

IN THE MATTER OF

PRAXAIR, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3648. Complaint, April 1, 1996--Decision, April 1, 1996*

This consent order requires, among other things, Praxair, Inc., a Connecticut corporation, to divest, within 12 months to Commission-approved acquirers, four CBI atmospheric gases production plants, located in Vacaville and Irwindale, California; Bozrah, Connecticut; and Madison, Wisconsin. If the transaction is not completed in the prescribed time, a trustee may be appointed to divest the four plants.

Appearances

For the Commission: *Ann B. Malester, James Holden and William Baer.*

For the respondent: *Nathan Eimer, Sidley & Austin, Chicago, IL.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Praxair, Inc. ("Praxair"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the common shares of CBI Industries, Inc. ("CBI"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and that such acquisition, if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the FTC Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Praxair is a corporation organized and existing under and by virtue of the laws of the United States, with its principal

executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut.

2. For purposes of this proceeding, respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. ACQUIRED COMPANY

3. CBI is a corporation organized and existing under and by virtue of the laws of the United States, with its principal executive offices located at 800 Jorie Boulevard, Oak Brook, Illinois.

4. CBI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On November 3, 1995, Praxair commenced a cash tender offer valued at approximately \$2 billion for all of the issued and outstanding common shares of CBI. On December 22, 1995, Praxair and CBI entered into a definitive agreement whereby Praxair will acquire all of the issued and outstanding common shares of CBI.

IV. THE RELEVANT MARKETS

6. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the acquisition are the manufacture and sale of merchant nitrogen, merchant oxygen, and merchant argon, whether sold in liquid form or in cylinders.

7. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the acquisition on the merchant nitrogen and merchant oxygen markets are:

- a. Northern California;
- b. Southern California; and

c. The Northern Midwest and Northeast United States, and narrower markets contained therein, including the Eastern Connecticut area and the Western Wisconsin/Southeastern Minnesota area.

8. For purposes of this complaint, the relevant geographic area in which to analyze the effects of the acquisition on the merchant argon market is the United States, and narrower markets contained therein, including the Eastern Connecticut area and the Western Wisconsin/Southeastern Minnesota area.

9. The relevant markets are highly concentrated whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios. In addition, CBI's Madison, Wisconsin and Bozrah, Connecticut plants are the closest competing facilities, geographically, to Praxair's Minneapolis, Minnesota and Suffield, Connecticut plants, respectively.

10. New entry into the merchant nitrogen, merchant oxygen, and merchant argon markets would be time consuming, costly and unlikely.

11. Praxair and CBI are actual competitors in the relevant markets.

V. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct actual competition between Praxair and CBI;

b. By enhancing the likelihood of collusion or coordinated action between or among the remaining firms in Northern and Southern California;

c. By eliminating competition between the two closest competitors, geographically, in Eastern Connecticut, and the two closest competitors, geographically, in Western Wisconsin and Southeastern Minnesota;

d. By increasing the likelihood that Praxair would unilaterally exercise market power in Eastern Connecticut, and in Western Wisconsin and Southeastern Minnesota; and

e. By increasing the likelihood that consumers would be forced to pay higher prices for merchant nitrogen, merchant oxygen, and merchant argon in the relevant geographic areas.

VI. VIOLATIONS CHARGED

13. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

14. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of all of the assets and businesses of CBI Industries, Inc. ("CBI"), and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 respondent has violated the said Acts, and that a 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, now in further conformity with the procedure described 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 Praxair, Inc. ("Praxair") is a corporation organized, existing and doing business under and by virtue of the laws of the United States, with its principal executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*Praxair*" means Praxair, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Praxair, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

B. "*CBI*" means CBI Industries, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns; its subsidiaries, divisions, and groups and affiliates controlled by CBI, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Commission*" means the Federal Trade Commission.

D. "*Acquisition*" means Praxair's acquisition of issued and outstanding common shares of CBI, pursuant to a cash tender offer dated November 3, 1995.

E. "*Merchant atmospheric gases*" means oxygen, nitrogen and argon sold in liquid form or packaged in cylinders.

F. "*Atmospheric gases plant*" means a facility that produces Merchant atmospheric gases.

G. "*Merchant Divestiture Assets and Businesses*" means, the Vacaville Plant, Irwindale Plant, Bozrah Plant, and Madison Plant, whether divested individually or in some combination, including the assets, properties, business and goodwill, tangible and intangible, used in the manufacture and sale of merchant atmospheric gases at those plants, including, without limitation, the following:

1. All real property interests, including rights, title and interest in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;
2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property, including distribution equipment and cylinders;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, software licenses, inventions, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;
4. Rights to and in contracts, including customer, dealer, distributor, supply and utility contracts;
5. Inventory, supplies and storage capacity, including storage vessels;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files; and
8. All items of prepaid expense.

