

Complaint

IN THE MATTER OF

AIR PRODUCTS AND CHEMICALS, 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 No. C-4299; File No. 101 0093
Filed September 8, 2010 — Decision, October 20, 2010

The consent order addresses allegations that Air Products and Chemicals, Inc.'s ("Air Products") acquisition of Airgas, Inc. would harm competition in five regional markets for bulk liquid oxygen and bulk liquid nitrogen. The consent order requires Air Products to divest certain assets relating to Airgas's bulk liquid oxygen and bulk liquid nitrogen business to an FTC-approved buyer within four months of its acquisition. The consent order further requires Air Products to maintain these assets' viability until they are divested. In the event Air Products is unable to divest the assets within the four month period, the Commission will appoint a trustee to oversee the divestiture.

Participants

For the *Commission*: Jeff Dahnke, Lisa D. DeMarchi Sleight,
Yolanda M. Gruendel, and Gregory P. Luib.

For the *Respondent*: Deborah L. Feinstein, Arnold & Porter.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Air Products and Chemicals, Inc. ("Air Products"), a corporation subject to the jurisdiction of the Commission, has made an offer to acquire all of the voting securities of Airgas, Inc. ("Airgas"), a corporation subject to the jurisdiction of the Commission, 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 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:

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I. RESPONDENT

1. Respondent Air Products 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 7201 Hamilton Boulevard, Allentown, PA 18195.

2. Airgas 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 259 North Radnor-Chester Road, Suite 100, Radnor, PA 19087.

3. Respondent Air Products and Airgas are engaged in, among other things, the production and sale of industrial gases, including, but not limited to, bulk liquid oxygen and bulk liquid nitrogen.

II. JURISDICTION

4. Respondent Air Products and Airgas are, and at all times relevant herein have been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. On February 11, 2010, Air Products announced its intention to acquire all outstanding common shares of Airgas pursuant to an all-cash tender offer for approximately \$7.0 billion, including the assumption of debt (the “Acquisition”). The Airgas board of directors rejected Air Products’ tender offer. More recently, on July 8, 2010, Air Products increased its original tender offer of \$60 per share to \$63.50 per share. Airgas remains hostile to Air Products’ tender offer.

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IV. THE RELEVANT MARKETS

6. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture and sale of:

- a. bulk liquid oxygen; and
- b. bulk liquid nitrogen.

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

- a. the Northeast;
- b. the Eastern Midwest;
- c. the Chicago-Milwaukee metropolitan area;
- d. the Southeast; and
- e. Oklahoma and surrounding areas.

V. THE STRUCTURE OF THE MARKETS

8. Respondent Air Products and Airgas are significant participants in each of the relevant markets, and each relevant market is highly concentrated, as measured by the Herfindahl-Hirschman Index ("HHI"). The Acquisition would further increase concentration levels, resulting in Air Products becoming the largest supplier of bulk liquid oxygen and nitrogen in each relevant area. In all but one of the relevant geographic markets, Air Products and Airgas are two of only five companies supplying bulk liquid oxygen and nitrogen to customers. In the fifth relevant geographic market, Air Products is the largest supplier, and the parties are two of only six suppliers of bulk liquid oxygen and nitrogen.

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VI. ENTRY CONDITIONS

9. New entry into the relevant markets would not occur in a timely manner sufficient to deter or counteract the likely adverse competitive effects of the Acquisition because it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact.

10. Entry into the bulk liquid oxygen and nitrogen markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct the air separation units that produce liquid oxygen and liquid nitrogen. Constructing one air separation unit large enough to be viable in the market would cost at least \$30 to \$50 million, most of which are sunk costs. Moreover, it is not economically justifiable to build an air separation unit unless a sufficient amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to liquid customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably and can take several years to secure.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in 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, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Respondent Air Products and Airgas;
- b. by increasing the likelihood that Respondent Air Products would unilaterally exercise market power in the relevant markets;
- c. by enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant markets; and

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- d. by increasing the likelihood that consumers would be forced to pay higher prices for bulk liquid oxygen and nitrogen in the relevant geographic areas.

VIII. VIOLATIONS CHARGED

12. The Acquisition described in Paragraph 5, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of September, 2010, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Air Products and Chemicals, Inc. (“Air Products” or “Respondent”) of the outstanding voting securities of Airgas, Inc. (“Airgas”) and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present 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. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute

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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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Air Products is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware, with its office and principal place of business located at 7201 Hamilton Boulevard, Allentown, PA 18195.
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 HEREBY ORDERED that, as used in this Order, the following definitions, and all other definitions used in the Order to Hold Separate and Maintain Assets, shall apply:

- A. "Air Products" means Air Products, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups and affiliates controlled

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by Air Products (including Airgas, after the Acquisition Date) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “Commission” means the Federal Trade Commission.
- C. “Acquirer” means any Person that acquires any of the Atmospheric Gases Assets or the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable).
- D. “Acquisition Date” means the date on which Air Products acquires a majority of the Airgas Shares.
- E. “Air Products Microbulk Assets” means all of Air Products’ right, title, and interest in and to all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the operation of the Air Products Microbulk Business, including but not limited to:
 - 1. All real property interests (including fee simple interests and real property lease-hold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 - 2. All Tangible Personal Property, including any Tangible Personal Property removed from any location of the Air Products Microbulk Business after the date the Commission accepts the Consent Agreement for public comment;
 - 3. All inventories, wherever located, stored in any of the Tangible Personal Property assets at the time the Air Products Microbulk Assets are divested;
 - 4. All (a) trade accounts receivable and other rights to payment from customers of Air Products and the

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full benefit of all security for such accounts or rights to payment, (b) all other accounts or notes receivable by Air Products and the full benefit of all security for such accounts or notes and (c) any claim, remedy or other right related to any of the foregoing;

5. All agreements, contracts, leases, and consensual obligations, and all outstanding offers or solicitations made by or to Air Products to enter into any of the foregoing; *provided, however*, that if such agreement, contract, lease, obligation, or offer also relates to businesses other than the Air Products Microbulk Business, then only those portions of such agreement, contract, lease, obligation, or offer that relate to the Air Products Microbulk Business shall be included;
6. All consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefor or renewals thereof, to the extent transferable;
7. All intangible rights and property, including Intellectual Property, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
8. All data and Records, including client and customer lists and Records, vendor lists, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to legal requirements, copies of all personnel Records and other Records

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described in proviso (iv) of this Paragraph I.E.; *provided, however*, that if such data and Records also contain information relating to the businesses other than the Air Products Microbulk Business, then only those portions of such data and Records that relate to the Air Products Microbulk Business shall be included;

9. All insurance benefits, including rights and proceeds;
10. All claims of Air Products against third parties, whether choate or inchoate, known or unknown, contingent or noncontingent; and
11. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Air Products Microbulk Assets need not include:

- (i) assets whose use is shared with or among Air Products' businesses other than the Air Products Microbulk Business unless such assets are primarily related to the operation of the Air Products Microbulk Business;
- (ii) commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications using the words "Cryoease" or "Air Products;"
- (iii) all rights in internet web sites and internet domain names presently used by Air Products;
- (iv) all personnel Records and other Records that Respondent is required by law to retain; and
- (v) any part of the Air Products Microbulk Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.

