

Complaint

94 F.T.C.

IN THE MATTER OF
LIQUID AIR CORPORATION OF NORTH AMERICA, ET
AL.

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

Docket C-2990. Complaint, Sept. 5, 1979 — Decision, Sept. 5, 1979

This consent order, among other things, requires a San Francisco, Calif. producer and seller of industrial gases, to divest as a unit within two years, specified air separation plants and other operations located in the areas of major competitive overlap between the firm and Chemetron Corporation, a Chicago, Ill. subsidiary of Allegheny Ludlum Industries, Inc. To promote the viability of the divested package and completely eliminate any possible overlap in the Southeast, the firm must also divest Chemetron's Knoxville acetylene plant and Chemetron's Chattanooga hydrogen plant. Liquid Air is further required to divest its Texas carbon dioxide operations and certain Chemetron retail stores, together with the distribution equipment; customer, dealer and distributor contracts; and customer lists associated with these enterprises. Additionally, the three companies are prohibited from acquiring any air separation production facilities for ten years.

Appearances

For the Commission: *Kenneth G. Starling, Stephen C. Garavito and Peter L. Feldman.*

For the respondents: *Miles W. Kirkpatrick, Morgan, Lewis & Bockius, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an agreement which, if consummated, would result in a violation of 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) and that said agreement therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and having found that a proceeding with respect to said violation is in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

1. For purposes of this complaint, the following definitions shall apply:

(a) "Industrial gases" are gases, except for common fuel gases, sold in compressed, liquid, and solid form, including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

(b) "Air separation gases" are oxygen, nitrogen and argon in gaseous or liquid form, or both.

(c) "Air separation gases producers" are those companies engaged in both (1) the production, and (2) the distribution and sale of the air separation gases.

(d) "Air separation plant" is a facility that produces air separation gases.

II. Liquid Air Corporation of North America

2. Liquid Air Corporation of North America (Liquid Air) is a Delaware corporation with its principal place of business at 1 Embarcadero Center, San Francisco, California.

3. In the United States, Liquid Air sells industrial gases, and diving and industrial safety equipment through subsidiaries. Liquid Air also sells gases in Canada and Brazil through subsidiaries.

4. In 1977, Liquid Air's total domestic sales were approximately \$157.3 million, its domestic air separation gases sales were approximately \$47.3 million and its domestic carbon dioxide sales were approximately \$8.2 million.

5. Approximately 79% of the common stock of Liquid Air is owned by L'Air Liquide S.A. (L'Air Liquide). L'Air Liquide is one of the largest industrial gases companies in the world. In 1977, L'Air Liquide's sales exceeded \$1.4 billion and its assets were over \$1.325 billion.

6. At all times relevant hereto, Liquid Air sold and shipped its products throughout the United States and engaged in business in or affecting commerce within the meaning of the Clayton Act, as amended, and engaged in business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. Allegheny Ludlum Industries, Inc.

7. Allegheny Ludlum Industries, Inc. (Allegheny) is a corporation organized under the laws of Pennsylvania with its principal place of business at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania.

8. Allegheny is engaged primarily in the manufacture and sale of

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specialty steels and alloys, consumer products, industrial gases, welding products and other industrial products. Allegheny produces and sells industrial gases through Chemetron Corporation (Chemetron), a wholly-owned subsidiary that was acquired by Allegheny on November 30, 1977.

9. In 1977, Allegheny's total sales were approximately \$1.002 billion, its net earnings were approximately \$25.4 million, and its total assets were approximately \$1.075 billion.

10. At all times relevant hereto, Allegheny sold and shipped products throughout the United States and engaged in business in or affecting commerce within the meaning of the Clayton Act, as amended, and engaged in business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. Chemetron Corporation

11. Chemetron is a wholly-owned subsidiary of Allegheny. It is a Delaware corporation with its principal place of business at 111 East Wacker Drive, Chicago, Illinois. Chemetron is engaged primarily in the production and sale of industrial gases, welding products, piping components and specialty chemicals.

