failing to file before the period expired. Dow has not provided any facts or argument to explain why Dow did not request an extension before the extended divestiture period expired. Therefore, Dow has not made any showing that its failure to request on time an additional extension of the divestiture period resulted from excusable neglect.

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Torrance Facility. Good cause to extend the divestiture deadline is lacking.

Accordingly, the Commission denies Dow's request for a second extension of the divestiture period. Dow has failed to establish good cause for the extension, nor excusable neglect for failing to request an additional extension before the expiration of the divestiture period.

By direction of the Commission.