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- F. “Air Products Microbulk Business” means Air Products’ business relating to the distribution, marketing, or sale of Microbulk Atmospheric Gases in North Carolina and northern Georgia.
- G. “Airgas” means 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 259 North Radnor-Chester Road, Suite 100, Radnor, PA 19087.
- H. “Airgas Microbulk Assets” means all of Airgas’s right, title, and interest in and to all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the operation of the Airgas Microbulk Business, including but not limited to:
 - 1. All real property interests (including fee simple interests and real property lease-hold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 - 2. All Tangible Personal Property, including any Tangible Personal Property removed from any location of the Airgas Microbulk Business after the date the Commission accepts the Consent Agreement for public comment;
 - 3. All inventories, wherever located, stored in any of the Tangible Personal Property assets at the time the Airgas Microbulk Assets are divested;
 - 4. All (a) trade accounts receivable and other rights to payment from customers of Airgas and the full benefit of all security for such accounts or rights to payment, (b) all other accounts or notes receivable by Airgas and the full benefit of all security for

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such accounts or notes and (c) any claim, remedy or other right related to any of the foregoing;

5. All agreements, contracts, leases, and consensual obligations, and all outstanding offers or solicitations made by or to Airgas to enter into any of the foregoing; *provided, however*, that if such agreement, contract, lease, obligation, or offer also relates to businesses other than the Airgas Microbulk Business, then only those portions of such agreement, contract, lease, obligation, or offer that relate to the Airgas Microbulk Business shall be included;
6. All consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefor or renewals thereof, to the extent transferable;
7. All intangible rights and property, including Intellectual Property, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
8. All data and Records, including client and customer lists and Records, vendor lists, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to legal requirements, copies of all personnel Records and other Records described in proviso (iv) of this Paragraph I.H.; *provided, however*, that if such data and Records also contain information relating to the businesses other than the Airgas Microbulk Business, then only those portions of such data and Records that

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relate to the Airgas Microbulk Business shall be included;

9. All insurance benefits, including rights and proceeds;
10. All claims of Airgas against third parties, whether choate or inchoate, known or unknown, contingent or noncontingent; and
11. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Airgas Microbulk Assets need not include:

- (i) assets whose use is shared with or among Airgas's businesses other than the Airgas Microbulk Business unless such assets are primarily related to the operation of the Airgas Microbulk Business;
 - (ii) commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications for the foregoing names and marks;
 - (iii) all rights in internet web sites and internet domain names presently used by Airgas;
 - (iv) all personnel Records and other Records that Respondent is required by law to retain; and
 - (v) any part of the Airgas Microbulk Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.
- I. "Airgas Microbulk Business" means Airgas's business relating to the distribution, marketing, or sale of Microbulk Atmospheric Gases in North Carolina and northern Georgia.

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- J. “Airgas Shares” means the issued and outstanding shares of common stock of Airgas on a fully diluted basis.
- K. “ASU” means air separation unit.
- L. “Atmospheric Gases” means oxygen, nitrogen, and argon.
- M. “Atmospheric Gases Assets” means all of Airgas’s right, title, and interest in and to all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the operation of the Atmospheric Gases Business, including but not limited to:
 - 1. All real property interests (including fee simple interests and real property lease-hold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 - 2. All Tangible Personal Property, including any Tangible Personal Property removed from any location of the Atmospheric Gases Business or the Airgas Microbulk Business after the date the Commission accepts the Consent Agreement for public comment;
 - 3. All of the ASU facilities listed in Appendix A of this Order;
 - 4. All inventories, wherever located, including all finished product, work in process, raw materials, spare parts and all other materials and supplies to be used or consumed by Airgas in the production of finished products;

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5. All (a) trade accounts receivable and other rights to payment from customers of Airgas and the full benefit of all security for such accounts or rights to payment, (b) all other accounts or notes receivable by Airgas and the full benefit of all security for such accounts or notes and (c) any claim, remedy or other right related to any of the foregoing;
6. All agreements, contracts, leases, and consensual obligations, and all outstanding offers or solicitations made by or to Airgas to enter into any of the foregoing; *provided, however*, that if such agreement, contract, lease, obligation, or offer also relates to businesses other than the Atmospheric Gases Business, then only those portions of such agreement, contract, lease, obligation, or offer that relate to the Atmospheric Gases Business shall be included; provided, further, that in the matter of a swap agreement, all portions of the agreement with respect to Atmospheric Gases shall be included if any portion is related to the Atmospheric Gases Business;
7. All consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefor or renewals thereof, to the extent transferable;
8. All intangible rights and property, including Intellectual Property, subject to an Atmospheric Gases License-Back, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
9. All data and Records, including client and customer lists and Records, vendor lists, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating

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guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to legal requirements, copies of all personnel Records and other Records described in proviso (iv) of this Paragraph I.M.; *provided, however*, that if such data and Records also relate to businesses other than the Atmospheric Gases Business, then only those portions of such data and Records that relate to the Atmospheric Gases Business shall be included;

10. All insurance benefits, including rights and proceeds;
11. All claims of Airgas against third parties, whether choate or inchoate, known or unknown, contingent or noncontingent; and
12. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Atmospheric Gases Assets need not include:

- (i) assets whose use is shared with or among Airgas's businesses other than the Atmospheric Gases Business unless such assets are primarily related to the operation of the Atmospheric Gases Business;
- (ii) commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications for the foregoing names and marks;
- (iii) all rights in internet web sites and internet domain names presently used by Airgas;
- (iv) all personnel Records and other Records that Respondent is required by law to retain; and