H. "*Vacaville Plant*" means CBI's atmospheric gases plant located in Vacaville, California, together with all associated Merchant Divestiture Assets and Businesses.

I. "*Irwindale Plant*" means CBI's atmospheric gases plant located in Irwindale, California, together with all associated Merchant Divestiture Assets and Businesses.

J. "*Bozrah Plant*" means CBI's atmospheric gases plant located in Bozrah, Connecticut, together with all associated Merchant Divestiture Assets and Businesses.

K. "*Madison Plant*" means CBI's atmospheric gases plant located in Madison, Wisconsin, together with all associated Merchant Divestiture Assets and Businesses.

II.

It is further ordered, That:

A. Praxair shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Merchant Divestiture Assets and Businesses, and shall also divest such additional ancillary CBI assets and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Merchant Divestiture Assets and Businesses.

B. Praxair shall divest the Merchant Divestiture Assets and Businesses, either individually or in some combination, only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the Merchant Divestiture Assets and Businesses as an ongoing, viable operation or operations, engaged in the same business in which the Merchant Divestiture Assets and Businesses are engaged at the time of the proposed divestiture, and to remedy the lessening of competition resulting from the proposed acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the Merchant Divestiture Assets and Businesses, Praxair shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Merchant Divestiture Assets and Businesses, and to prevent the destruction, removal, wasting, deterioration or impairment of the Merchant Divestiture Assets and Businesses except for ordinary wear and tear.

D. Praxair shall comply with all terms of the Agreement to Hold Separate attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect until such time as respondent has divested all of the Merchant Divestiture Assets and Businesses as required by this order.

III.

It is further ordered, That:

A. If Praxair has not divested, absolutely and in good faith, and with the prior approval of the Commission, the Merchant Divestiture

Assets and Businesses within twelve (12) months of the date this order becomes final, the Commission may appoint a trustee to divest the Merchant Divestiture Assets and Businesses. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Praxair shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph III shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Praxair to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A., Praxair shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Praxair, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Praxair has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Praxair of the identity of any proposed trustee, Praxair shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Merchant Divestiture Assets and Businesses.

3. Within ten (10) days after appointment of the trustee, Praxair shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture(s) required by this order.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.C.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time,

the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Merchant Divestiture Assets and Businesses, or to any other relevant information, as the trustee may request. Praxair shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Praxair shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Praxair shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Praxair's absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order, provided, however, if the trustee receives *bona fide* offers for any of the plants to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest that particular plant to the acquiring entity or entities selected by Praxair from among those approved by the Commission.

7. The trustee shall serve at the cost and expense of Praxair, without bond or other security unless paid for by Praxair, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Praxair, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Praxair, 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's divesting the Merchant Divestiture Assets and Businesses.

8. Praxair shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, 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.

11. The trustee shall have no obligation or authority to operate or maintain the Merchant Divestiture Assets and Businesses.

12. In the event that the trustee determines that he or she is unable to divest the Merchant Divestiture Assets and Businesses in a manner consistent with the Commission's purpose as described in paragraph II, the trustee may divest additional ancillary CBI assets of Praxair and effect such arrangements as are necessary to satisfy the requirements of this order.

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

IV.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Praxair has fully complied with paragraphs II and III of this order, Praxair shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Praxair shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts

being made to comply with paragraphs II and III including a description of all substantive contacts or negotiations for the divestiture(s) required by this order, including the identity of all parties contacted. Praxair shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture(s).

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, Praxair shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Praxair, relating to any matters contained in this order; and

B. Upon five (5) days' notice to Praxair, and without restraint or interference from Praxair, to interview officers, directors, or employees of Praxair, who may have counsel present, regarding any such matters.

VI.

It is further ordered, That until Praxair has completed all of its obligations under this order, Praxair shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondent shall not be obligated to comply with this order if Praxair abandons the proposed acquisition of CBI. For purposes of this order, Praxair will be deemed to have abandoned the proposed acquisition of CBI after it provides written

notice to the Commission that it has abandoned its proposed acquisition and has withdrawn any related notifications filed pursuant to Section 7A of the Clayton Act, as amended, 15 U.S.C. 18a.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between Praxair, Inc. ("Praxair"), a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the "Parties").