12. In 1977, Chemetron had total sales of \$494 million.

13. In the United States, Chemetron sells its industrial gases through its Industrial Gases Division (IGD) and its Carbon Dioxide Division (Cardox).

14. In 1977, IGD's total domestic sales were approximately \$83 million and its domestic air separation gases sales were approximately \$58.8 million.

15. In 1977, Cardox's domestic carbon dioxide sales were approximately \$41.8 million.

16. At all times relevant hereto, Chemetron sold and shipped products throughout the United States and engaged in business in or affecting commerce within the United States and engaged in business in or affecting commerce within the meaning of the Clayton Act, as amended, and engaged in business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

Agreement

17. On or about June 5, 1978, Liquid Air, Allegheny and Chemetron entered into an agreement under which Liquid Air would acquire the total domestic industrial gases assets of IGD. In return, Allegheny would acquire 3.335 million shares of Liquid Air, approxi-

mately 33% of Liquid Air's total outstanding common shares. The value of the transaction, based on the selling price of Liquid Air stock on the date of the agreement, was approximately \$104 million.

18. Under the terms of the agreement, Allegheny would have four representatives out of fourteen on Liquid Air's Board of Directors.

VI. Trade and Commerce

19. The relevant lines of commerce are the production, distribution and sale of air separation gases by air separation gases producers, and the production, distribution and sale of carbon dioxide.

20. Barriers to entry are high in each of the relevant lines of commerce.

A. Air Separation Gases

21. The relevant sections of the country for the production, distribution and sale of air separation gases are Southern California, the Texas-Louisiana Gulf Coast, and the Middle Southeast.

22. The Southern California Air Separation Gases Market is the area within a 150 mile radius of Los Angeles.

23. The Texas-Louisiana Gulf Coast Air Separation Gases Market is the area encompassing the Gulf Coast concentration of air separation plants from Victoria, Texas to Lake Charles, Louisiana, and their normal marketing areas.

24. The Middle Southeast Air Separation Gases Market is the area encompassing the air separation plants in Tennessee, North Carolina, South Carolina, Georgia and northern Alabama, and their normal marketing areas.

25. Each of the relevant sections of the country for the production, distribution and sale of air separation gases is highly concentrated. Four-firm concentration in each section exceeds 84%.

26. Liquid Air and IGD occupy significant positions in each of the relevant sections of the country for the production, distribution and sale of air separation gases.

B. Carbon Dioxide

27. The relevant section of the country for the production, distribution and sale of carbon dioxide is the area south of a line which extends from Lake Charles, Louisiana across Beaumont, Texas, west through Austin and San Antonio to the Mexican Border (Carbon Dioxide Gulf Coast Market).

28. The Carbon Dioxide Gulf Coast Market is highly concentrated. Four-firm concentration was approximately 99% in 1977. Liquid Air and Cardox each accounted for more than 33% of carbon dioxide sales in the Carbon Dioxide Gulf Coast Market in 1977.

VII. Effects of the Proposed Transaction

29. The effects of the proposed transaction may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce, in the relevant sections of the country, in the following ways, among others:

- (a) Substantial direct competition between Liquid Air and Chemetron in the relevant lines of commerce will be eliminated;
- (b) Already high concentration in the relevant lines of commerce will be increased;
- (c) High barriers to entry into the relevant lines of commerce will be further raised;
- (d) IGD will be eliminated as a significant independent competitive influence on the relevant lines of commerce;
- (e) The likelihood of eventual deconcentration of the relevant lines of commerce may be substantially lessened;
- (f) The likelihood of interdependent behavior among firms in the relevant lines of commerce will be substantially increased.

30. In addition to the effects alleged in Paragraph 29, the proposed acquisition is likely to produce anticompetitive effects in the production, distribution and sale of air separation gases, in geographic areas beyond the relevant sections of the country alleged in Paragraphs 22, 23 and 24.

VIII. Violations Charged

31. The proposed acquisition of Liquid Air stock, would, if consummated, constitute a violation of 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).

32. The proposed acquisition of Chemetron assets would, if consummated, constitute a violation of 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).