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- (v) any part of the Atmospheric Gases Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.
- N. “Atmospheric Gases Business” means Airgas’s business relating to (1) the production or refinement of Atmospheric Gases at any Airgas on-site facilities or the ASU facilities listed in Appendix A of this Order and (2) the distribution, marketing, or sale of such Atmospheric Gases (wherever located) by pipeline, from such on-site facilities, or as Bulk Atmospheric Gases; *provided, however*, that Atmospheric Gases Business does not include Airgas’s Packaged Atmospheric Gases or Microbulk Atmospheric Gases businesses.
- O. “Atmospheric Gases Employee” means, as of the Acquisition Date, (i) any full-time, part-time, or contract employee of the Atmospheric Gases Business or the Airgas Microbulk Business (or Air Products Microbulk Business, if applicable), (ii) any other person employed by Airgas whose work primarily relates to the Atmospheric Gases Business, or (iii) any other person employed by Airgas whose work primarily relates to the Airgas Microbulk Business (or employed by Air Products whose work primarily relates to the Air Products Microbulk Business, if applicable).
- P. “Atmospheric Gases License” means:
 - 1. A worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sublicensable, non-exclusive license under all Intellectual Property relating to operation of the Atmospheric Gases Business or the Airgas Microbulk Business (or the Air Products Microbulk Business, if applicable) other than Intellectual Property already included in the Atmospheric Gases Assets or Airgas Microbulk

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Assets (or Air Products Microbulk Assets, if applicable); and

2. Such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary or appropriate to enable an Acquirer to use the rights.

Q. “Atmospheric Gases License-Back” means:

1. A worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sublicensable, non-exclusive license under any Intellectual Property that is included in the Atmospheric Gases Assets or the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) and is not solely related to the operation of the Atmospheric Gases Business or the Airgas Microbulk Business (or the Air Products Microbulk Business, if applicable); and
2. Such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary or appropriate to enable an Acquirer to use the rights.

R. “Bulk Atmospheric Gases” means Atmospheric Gases delivered in bulk liquid form (as the term “bulk” generally is defined by participants in the Atmospheric Gases industry, including by Respondent in the ordinary course of its business), typically to an on-site storage tank with a capacity greater than 2,000 liters.

S. “Confidential Business Information” means competitively sensitive, proprietary and all other business information of any kind owned by or pertaining to any business or assets specified in the relevant provisions of this Order or the Order to Hold Separate and Maintain Assets (including, but not limited to, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses,

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customer lists, customer contracts, employee lists, salary and benefits information, technologies, processes, and other trade secrets), except for any information that Respondent demonstrates (i) was or becomes generally available to the public other than as a result of a disclosure by Respondent, or (ii) was available, or becomes available, to Respondent on a non-confidential basis, but only if, to the knowledge of Respondent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

- T. “Direct Cost” means the actual cost of labor, including employee benefits, materials, resources, and services plus the actual cost of any third-party charges.
- U. “Divestiture Agreement” means any purchase and sale agreement approved by the Commission between Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph V of this Order) and an Acquirer to purchase all or any of the Atmospheric Gases Assets or the Airgas Microbulk Assets (or the Air Products Microbulk Assets, if applicable) including all amendments, exhibits, attachments, agreements, and schedules thereto.
- V. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Airgas or Air Products (as the case may be), in which Airgas or Air Products has a proprietary interest, including (i) commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, logos, service marks and applications; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all know-how, trade secrets, confidential or proprietary information, protocols, quality control information, software, technical information, data, process technology, plans, drawings and blue prints;

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and (v) all rights in internet web sites and internet domain names presently used by Airgas or Air Products.

- W. “Microbulk Atmospheric Gases” means Atmospheric Gases delivered in microbulk liquid form (as the term “microbulk” generally is defined by participants in the Atmospheric Gases industry, including by Respondent in the ordinary course of its business), typically to an on-site storage tank with a capacity greater than or equal to 230 liters and less than or equal to 2,000 liters.
- X. “Packaged Atmospheric Gases” means Atmospheric Gases delivered in packaged form (as the term “packaged” generally is defined by participants in the Atmospheric Gases industry, including by Respondent in the ordinary course of its business), typically in a gaseous cylinder, a liquid dewar, or delivered as bulk gas in a tube trailer.
- Y. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity.
- Z. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- AA. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles (including delivery vehicles of any kind), and other items of tangible personal property (other than inventories) of every kind owned or leased by Airgas or Air Products (as the case may be), together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- BB. “Transitional Assistance” means any (i) administrative services (including, but not limited to, order

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processing, shipping, accounting, and information transitioning services) or (ii) technical assistance with respect to the production, refinement, distribution, marketing, or sale of Atmospheric Gases.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest the Atmospheric Gases Assets and the Airgas Microbulk Assets at no minimum price, absolutely and in good faith, as an on-going business, no later than 120 days from the Acquisition Date, to one or more Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission; *provided, however*, that Respondent shall divest the Air Products Microbulk Assets instead of the Airgas Microbulk Assets at the option of an Acquirer.
- B. At any time after February 15, 2011, if Respondent has not acquired a majority of the Airgas Shares, the Commission may, at its discretion, notify Respondent that it shall be required to divest the Atmospheric Gases Assets and Airgas Microbulk Assets pursuant to the following terms:
 - 1. Respondent shall not acquire a majority of the Airgas Shares until it receives the Commission's prior approval of (a) the Acquirer(s) and (b) the manner of divestiture of the Atmospheric Gases Assets and the Airgas Microbulk Assets; and
 - 2. Upon obtaining such Commission approval and after acquiring a majority of the Airgas Shares, Respondent shall divest the Atmospheric Gases Assets and the Airgas Microbulk Assets at no minimum price, absolutely and in good faith, as an on-going business, no later than ten (10) days from the Acquisition Date.

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Provided, however, that Respondent shall divest the Air Products Microbulk Assets instead of the Airgas Microbulk Assets at the option of an Acquirer.

- C. If Respondent has not acquired a majority of the Airgas Shares as of one year from the date the Commission accepts the Consent Agreement for public comment (“Expiration Date”) or if Respondent withdraws its tender offer to acquire Airgas and does not have a letter of intent or agreement to purchase Airgas, Respondent shall:
 - 1. Notify the Commission within five (5) days of withdrawal of its tender offer (“Withdrawal Date”); and
 - 2. Shall divest on the New York Stock Exchange absolutely and in good faith all its interest in Airgas Shares within six (6) months from the earlier of the (i) Expiration Date or (ii) Withdrawal Date.
- D. Respondent shall divest the (1) Atmospheric Gases Assets in any relevant market area (as set forth in Appendix A) to no more than one Acquirer and (2) Airgas Microbulk Assets (or the Air Products Microbulk Assets, if applicable) to the Acquirer of the Atmospheric Gases Assets located in the Southeast market (as set forth in Appendix A).
- E. The Commission may order Respondent to divest additional assets relating to Airgas’s business of distribution, marketing, or sale of Bulk Atmospheric Gases not included in the Atmospheric Gases Business as the Commission determines will ensure the divestiture of the Atmospheric Gases Assets as ongoing viable enterprises.
- F. No later than the date of divestiture of the Atmospheric Gases Assets, Respondent shall grant to an Acquirer an Atmospheric Gases License for any use in any

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business and take all actions necessary to facilitate the unrestricted use of the license.