PREMISES

Whereas, on November 3, 1995, Praxair offered to purchase all of the outstanding common shares of CBI Industries, Inc. ("CBI"); and

Whereas, CBI, with its principal office and place of business located at 800 Jorie Boulevard, Oak Brook, Illinois, manufactures and markets, among other things, Merchant atmospheric gases; and

Whereas, Praxair, with its principal office and place of business located at 39 Old Ridgebury Road, Danbury, Connecticut, manufactures and markets, among other things, Merchant Atmospheric Gases; and

Whereas, the Commission is now investigating the Acquisition to determine whether it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission must place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Merchant Divestiture Assets and Businesses, as defined in paragraph I.G. of the Consent Agreement, during the period prior to the final acceptance

and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the Merchant Divestiture Assets and Businesses and the Commission's right to have the Merchant Divestiture Assets and Businesses continue as viable competitors; and

Whereas, the purposes of this Hold Separate and the Consent Agreement are:

A. To preserve the Merchant Divestiture Assets and Businesses as viable, competitive, and independent businesses pending divestiture of the Merchant Divestiture Assets and Businesses, and

B. To remedy any anticompetitive effects of the Acquisition; and

Whereas, Praxair's entering into this Hold Separate shall in no way be construed as an admission by Praxair that the Acquisition is illegal; and

Whereas, Praxair understands that no act or transaction contemplated by this Hold Separate shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Hold Separate.

Now, therefore, the Parties agree, upon the understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Praxair agrees to execute and be bound by the Consent Agreement.

2. Praxair agrees that from the date this Hold Separate is accepted until the earliest of the times listed in subparagraphs 2.a. - 2.b., it will comply with the provisions of paragraph 3. of this Hold Separate:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement Pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The time that divestiture of the Merchant Divestiture Assets and Businesses as required by paragraph II of the Consent Agreement is completed.

3. To assure the complete independence and viability of the Merchant Divestiture Assets and Businesses, and to assure that no material confidential information is exchanged between Praxair and the Merchant Divestiture Assets and Businesses, Praxair shall hold the Merchant Divestiture Assets and Businesses separate and apart on the following terms and conditions:

a. Within 30 days from the date this Hold Separate becomes final Praxair shall cause all of its rights, title and interest in the Merchant Divestiture Assets and Businesses, as defined in paragraph I.G. of the Consent Agreement, as well as all such necessary personnel, including but not limited to, payroll and marketing personnel, to be transferred to a separate corporation ("Nucorp"), and effect any other arrangements as are necessary to ensure that Nucorp has complete viability and independence from Praxair (meaning here and hereinafter, Praxair excluding the Merchant Divestiture Assets and Businesses, personnel connected with the Merchant Divestiture Assets and Businesses, and Nucorp as of the date this Agreement is signed, but including all other portions of CBI).

b. Nucorp shall be held separate and apart and shall be managed and operated independently of Praxair, except to the extent that Praxair must exercise direction and control over Nucorp to assure compliance with this Hold Separate or the Consent Agreement.

c. Praxair shall maintain the marketability, viability, and competitiveness of Nucorp, including the Merchant Divestiture Assets and Businesses, and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and it shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Nucorp including the Merchant Divestiture Assets and Businesses.

d. Praxair shall appoint a knowledgeable person among the top management of CBI's Merchant Atmospheric Gases Business to manage and maintain Nucorp on a day to day basis during the term of the Hold Separate. The manager shall have exclusive management and control of Nucorp, and shall manage Nucorp independently of Praxair's other businesses.

e. The Manager shall report exclusively to the Nucorp Management Committee ("Management Committee"). The Management Committee shall consist of the Manager; two other knowledgeable persons from among the top management of CBI's Merchant Atmospheric Gases Business; and two Praxair financial officers or a comparable, knowledgeable persons from Praxair's financial office who have no direct involvement with Praxair's Merchant Atmospheric Gases Business ("Praxair Management Committee Members"). The Chairman of the Management Committee shall be the Manager. Except for the Praxair Management Committee Members serving on the Management Committee, Praxair shall not permit any officer, employee, or agent of Praxair also to be an officer, employee or agent of Nucorp. Each Management Committee Member shall enter into a confidentiality agreement agreeing to be bound by the terms and conditions set forth in Attachment A, appended to this Hold Separate. The Management Committee shall meet monthly during the course of the Hold Separate, and as otherwise necessary. Meetings of the Management Committee during the term of the Hold Separate shall be audio recorded, and the recording shall be retained for two (2) years after the termination of the Hold Separate.