33. By entering into the agreement giving rise to the violations described in Paragraph 31 and 32 herein, Allegheny, Chemetron and Liquid Air have violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Liquid Air Corporation of North America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Embarcadero Center, in the City of San Francisco, State of California.
2. Respondent Allegheny Ludlum Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 2 Oliver Plaza, in the City of Pittsburgh, Commonwealth of Pennsylvania.
3. Respondent Chemetron Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business

located at 111 E. Wacker Drive, in the City of Chicago, State of Illinois.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following terms shall have the following meanings:

a) "Liquid Air" shall mean Liquid Air Corporation of North America, and all subsidiaries which it controls.

b) "Allegheny" shall mean Allegheny Ludlum Industries, Inc., and all subsidiaries which it controls.

c) "IGD" shall mean the Industrial Gases Division of Chemetron Corporation, a wholly-owned subsidiary of Allegheny.

d) "Industrial gases" shall mean gases, except for common fuel gases, sold in compressed, liquid, and solid form, including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

e) "Air separation gases" shall mean oxygen, nitrogen and argon in gaseous or liquid form, or both.

f) "Air separation plant" shall mean a facility that produces air separation gases.

g) "Air separation gases asset" shall mean any asset used in the production, distribution or sale of any air separation gas.

h) "Acetylene" shall mean the gas produced by the combination of calcium carbide and water.

i) "Acetylene plant" shall mean a facility that produces acetylene.

j) "Air separation gases producer" shall mean a person who is engaged in both (1) the production, and (2) the distribution and sale of two or more of the air separation gases.

k) "Person" shall mean any individual, partnership, firm, corporation, association, or any other business or legal entity.

l) "Southern California" shall mean the area within a 150 mile radius of Los Angeles, California.

I

It is ordered, That within two (2) years from the date of service of this order upon respondents, Liquid Air shall divest absolutely all the assets and operations described below, as a unit, to an acquirer that shall be subject to the prior approval of the Federal Trade

Commission, so as to transfer these assets and operations as a going enterprise and a viable, competitive concern engaged in the production, sale and distribution of industrial gases, *provided, however*, that during such period Liquid Air may seek the approval of the Commission for the divestiture of such assets and operations to two or more acquirers.

Assets and Operations to be Divested

1. IGD's Mount Vernon, Indiana air separation plant;
2. IGD's Chattanooga, Tennessee air separation plant;
3. IGD's Richmond, Virginia air separation plant;
4. Liquid Air's La Porte, Texas air separation plant;
5. Liquid Air's Santa Fe Springs, California air separation plant;
6. IGD's Knoxville, Tennessee acetylene plant;
7. IGD's Chattanooga, Tennessee hydrogen plant;
8. IGD's six (6) retail stores in southern California, and one (1) retail store in Knoxville, Tennessee, and one (1) retail store in Richmond, Virginia.
9. IGD's existing customer, dealer and distributor contracts, customer lists, and distribution equipment associated with the Mount Vernon, Indiana, Richmond, Virginia, and Chattanooga, Tennessee air separation plants, Knoxville, Tennessee acetylene plant, and Chattanooga, Tennessee hydrogen plant.
10. IGD's existing customer contracts, customer lists and distribution equipment associated with the southern California, Knoxville, Tennessee, and Richmond, Virginia retail stores.
11. IGD's bulk liquid and cylinder customer and distributor contracts, customer lists and distribution equipment associated with:
 - (a) IGD's southern California bulk liquid and cylinder sales operations to be divested with Liquid Air's Santa Fe Springs, California air separation plant, and
 - (b) IGD's Stafford, Texas air separation plant to be divested with Liquid Air's La Porte, Texas air separation plant.

II

It is further ordered, That within two (2) years from the date of service of this order upon respondents, Liquid Air shall divest its carbon dioxide assets and operations located in the State of Texas, including carbon dioxide plants, distribution equipment, existing customer, dealer, and distributor contracts, and customer lists, to

one or more acquirers subject to the prior approval of the Federal Trade Commission, so as to transfer these assets and operations as viable competitive facilities engaged in the production, sale and distribution of carbon dioxide.

III

It is further ordered, That respondents shall not cause or permit the wasting or deterioration of the assets and operations to be divested in accordance with Paragraphs I and II of this order in a manner that impairs the marketability of any such assets and operations or:

(a) impairs in any manner the viability of the assets and operations divested in accordance with Paragraph I as a going concern engaged in the production, sale and distribution of industrial gases;

(b) impairs in any manner the viability of the assets and operations divested in accordance with Paragraph II as viable competitive facilities engaged in the production, sale and distribution of carbon dioxide.

Provided, however, that deterioration in the ordinary course of operation and normal wear is not a violation of this paragraph.

IV

It is further ordered, That for a period of nine (9) months after the divestiture of the assets and operations identified in Paragraph I, respondents shall not solicit customers divested pursuant to that paragraph.

V

It is further ordered, That for a period commencing on the effective date of this Order and continuing for ten (10) years from and after the date of service upon respondents of this order, respondents shall cease and desist from acquiring, without prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock or share capital of any United States air separation gases producer, or any of the air separation gases assets of any United States air separation gases producer, *provided, however,* that nothing in this order shall prevent respondents from acquiring (a) gas or any product for resale, (b) transportation, delivery or storage equipment, (c) cylinders, (d)

converters, (e) bulk customer stations, or (f) plant equipment not incorporated in an operating plant.

VI

It is further ordered, That within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until it has fully complied with Paragraphs I and II of this order, Liquid Air shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Liquid Air to make public its desire to divest the assets described herein, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture. Information to be supplied is subject to legally recognized privileges, and shall not be divulged by any representative of the Federal Trade Commission to any person except in response to a formal request from Congress or to compulsory process, or for the purpose of securing compliance with this order, or as is otherwise required by law.

VII

It is further ordered, That on the first anniversary date of the effective date of this order and on each anniversary date thereafter until the expiration of the prohibitions in Paragraph V of this order, respondents shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge with air separation gases producers made by respondents, the date of each such acquisition, merger or agreement, the products or services involved and such additional information as may from time to time be required.

VIII

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of

successor corporations, and that this order shall be binding on any such successor.

IN THE MATTER OF
PERPETUAL FEDERAL SAVINGS & LOAN ASSOCIATION

ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9083. Decision, Dec. 6, 1977 — Order, Sept. 6, 1979

This order withdraws a Commission order issued December 6, 1977, 90 F.T.C. 608, against a Washington, D.C. savings and loan association for having as directors individuals who simultaneously serve as directors of competitive financial institutions. Further, the complaint in this matter has been dismissed.

ORDER

On December 6, 1977 the Commission held that respondent Perpetual Federal Savings & Loan Association ("Perpetual") had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by having on its board of directors individuals who served simultaneously as directors of competing commercial banks. 90 F.T.C. 608, 648. Accordingly, the Commission issued a Final Order requiring Perpetual to cease and desist from having any individual serve as a director while at the same time serving as a director of any corporation engaged in the provision of any financial service in competition with Perpetual. 90 F.T.C. at 665-66. Perpetual filed a petition for review.

On November 14, 1978, this matter was remanded to the Commission by the United States Court of Appeals for the Fourth Circuit for reconsideration in light of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. Law 95-630, 92 Stat. 3641 (Nov. 10, 1978). Title II of that Act, the Depository Institution Management Interlocks Act of 1978, 92 Stat. 3672, codified at 12 U.S.C. 3201, *et seq.*, prohibits a range of interlocks between savings and loan associations and competing banks. Interlocks like those at issue in this proceeding are exempted from the Act's proscriptions for a period of ten years from the Act's enactment.

In the limited rebriefing that followed, both Perpetual and complaint counsel concurred that the December 6, 1977, Final Order should be withdrawn and the complaint dismissed. Complaint counsel construed Section 206 of Title II as impliedly exempting interlocks like Perpetual's from the reach of the Commission for ten years. According to Perpetual, passage of the Act confirmed that Commission jurisdiction over Perpetual's director interlocks was lacking, that its conduct did not violate the Federal Trade Commis-