- G. In the event that Respondent is unable to obtain any consents, licenses, certificates, registrations, permits, or other authorizations granted by:
1. Any governmental entity that are necessary to operate the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall provide such assistance as an Acquirer may reasonably request in an Acquirer's efforts to obtain a comparable authorization; and
 2. Any other Person that are necessary to divest the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall, with the acceptance of an Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- H. At the option of an Acquirer and subject to the prior approval of the Commission, Respondent shall enter into a supply agreement, not to exceed a period of forty-eight (48) months, through which the Acquirer shall supply Respondent with Atmospheric Gases in substantially the same volumes that Airgas historically obtained from the Atmospheric Gases Assets (or relevant portions thereof) for use in its Packaged Atmospheric Gases and Microbulk Atmospheric Gases businesses (excluding the volume obtained for its Airgas Microbulk Business or the volume used by Air Products in the Air Products' Microbulk Business if the Air Products' Microbulk Assets are divested pursuant to this Order) prior to the Acquisition Date; *provided, however*, that Respondent shall not terminate its obligation under such supply agreement because of a material breach by an Acquirer, in the absence of a final order of a court of competent jurisdiction or

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arbitration proceeding (if an Acquirer agrees to arbitration).

I. At the option of an Acquirer and subject to the prior approval of the Commission, Respondent shall enter into one or more agreements to provide Transitional Assistance to an Acquirer. In such case, Respondent shall provide Transitional Assistance sufficient to enable an Acquirer to operate the divested assets and business:

1. In substantially the same manner that Airgas or Air Products (as the case may be) operated the divested assets and business prior to the Acquisition Date; and
2. At substantially the same level and quality as such services were provided by Airgas or Air Products (as the case may be) in connection with its operation of the divested assets and business prior to the Acquisition Date.

Provided, however, that Respondent shall not (i) require an Acquirer to pay compensation for Transitional Assistance that exceeds the Direct Cost of providing such Transitional Assistance or (ii) terminate its obligation to provide Transitional Assistance because of a material breach by an Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction or arbitration proceeding (if an Acquirer agrees to arbitration).

J. Respondent shall allow an Acquirer an opportunity to identify, recruit, and employ any Atmospheric Gases Employee:

1. Respondent shall (i) identify for an Acquirer each Atmospheric Gases Employee, (ii) allow an Acquirer an opportunity to interview any Atmospheric Gases Employee, and (iii) allow an Acquirer to inspect the personnel files and other

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documentation relating to any such employee, to the extent permissible under applicable laws, no later than:

- a. Twenty (20) days prior to the date of divestiture of the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) and continuing thereafter for a period of ninety (90) days after the date of divestiture of the relevant assets, if Respondent divests the relevant assets pursuant to Paragraph II.A. of this Order, or
 - b. Five (5) days prior to the date of divestiture of the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), or sooner, if permitted by Airgas, and continuing thereafter for a period of ninety (90) days after the date of divestiture of the relevant assets, if Respondent divests the relevant assets pursuant to Paragraph II.B. of this Order.
2. Respondent shall (i) not offer any incentive to any Atmospheric Gases Employee to decline employment with an Acquirer, (ii) remove any contractual impediments with Respondent that may deter any Atmospheric Gases Employee from accepting employment with an Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability of such employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment or hiring of any Atmospheric Gases Employee by an Acquirer.
 3. Respondent shall (i) vest all current and accrued pension benefits as of the date of transition of employment with an Acquirer for any Atmospheric Gases Employee who accepts an offer of

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employment from the Acquirer no later than thirty (30) days from the date Respondent divests the relevant assets and (ii) provide any Key Employee (hereinafter defined) to whom an Acquirer has made a written offer of employment with reasonable financial incentives to accept a position with the Acquirer at the time of divestiture of the relevant assets and business, pursuant to the terms set forth in Confidential Appendix B attached to this Order.

4. For a period of two (2) years after the date of divestiture of the Atmospheric Gases Assets and Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Atmospheric Gases Employee who has accepted an offer of employment with an Acquirer, or who is employed by an Acquirer, to terminate his or her employment relationship with an Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by an Acquirer, (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (3) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

For purposes of this Paragraph II.J. and Confidential Appendix B, "Key Employee" means any Atmospheric Gases Employee identified by agreement between Respondent and an Acquirer and made a part of a Divestiture Agreement.

- K. For a period of two (2) years from the date Respondent divests the Atmospheric Gases Assets and Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or

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induce any Multi-Product Customer (hereinafter defined) to discontinue or reduce its purchases of Atmospheric Gases other than Packaged Atmospheric Gases from an Acquirer and purchase such products from Respondent; *provided, however*, that a violation of this provision will not occur if: (1) a customer initiates communications with Respondent regarding Atmospheric Gases purchases or (2) Respondent advertises in newspapers, trade publications, or other media in a manner not targeted specifically at customers of an Acquirer.

For purposes of this Paragraph II.K., “Multi-Product Customer” means a customer who purchased from Airgas as of the Acquisition Date both (i) Packaged Atmospheric Gases and (ii) Atmospheric Gases from the Atmospheric Gases Business or the Airgas Microbulk Business.

- L. Respondent shall comply with all terms of any Divestiture Agreement, and any breach by Respondent of any term of such agreement shall constitute a violation of this Order. If any term of the Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Respondent shall provide written notice to the Commission no later than five days after any modification of the Divestiture Agreement.
- M. The purpose of the divestiture of the Atmospheric Gases Assets and the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time this Order becomes final and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission’s Complaint.

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III.**IT IS FURTHER ORDERED** that:

- A. Respondent shall not (i) provide, disclose or otherwise make available Confidential Business Information owned by or pertaining to the Divested Assets and Businesses (hereinafter defined) or the Air Products Microbulk Assets and Air Products Microbulk Business to any Person or (ii) use such Confidential Business Information for any reason or purpose; *provided, however*, that Respondent may disclose or use such Confidential Business Information:
1. In the course of performing its obligations or as permitted under this Order or the Order to Hold Separate and Maintain Assets;
 2. In the course of performing its obligations under any Divestiture Agreement (including any transitional services or supply agreements);
 3. In the course of complying with financial reporting requirements, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Divested Assets and Businesses, or as required by law; and
 4. Relating to the Air Products Microbulk Assets and the Air Products Microbulk Business in the ordinary course of business and in accordance with past practice until such time that Respondent has divested the Air Products Microbulk Assets, if applicable;

Provided, however, that Confidential Business Information relating to the Air Products Microbulk Assets and Air Products Microbulk Business shall not be subject to this Paragraph III as of the date of divestiture of the Airgas Microbulk Assets if

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Respondent divests such assets instead of the Air Products Microbulk Assets under this Order.

- B. If permitted under Paragraph III.A. of this Order, Respondent shall disclose Confidential Business Information owned by or pertaining to the Divested Assets and Businesses or the Air Products Microbulk Assets and Air Products Microbulk Business (i) only to those Persons who require such information, (ii) only to the extent such Confidential Business Information is required, and (iii) only to those Persons who agree in writing to maintain the confidentiality of such information.
- C. Respondent shall enforce the terms of this Paragraph III as to any Person other than an Acquirer of the Atmospheric Gases Assets and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph III, including training of Respondent's employees and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

For purposes of this Paragraph III., "Divested Assets and Businesses" means the Atmospheric Gases Assets, Atmospheric Gases Business, Airgas Microbulk Assets, or Airgas Microbulk Business.

IV.**IT IS FURTHER ORDERED** that:

- A. Prior to the Acquisition Date, Respondent may obtain Confidential Business Information owned by or pertaining to any Airgas business for the purposes of conducting customary due diligence as permitted by Airgas; *provided, however*, that:
 - 1. Respondent may not obtain Confidential Business Information owned by or pertaining to the Atmospheric Gases Business or Airgas Microbulk

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Business relating to (i) current or future information about any price plans, or price, cost, or margin information at the customer level (but may obtain aggregated, non-customer specific cost and revenue information); (ii) Strategies or Policies Related to Competition (hereinafter defined); or (iii) Cost or Price Analyses (hereinafter defined);

2. With respect to any Confidential Business Information that Respondent may obtain under this Paragraph IV.A., (i) no Person who is involved in the pricing, marketing, sale, or production of Atmospheric Gases in the United States (other than officers, directors, and counsel) shall have access to such information and (ii) any Person with access to such information shall agree in writing to maintain the confidentiality of the information.
- B. After the Acquisition Date, Respondent may obtain Confidential Business Information owned by or pertaining to businesses other than the Atmospheric Gases Business or Airgas Microbulk Business (until Respondent has divested the Air Products Microbulk Assets, if applicable) for the purposes of integration planning with respect to such other businesses; *provided, however*, that with respect to any Confidential Business Information that Respondent may obtain under this Paragraph IV.B., the Integration Clean Team (hereinafter defined) shall, until the end of the Hold Separate Period, (i) have sole access to such information (other than employees of the Hold Separate Business); (ii) agree in writing to maintain the confidentiality of the information; and (iii) not provide such information to anyone other than in aggregated or summary form to Air Products' officers, directors, and counsel.
- C. For purposes of this Paragraph IV:
1. "Integration Clean Team" means (i) third parties that Respondent has retained for the purpose of acquiring and integrating Airgas, including but not

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limited to outside legal counsel, and (ii) no more than twelve (12) Persons from Air Products, provided that in no event shall such persons have direct responsibility for pricing, marketing, sale, or production of Atmospheric Gases in the United States (except Air Products' officers, directors, or counsel);

2. "Strategies or Policies Related to Competition" means information relating to a company's current or future approach to negotiating with customers, targeting specific customers, identifying or in any other manner attempting to win customers, retaining customers, or risk of loss of customers, including but not limited to all sales personnel call reports, market studies, forecasts, and surveys which contain such information; and
3. "Cost or Price Analyses" means a formula, analysis, method, study, test, program, examination, tool, or other type of logical reasoning used to determine a product's cost or price for an identifiable individual customer.

V.

IT IS FURTHER ORDERED that:

- A. If Respondent has not divested all of the Atmospheric Gases Assets as required by Paragraphs II.A. or II.B. of this Order, the Commission may appoint one or more Persons as Divestiture Trustee to divest the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as HS Trustee pursuant to the relevant provisions of the Order to Hold Separate and Maintain Assets.

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- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and

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conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph V in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

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4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, that if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture 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 Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in

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significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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 losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph V.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph V.E.5. of this Order.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
9. Respondent or the Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement required by Respondent shall not restrict the Divestiture Trustee from providing any information to the Commission.

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- F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph V.
- G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VI.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the earlier of (i) the Acquisition Date or (ii) February 15, 2011, and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II.A.-C. of this Order, Respondent 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 this Order and the Order to Hold Separate and Maintain Assets. Respondent shall include in its compliance reports, among other things that are required from time to time:
 - 1. A full description of the efforts being made to comply with this Order and with the Order to Hold Separate and Maintain Assets, including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted.
 - 2. Copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval, and, as applicable, a statement that the

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divestiture(s) approved by the Commission have been accomplished, including a description of the manner in which Respondent completed such divestiture and the date the divestiture was accomplished.

- B. One (1) year after the date this Order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may request, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order and any Divestiture Agreement.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in the Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent, which copying

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services shall be provided by the Respondent at its expense; and

- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date this Order becomes final.

By the Commission.

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APPENDIX A**Airgas ASUs By Relevant Market**Northeast

Bozrah, Connecticut

Eastern Midwest

Carrollton, Kentucky

Canton, Ohio

Dayton, Ohio

Chicago-Milwaukee metropolitan area

New Carlisle, Indiana

Madison, Wisconsin

Waukesha, Wisconsin

Southeast

Carrollton, Georgia

Jefferson, Georgia

Gaston, South Carolina (2 ASUs)

Rock Hill, South Carolina

Chester, Virginia

Oklahoma and surrounding areas

Mulberry, Arkansas

Lawton, Oklahoma

The Atmospheric Gases Assets shall not include any assets relating to Airgas's Atmospheric Gases Business in Hawaii.

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CONFIDENTIAL APPENDIX B

**[Redacted From Public Record Version,
But Incorporated By Reference]**

Order to Maintain Assets

**ORDER TO HOLD SEPARATE
AND MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Air Products and Chemicals, Inc. (“Air Products” or “Respondent”) of the outstanding voting securities of Airgas, Inc. (“Airgas”) and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present 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. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

1. Respondent Air Products is a corporation organized, existing, and doing business under, and by virtue of,

Order to Maintain Assets

the laws of Delaware, with its office and principal place of business located at 7201 Hamilton Boulevard, Allentown, PA 18195.

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 Hold Separate, the following definitions, and all other definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), shall apply:

- A. “Acquisition” means the acquisition of Airgas, Inc. by Air Products.
- B. “Airgas, Inc.” means 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 259 North Radnor-Chester Road, Suite 100, Radnor, PA 19087.
- C. “Decision and Order” means (i) the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and (ii) the Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- D. “Divestiture Date” means, with regard to any of the Atmospheric Gases Assets or the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), the date on which Respondent (or a Divestiture Trustee) closes on the divestiture of those assets completely and as required by Paragraph II (or

Order to Maintain Assets

Paragraph V) of the Decision and Order to an Acquirer approved by the Commission.

- E. “Hold Separate” means this Order to Hold Separate and Maintain Assets.
- F. “Hold Separate Business” means Airgas, Inc.
- G. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph VI hereof.
- H. “HS Trustee” means the Person appointed pursuant to Paragraph II.C.1. of this Hold Separate.
- I. “Manager” means the Person appointed pursuant to Paragraph II.C.2. of this Hold Separate.
- J. “Orders” means the Decision and Order and this Hold Separate.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

- A. Respondent shall:
 - 1. Hold the Hold Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business.
 - 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the HS Trustee, except to the extent that Respondent must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with

Order to Maintain Assets

this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.

- B. Respondent shall take such actions as are necessary to maintain and assure the continued maintenance of the viability, marketability and competitiveness of the Hold Separate Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, and shall not sell, transfer, encumber or otherwise impair the Hold Separate Business (except as required by the Decision and Order).
- C. Respondents shall hold the Hold Separate Business separate, apart, and independent of Air Products on the following terms and conditions:
 - 1. At any time after Respondent signs the Consent Agreement, the Commission shall appoint one or more Persons to serve as HS Trustee to manage the Hold Separate Business and ensure that Respondent complies with its obligations as required by this Hold Separate and the Decision and Order:
 - a. The Commission shall select the HS Trustee, subject to the consent of the Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after notice by the staff of the Commission to Respondent of the identity of any proposed HS Trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
 - b. The HS Trustee shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Manager; maintaining the independence of

Order to Maintain Assets

the Hold Separate Business; and monitoring Respondent's compliance with its obligations pursuant to the Orders, including maintaining the viability, marketability and competitiveness of the Hold Separate Business pending divestiture.

- c. No later than three (3) days after appointment of the HS Trustee, Respondent shall execute an agreement that, subject to the prior approval of the Commission, transfers to and confers upon the HS Trustee all rights, powers, and authority necessary to permit the HS Trustee to perform his duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Decision and Order.
- d. Subject to all applicable laws and regulations, the HS Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Hold Separate Business, and to any other relevant information as the HS Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Hold Separate Business. Respondent shall develop such financial or other information as the HS Trustee may reasonably request and shall cooperate with the HS Trustee.
- e. Respondent shall take no action to interfere with or impede the HS Trustee's ability to monitor Respondent's compliance with this Hold Separate, the Consent Agreement or the Decision and Order or otherwise to perform his duties and responsibilities consistent with the terms of this Hold Separate.
- f. The HS Trustee shall have the authority to employ, at the cost and expense of Respondent,

Order to Maintain Assets

such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the HS Trustee's duties and responsibilities.

- g. The Commission may require the HS Trustee and each of the HS Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the HS Trustee's duties.
- h. Respondent may require the HS Trustee and each of the HS Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the HS Trustee from providing any information to the Commission.
- i. The HS Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
- j. Respondents shall indemnify the HS Trustee and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the HS 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 gross negligence or willful misconduct by the HS Trustee.

Order to Maintain Assets

- k. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate terminates, the HS Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate and Respondent's compliance with its obligations under the Hold Separate and the Decision and Order. Included within that report shall be the HS Trustee's assessment of the extent to which the Hold Separate Business is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
 - l. If the HS Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute HS Trustee consistent with the terms of this Hold Separate.
 - m. The HS Trustee shall serve until the day after the Divestiture Date; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
2. No later than ten (10) days after the Acquisition Date, Respondent shall appoint a Manager, approved by the HS Trustee in consultation with Commission staff, from among the current employees of the Hold Separate Business to manage and maintain the operations of the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice:
- a. The Manager shall report directly and exclusively to the HS Trustee and shall manage the Hold Separate Business independently of the management of Respondent. The Manager

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shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.

- b. No later than three (3) days after appointment of a Manager, Respondent shall enter into a management agreement with the Manager that, subject to the prior approval of the HS Trustee, shall transfer all rights, powers, and authority necessary to permit the Manager to perform his duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Decision and Order.
- c. The Manager shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the HS Trustee, in consultation with the Commission staff.
- d. The Manager shall have the authority, with the approval of the HS Trustee, to remove Hold Separate Business employees and replace them with others of similar experience or skills. If any Person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the HS Trustee, may request Respondents to, and Respondents shall, appoint a substitute Person, which Person the Manager shall have the right to approve.
- e. In addition to Hold Separate Business employees, the Manager may, with the approval of the HS Trustee, employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business.
- f. Respondent shall provide the Manager with reasonable financial incentives to undertake

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this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the Hold Separate Business's viability, marketability and competitiveness until the Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate.

- g. The HS Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within three (3) days of such removal, Respondent shall appoint a replacement Manager on the same terms and conditions as provided in this Hold Separate. In the event that the Manager voluntarily ceases to act as a Manager, then Respondent shall appoint a substitute Manager within three (3) days on the same terms and conditions as provided in this Hold Separate.
- h. The Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.
- i. Respondent shall indemnify the Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Manager'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

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result from gross negligence or willful misconduct by the Manager.

3. The Hold Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business. To the extent that such employees leave or have left the Hold Separate Business prior to the Divestiture Date, the Manager, with the approval of the HS Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.
4. Respondent shall provide the Hold Separate Business with sufficient financial and other resources:
 - a. as are appropriate in the judgment of the HS Trustee to operate the Hold Separate Business as it is currently operated (including efforts to generate new business);
 - b. to perform all maintenance to, and replacements of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice;
 - c. to carry on existing and planned capital projects and business plans; and
 - d. to maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order and in consultation with the HS Trustee, the Manager

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may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

5. Respondent shall cause the HS Trustee, the Manager, and each of Respondent's employees (excluding those employed in the Hold Separate Business) having access to Confidential Business Information of or pertaining to the Hold Separate Business to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Confidential Business Information of or pertaining to the Hold Separate Business on a confidential basis and, except as is permitted by this Hold Separate or the Decision and Order, such Persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other Person whose employment involves any of Respondent's businesses or activities other than the Hold Separate Business.
6. Except for the Manager and Hold Separate Business employees, and except to the extent provided in this Hold Separate, Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hold Separate Business.
7. Respondent's employees (excluding the Hold Separate Business employees) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Hold Separate Business except:
 - a. as required by law; and

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- b. to the extent that necessary information is exchanged:
- (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence;
 - (3) in complying with or as permitted by this Hold Separate or the Decision and Order;
 - (4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Hold Separate Business and the integrity of the financial controls of the Hold Separate Business;
 - (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Hold Separate Business; or
 - (6) in obtaining legal advice.

Nor shall the Manager or any Hold Separate Business employees receive or have access to, or use or continue to use, any Confidential Business Information relating to Respondent's businesses (not subject to the Hold Separate), except such information as is necessary to maintain and operate the Hold Separate Business. Respondent may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold

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Separate or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

8. Respondent and the Hold Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the HS Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the HS Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.
 9. No later than ten (10) days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the HS Trustee, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate.
 10. No later than ten (10) days after the Acquisition Date, Respondent shall circulate to employees of the Hold Separate Business, and to persons who are employed in Respondent's businesses that compete with the Hold Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Appendix A.
- D. Respondent shall provide each Atmospheric Gases Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Atmospheric Gases Assets and Airgas Microbulk

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Assets pending divestiture. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the viability, marketability and competitiveness of the Atmospheric Gases Assets and Airgas Microbulk Assets until the applicable Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate.

- E. The purpose of this Hold Separate is to: (1) preserve the assets and businesses within the Hold Separate Business as viable, competitive, and ongoing businesses independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent and the Hold Separate Business, except in accordance with the provisions of this Hold Separate and the Decision and Order; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) maintain the full economic viability, marketability and competitiveness of the Atmospheric Gases Assets and Airgas Microbulk Assets, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Atmospheric Gases Assets or Airgas Microbulk Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that from the date Respondent executes the Consent Agreement and during the Hold Separate Period, Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Air Products Microbulk Business. Among other things that may be necessary, Respondent shall:

- A. Maintain the operations of the Air Products Microbulk Business in the regular and ordinary course of business and in accordance with past practice (including regular

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repair and maintenance) until either the Air Products Microbulk Assets or Airgas Microbulk Assets have been divested;

- B. Provide sufficient working capital to operate the Air Products Microbulk Business at least at current rates of operation, to meet all capital calls with respect to the Air Products Microbulk Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;
- C. Make available for use by the Air Products Microbulk Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Air Products Microbulk Business;
- D. Continue, at least at their scheduled pace, any additional expenditures relating to the Air Products Microbulk Business authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all marketing expenditures;
- E. Use best efforts to maintain and increase sales of the Air Products Microbulk Business, and to maintain at budgeted levels for the year 2009 or the current year, whichever are higher, all administrative, technical, and marketing support for the Air Products Microbulk Business;
- F. Provide such support services to the Air Products Microbulk Business as were being provided to these businesses as of the date the Consent Agreement was signed by Respondent;
- G. Maintain a work force at least equivalent in size, training, and expertise to what has been associated with the Air Products Microbulk Business prior to the Acquisition Date;

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- H. Assure that Respondent's employees with primary responsibility for managing and operating the Air Products Microbulk Business are not transferred or reassigned to other areas within Respondent's organizations except for transfer bids initiated by employees pursuant to Respondent's regular, established job posting policy; and
- I. Use best efforts to preserve and maintain the existing relationships with customers, suppliers, vendors, private and governmental entities, and others having business relations with the Air Products Microbulk Business.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of this Hold Separate, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent, which copying services shall be provided by the Respondent at its expense; and

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- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Hold Separate shall terminate at the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the Divestiture Date of the Atmospheric Gases Assets and Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) required to be divested pursuant to the Decision and Order.

By the Commission.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted from Air Products and Chemicals, Inc. (“Air Products”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Air Products’ proposed acquisition of Airgas, Inc. (“Airgas”). Under the terms of the Consent Agreement, Air Products is required, among other things, to divest 15 air separation units (“ASUs”) and related assets currently owned and operated by Airgas in the following

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locations: (1) Bozrah, Connecticut; (2) Carrollton, Kentucky; (3) Canton, Ohio; (4) Dayton, Ohio; (5) New Carlisle, Indiana; (6) Madison, Wisconsin; (7) Waukesha, Wisconsin; (8) Carrollton, Georgia; (9) Jefferson, Georgia; (10) Gaston, South Carolina (2 ASUs); (11) Rock Hill, South Carolina; (12) Chester, Virginia; (13) Mulberry, Arkansas; and (14) Lawton, Oklahoma. With the divestiture of these ASUs and related assets, the competition that would otherwise be eliminated through the proposed acquisition of Airgas by Air Products will be fully preserved.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order (“Order”).

On February 11, 2010, Air Products announced its intention to acquire all of the outstanding shares of Airgas pursuant to an all-cash tender offer for an aggregate purchase price of approximately \$7.0 billion. Consummation of this transaction is subject to acceptance of the offer by a sufficient number of the shareholders of Airgas. Airgas has repeatedly recommended that its shareholders not tender their shares, and a sufficient number of shares have not been tendered to date. It could be several months or more until the proposed acquisition is consummated, if it is consummated at all.

The Commission’s complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate 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, by lessening competition in certain regional markets in the United States for the manufacture and sale of bulk liquid oxygen and bulk liquid nitrogen.

II. The Parties

Air Products is a global supplier of industrial, medical, and specialty gases for use in a variety of industries, including health

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care, technology, and energy. Air Products is the second-largest industrial gas supplier in the United States with 32 liquid atmospheric gas-producing plants throughout the United States.

Airgas is the fifth-largest industrial gas supplier in the United States. Airgas operates 16 liquid atmospheric gas-producing plants in the United States, most of which are concentrated in the Eastern United States. Airgas also is the largest U.S. distributor of packaged industrial, medical, and specialty gases and hardgoods, such as welding equipment and supplies.

III. The Products and Structure of the Markets

Both Air Products and Airgas own and operate ASUs in the United States that produce liquid atmospheric gases, including liquid oxygen and liquid nitrogen. Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no viable substitute for the use of oxygen or nitrogen. Accordingly, customers would not switch to another gas or product even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent.