f. All material transactions, out of the ordinary course of business and not precluded by paragraph three hereof, shall be subject to a majority vote of the Management Committee.

g. Praxair shall not exercise direction or control over, or influence directly or indirectly, Nucorp, including the Merchant Divestiture Assets and Businesses, the Management Committee, or the Manager of Nucorp, any of their operations, assets, or businesses; provided, however, that Praxair may exercise only such direction and control over Nucorp as is necessary to assure compliance with this Hold Separate, the consent order and with all applicable laws and except as otherwise provided in this Hold Separate.

h. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating and

consummating the Acquisition, defending investigations or litigation, obtaining legal advice, complying with this Hold Separate or the consent order or negotiating agreements to divest assets, Praxair shall not receive or have access to, or the use of, any material confidential information of Nucorp or the activities of the Manager or Management Committee not in the public domain, nor shall Nucorp, the Manager, or the Management Committee receive or have access to, or the use of, any material confidential information about Praxair. Praxair may receive on a regular basis from Nucorp aggregate financial information necessary and essential to allow Praxair to file financial reports, tax returns, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets, not independently known to:

1. Praxair, with regard to Nucorp, including the Merchant Divestiture Assets and Businesses, from sources other than Nucorp or its employees or the Management Committee; or

2. The Management Committee or Nucorp or its employees, with regard to Praxair, from sources other than Praxair.)

- i. Except as is permitted by this Hold Separate, the Praxair Management Committee Members shall not receive any Nucorp material confidential information and shall not disclose any such information obtained through their involvement with Nucorp to Praxair or use it to obtain any advantage for Praxair. The Praxair Management Committee Members shall participate in matters that come before the Management Committee only for the limited purpose of considering any capital investment of over \$250,000, approving any proposed budget and operating plans, authorizing dividends and repayment of loans consistent with the provisions hereof, reviewing material transactions described in subparagraph 3.f, and carrying out Praxair's responsibilities under the Hold Separate and the Consent Agreement. Except as permitted by the Hold Separate, the Praxair Management Committee Members shall not participate in any matter, or attempt to influence the votes of the other directors on the Management Committee with respect to matters that would involve

a conflict of interest between Praxair and Nucorp, including the Merchant Divestiture Assets and Businesses.

j. Praxair shall not change the composition of the Management Committee unless a majority of the Management Committee consents. The Chairman of the Management Committee shall have the power to remove members of the Management Committee for cause and to require Praxair to appoint replacement members to the Management Committee in the same manner as provided in paragraph 3.e. of this Hold Separate. Praxair shall not change the composition of the management of the Merchant Divestiture Assets and Businesses, except that the Management Committee shall have the power to remove management employees for unsatisfactory performance or for cause.

k. If the Chairman of the Management Committee ceases to act or fails to act diligently, a substitute Chairman shall be appointed in the same manner as provided in paragraphs 3.d. and 3.e.

1. CBI personnel connected with Nucorp or the Merchant Divestiture Assets and Businesses or providing support services to Nucorp or the Merchant Divestiture Assets and Businesses as of the date this Hold Separate is signed shall continue, as employees of Praxair, to provide such services as of the date of this Hold Separate. Such Praxair personnel must retain and maintain all material confidential information relating to Nucorp, including the Merchant Divestiture Assets and Businesses on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Praxair business.

Such Praxair personnel shall also execute a confidentiality agreement prohibiting the disclosure of any material confidential information concerning Nucorp, including the Merchant Divestiture Assets and Businesses, or Praxair information.

m. Nucorp shall be staffed with sufficient employees to maintain the viability and competitiveness of the Merchant Divestiture Assets and Businesses, which employees shall be the Nucorp employees and may also be hired from sources other than Praxair. Each management employee of Nucorp shall execute a confidentiality agreement prohibiting the disclosure of any material confidential information concerning Nucorp.