There are three primary and distinct methods of distributing oxygen and nitrogen: (1) in packaged form (typically delivered in gaseous cylinders or liquid dewars); (2) in bulk liquid form; and (3) in gaseous form via on-site ASUs or pipelines connecting customers to nearby ASUs. Customers choose a distribution method based on the volume of gas required. Customers who use bulk liquid oxygen or nitrogen require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. Thus, even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, bulk liquid oxygen and nitrogen may only be purchased economically from a supplier with an ASU located within 150 to 250 miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for bulk

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liquid oxygen and nitrogen. The relevant geographic markets in which to analyze the effects of the proposed acquisition are (1) the Northeast (including Connecticut, Maine, Massachusetts, New Hampshire, Eastern New York, Rhode Island, and Vermont), (2) the Eastern Midwest (including Eastern Indiana, Northern Kentucky, Southeastern Michigan, Ohio, Western Pennsylvania, and Northern West Virginia), (3) the Chicago-Milwaukee metropolitan area (including the area 150 miles around Chicago), (4) the Southeast (including part of Alabama, all of Georgia, North Carolina, and South Carolina, part of Tennessee, and Southern Virginia), and (5) Oklahoma and surrounding areas (including Western Arkansas, Southeastern Kansas, Southwestern Missouri, Oklahoma, and Northeastern Texas). Because the boundaries of the relevant geographic markets at issue are largely determined by the proximity of overlapping ASUs, those geographic markets with a greater number of proximate, overlapping ASUs – for example, the Southeast market – tend to be larger in size than those markets with fewer such ASUs – for example, the Chicago-Milwaukee market.

The markets for bulk liquid oxygen and nitrogen are highly concentrated. In all but the Oklahoma market, Air Products and Airgas are two of only five companies supplying bulk liquid oxygen and nitrogen to customers. In the Oklahoma market, Air Products is the largest supplier, and the parties are two of only six suppliers of bulk liquid oxygen and nitrogen.

IV. Effects of the Acquisition

In each of the relevant markets, as a result of the proposed acquisition, a significant competitor would be eliminated, and a small number of viable competitors would remain. Certain market conditions, including the relative homogeneity of the firms and products involved and availability of detailed market information, are conducive to the firms reaching terms of coordination and detecting and punishing deviations from those terms. Therefore, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market.

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The proposed acquisition also would eliminate direct and substantial competition between Air Products and Airgas in these areas, provide Air Products with a larger base of sales on which to enjoy the benefit of a unilateral price increase, and eliminate a competitor to which customers otherwise could have diverted their sales in markets where alternative sources of supply are already limited. The proposed acquisition, therefore, likely would allow Air Products to exercise market power unilaterally, increasing the likelihood that purchasers of bulk liquid oxygen or bulk liquid nitrogen would be forced to pay higher prices in these areas.

V. Entry

Significant impediments to new entry exist in the markets for bulk liquid oxygen and nitrogen. In order to be competitively viable in the relevant markets, an ASU must produce at least 250 to 300 tons per day of liquid product. The cost to construct a plant sufficiently large to be cost-effective can be 30 to 50 million dollars, most of which are sunk costs and cannot be recovered. Although an ASU can be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's capacity, either to an on-site customer or to liquid customers. On-site customers normally sign long-term contracts. Because such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise in the near future in any of the areas affected by the proposed acquisition. It is even more difficult and time-consuming for a potential new entrant to contract with enough liquid gas customers to justify building a new ASU. These customers are generally locked into contracts with existing suppliers that typically last between five and seven years. Even if the new entrant were able to secure enough customers to justify constructing a new ASU in any of the affected markets, the new entrant may still need to rely on incumbent suppliers to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entry, it is unlikely that new entry could be accomplished in a timely manner in the bulk liquid oxygen and nitrogen markets to defeat a likely price increase caused by the proposed acquisition.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the markets for bulk liquid oxygen and bulk liquid nitrogen. Pursuant to the Consent Agreement, Air Products will divest all of the Airgas business and assets relating to the manufacture or sale of bulk liquid oxygen and nitrogen in the identified geographic markets. The Consent Agreement provides that Air Products must find a buyer for the ASUs, at no minimum price, that is acceptable to the Commission, no later than four months from the date on which Air Products consummates its acquisition of Airgas. If Air Products is unable to consummate the acquisition by February 15, 2011, however, the Commission, in its discretion, may require Air Products to seek prior approval of a buyer before Air Products can close any transaction with Airgas. This provision provides the Commission an opportunity to evaluate the continued availability of acceptable purchasers – if, for example, economic conditions were to deteriorate significantly – if the closing of the Air Products-Airgas transaction takes place after February 15, 2011.

Any acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems. There are a number of parties interested in purchasing the ASUs and related assets to be divested that have the expertise, experience, and financial viability to successfully purchase and manage these assets and retain the current level of competition in the relevant markets. The Commission is therefore satisfied that sufficient potential buyers for the divested bulk liquid oxygen and nitrogen assets currently exist.

If the Commission determines that Air Products has not provided an acceptable buyer for the ASUs within the required time period, or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee would have the exclusive power and authority to accomplish the divestiture.

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The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until the assets are divested to a buyer approved by the Commission.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

INTEL CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. D-9341; File No.061 0247
Filed December 16, 2009 — Decision, October 29, 2010

The Commission issued an administrative complaint, alleging that Intel Corporation (“Intel”) illegally used its dominant market position to foreclose rivals from competing in the CPU microchip market. The complaint further alleges that Intel misled and deceived potential competitors in order to preserve its monopoly power. The consent order prohibits Intel from conditioning benefits to computer makers on their promise to purchase microchips exclusively from Intel or on their refusal to purchase microchips from others. The consent order also prohibits Intel from retaliating against computer makers if they do business with suppliers other than Intel. The consent order further requires, in part, that Intel modify its intellectual property agreements with AMD, Nvidia, and Via; offer to extend Via’s x86 licensing agreement; and disclose to software developers that Intel computer compilers discriminate between Intel and non-Intel microchips. The consent order further requires Intel to reimburse all software vendors that wish to recompile their software using a non-Intel compiler.

Participants

For the Commission: Kyle D. Andeer, J. Alexander Ansaldo, Thomas H. Brock, Kent E. Cox, Richard B. Dagen, Thomas Dahdouh, Jeff Dahnke, Sean G. Dillon, Peggy Bayer Femenella, Nur-ul-Haq, Albert Y. Kim, Lisa Kopchik, Andrew K. Mann, Brendan McNamara, J. Robert Robertson, Trang T. Tran, Nancy Turnblacer, Priya B. Viswanath, Norris Washington, and Theodore Zang, Jr.

For the Respondent: James L. Hunt, Bingham McCutchen LLP; Robert H. Cooper, Michael L. Denger, Daniel Floyd, and Joseph Kattan, PC, Gibson, Dunn & Crutcher LLP; Darren B. Bernhard and Thomas Dillickrath, Howrey LLP; Roy T. Englert, Jr., Robbins Russell Englert Orseck Untereiner & Sauber LLP; and James C. Burling, Leon Greenfield, Eric Mahr, James L. Quarles III, and Howard M. Shapiro, Wilmer Cutler Pickering Hale and Dorr LLP.