n. Praxair shall circulate to the management employees of Nucorp and appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

o. Praxair shall cause Nucorp to expend funds for research and development, quality control, manufacturing and marketing of the products produced at Nucorp at a level not lower than that budgeted for the 1994 fiscal year, and shall increase such spending as deemed reasonably necessary in light of competitive conditions. Within thirty (30) days of the date of this Hold Separate, the Chairman of the Management Committee shall develop a budget and operating plan for the 1996 fiscal year that complies with the provisions of this paragraph and present it to the Management Committee for approval. If necessary, Praxair shall provide Nucorp with any funds to accomplish the foregoing. Praxair shall provide to Nucorp such support services as provided by CBI prior to the Acquisition.

p. Praxair shall provide Nucorp with sufficient working capital to operate at a level not less than the rate of operation in effect during the twelve (12) months preceding the date of this Hold Separate.

q. The Management Committee shall serve at the cost and expense of Praxair. Praxair shall indemnify the Management Committee against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Management Committee members.

r. The Management Committee shall have access to and be informed about all companies who inquire about, seek or propose to buy the Merchant Divestiture Assets and Businesses.

s. Notwithstanding the provisions of paragraph 3.i., companies who undertake a due diligence process in the course of negotiations to purchase Nucorp, or any part thereof, may be accompanied and assisted by either or both of the Praxair Management Committee Members, in addition to appropriate Nucorp employees selected by the Management Committee. The Praxair Management Committee Members may delegate tasks relating to such due diligence to attorneys, accountants and/or other financial employees of Praxair who are not directly engaged in the Praxair Merchant Atmospheric Gases Business; provided, however, that such Praxair employees, accountants and attorneys shall execute a confidentiality agreement prohibiting the disclosure of any Nucorp material confidential information.

4. Should the Federal Trade Commission seek in any proceeding to compel Praxair to divest itself of Nucorp, or any additional assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief, Praxair shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Praxair shall also waive all rights to contest the validity of this Hold Separate.

5. To the extent that this Hold Separate requires Praxair to take, or prohibits Praxair from taking, certain actions that otherwise may be required or prohibited by contract, Praxair shall abide by the terms of this Hold Separate or the Consent Agreement, and shall not assert as a defense such contract requirements in any action brought by the Commission to enforce the terms of this Hold Separate or the Consent Agreement.

6. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege or provision of applicable law, and upon written request with reasonable notice to Praxair made to its General Counsel, Praxair shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Praxair and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Praxair or relating to compliance with this Hold Separate;

b. Upon five (5) days' notice to Praxair, and without restraint or interference from it, to interview officers or employees of Praxair, who may have counsel present, regarding any such matters.

7. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND
REQUIREMENT FOR CONFIDENTIALITY

Praxair, Inc. ("Praxair") and CBI Industries, Inc. have entered into a Consent Agreement and Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Merchant Divestiture Assets and Businesses. Until after the Commission's order becomes final and the Merchant Divestiture Assets and Businesses are divested, the Merchant Divestiture Assets and Businesses must be managed and maintained as a separate company, independent of all other Praxair businesses. All competitive information relating to The Merchant Divestiture Assets and Businesses must be retained and maintained by the persons involved in the Merchant Divestiture Assets and Businesses on a confidential basis and such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment or agency involves any other Praxair business. Similarly, all such persons involved in any other Praxair business shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing competitive information about such business to or with any person whose employment or agency involves the Merchant Divestiture Assets and Businesses.

Any violation of the Consent Agreement or the Agreement to Hold Separate, incorporated by reference as part of the consent order, may subject Praxair to civil penalties and other relief as provided by law.

IN THE MATTER OF

THE STOP & SHOP COMPANIES, INC., ET AL.

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

Docket C-3649. Complaint, April 2, 1996--Decision, April 2, 1996

This consent order requires, among other things, the respondents to divest 17 supermarkets, within nine months, to Commission-approved acquirers. If the respondents fail to satisfy any of the divestiture provisions, the Commission may appoint a trustee to divest the supermarkets.

Appearances

For the Commission: *Ronald B. Rowe, James Fishkin and William Baer.*

For the respondents: *Richard Weisberg, Simpson, Thacher & Bartlett, New York, N.Y. and David Beddow, O'Melveny & Myers, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that respondents, The Stop & Shop Companies, Inc. ("Stop & Shop"), a corporation, and SSC Associates, L.P. ("SSC Associates"), a limited partnership, both subject to the jurisdiction of the Commission, have entered into an agreement to acquire Purity Supreme, Inc. ("Purity") in 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 a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows: