

Complaint

IN THE MATTER OF

AMERICAN AIR LIQUIDE HOLDINGS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket No. C-4574; File No. 161 0045
Complaint, May 12, 2016 – Decision, July 15, 2016

This consent order addresses the \$13.4 billion acquisition by American Air Liquide Holdings, Inc., of certain assets of Airgas, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in various geographic markets for bulk oxygen, bulk nitrogen, bulk argon, bulk nitrous oxide, bulk liquid carbon dioxide, dry ice, and retail packaged welding gases. The consent order requires Air Liquide to divest sixteen air separation units (“ASUs”), four vertically integrated dry ice and liquid carbon dioxide plants, two separate liquid carbon dioxide plants, two nitrous oxide plants, and three retail packaged welding gas and hardgoods stores.

Participants

For the *Commission*: Jeffrey Dahnke, Jonathan. Ripa, Christine Tasso, and Sarah Wohl.

For the *Respondent*: Bryan Byrne, Cleary Gottlieb Steen & Hamilton LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent American Air Liquide Holdings, Inc. (“Air Liquide”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire 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 FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect

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thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Air Liquide is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 9811 Katy Freeway, Suite 100, Houston, Texas 77024. Air Liquide, is an indirect wholly owned subsidiary of L’Air Liquide, S.A., a French *société anonyme*.

2. The Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. ACQUIRED COMPANY

3. Airgas is a corporation organized, existing, and doing business under, and by virtue of the laws of Delaware, with its corporate office and principal place of business located at 259 N. Radnor-Chester Road, Suite 100, Radnor, Pennsylvania 19087.

4. Airgas is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. Pursuant to an Agreement and Plan of Merger dated November 17, 2015, a wholly owned subsidiary of Respondent will merge with and into Airgas in a transaction valued at approximately \$13.4 billion (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

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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 oxygen;
- b. bulk nitrogen;
- c. bulk argon;
- d. bulk nitrous oxide;
- e. bulk liquid carbon dioxide;
- f. dry ice; and
- g. retail packaged welding gases.

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

- a. the Northeast;
- b. the Mid-Atlantic;
- c. the Southeast;
- d. Atlanta and surrounding areas;
- e. Arkansas and surrounding areas;
- f. Oklahoma and surrounding areas;
- g. Western Kentucky and surrounding areas;
- h. Chicago, Milwaukee, and surrounding areas;
- i. Western Ohio and surrounding areas; and

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j. Pittsburgh, Cleveland, and surrounding areas.

8. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the bulk argon market is the United States.

9. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the bulk nitrous oxide market is the United States and Canada.

10. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the bulk liquid carbon dioxide market are:

- a. Indiana, Kentucky, and surrounding areas;
- b. Mississippi and surrounding areas; and
- c. the Texas Panhandle and surrounding areas.

11. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the dry ice market are:

- a. the San Francisco Bay Area;
- b. Iowa and surrounding areas; and
- c. the Texas Panhandle and surrounding areas.

12. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the retail packaged welding gases market are:

- a. Anchorage, Alaska;
- b. Fairbanks, Alaska; and
- c. Kenai, Alaska.

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V. THE STRUCTURE OF THE MARKETS

13. Respondent Air Liquide and Airgas are two of a limited number of significant participants in each of the relevant markets for bulk oxygen, bulk nitrogen, bulk argon, bulk liquid carbon dioxide, and dry ice, and each relevant market is concentrated, as measured by the Herfindahl-Hirschman Index. The Acquisition would further increase concentration levels, resulting in Air Liquide becoming one of the largest suppliers in each relevant area.

14. Respondent Air Liquide and Airgas are the only two participants in the relevant geographic markets for bulk nitrous oxide and retail packaged welding gases. The Acquisition would result in Respondent holding a monopoly in these relevant markets.

VI. ENTRY CONDITIONS

15. 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.

16. Entry into the bulk oxygen, nitrogen, and argon markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct the air separation units that produce these products. Constructing an air separation unit at a scale sufficient to be viable in the market would cost at least \$30 to \$100 million, most of which are sunk costs. Moreover, it is not economically justifiable to build an air separation unit unless a significant amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably and can take several years to secure.

17. Entry into the bulk nitrous oxide market is costly, difficult, and unlikely because of, among other things, the time and cost required to construct a plant capable of producing nitrous oxide. Constructing such a plant would cost at least \$5 to \$10 million, and the demand for nitrous oxide is generally insufficient to

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justify the high costs of building a nitrous oxide plant. In addition, there are regulatory barriers to overcome due to the hazardous nature of producing nitrous oxide.

18. Entry into the bulk liquid carbon dioxide and dry ice markets would also not be likely, timely, or sufficient to deter or counteract the likely adverse competitive effects of the Acquisition. Constructing a plant capable of producing bulk liquid carbon dioxide would cost at least \$10 to \$30 million. In addition, successful entry into the bulk liquid carbon dioxide market requires access to raw carbon dioxide supply sources, which are typically unavailable due to long-term contracts with incumbent liquid carbon dioxide suppliers. For dry ice production, there are similar entry barriers. Because liquid carbon dioxide is the primary input in dry ice production, the most significant barrier to entering the market for dry ice is obtaining a liquid carbon dioxide source. If the entrant does not have its own source, it would have to secure one or enter into a supply agreement with an existing liquid carbon dioxide manufacturer. The entrant would also have to build a dry ice facility, but sales opportunities would likely be too small to justify the sunk costs associated with the required investment.

19. Entry into the retail packaged welding gases market would also not be likely, timely, or sufficient to deter or counteract the likely adverse competitive effects of the Acquisition. Currently, Air Liquide is the only entity capable of filling packaged gases in the relevant geographic markets for retail packaged welding gas, all of which are in Alaska. A new entrant would be required either to purchase bulk gases and construct a fill plant to put the gases in packaged form or to establish a supply network to transport packaged gases from a fill plant outside of Alaska to the relevant geographic markets. Because of the obstacles that must be overcome, significant market impact is unlikely to occur and could not be achieved in a timely manner.

VII. EFFECTS OF THE ACQUISITION

20. The effects of the acquisition may be to substantially lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended,

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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 Liquide and Airgas;
- b. by increasing the likelihood that Respondent Air Liquide would unilaterally exercise market power in the bulk oxygen, bulk nitrogen, bulk argon, bulk nitrous oxide, bulk liquid carbon dioxide, dry ice, and retail packaged welding gases markets in the relevant geographic areas;
- c. by enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the bulk oxygen, bulk nitrogen, bulk argon, bulk liquid carbon dioxide, and dry ice markets in the relevant geographic areas; and
- d. by increasing the likelihood that consumers would be forced to pay higher prices for bulk oxygen, bulk nitrogen, bulk argon, bulk nitrous oxide, bulk liquid carbon dioxide, dry ice, and retail packaged welding gases in the relevant geographic areas.

VIII. VIOLATIONS CHARGED

21. 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 twelfth day of May, 2016, issues its Complaint against said Respondent.

By the Commission.

Decision and Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of a wholly owned subsidiary of Respondent American Air Liquide Holdings, Inc. (“Air Liquide,” a wholly owned subsidiary of L’Air Liquide, S.A.) with and into Airgas, Inc. (“Airgas”) and Respondent having been furnished thereafter with a copy of a 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 (“Consent Agreement”) containing consent orders, 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 thereupon accepted the Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following Order to Maintain Assets:

1. Respondent American Air Liquide Holdings, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place

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of business located at 9811 Katy Freeway, Suite 100, Houston, Texas 77024. American Air Liquide Holdings, Inc., is an indirect wholly owned subsidiary of L’Air Liquide, S.A., a French *société anonyme*.

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 to Maintain Assets, the following definitions shall apply (to the extent any capitalized term appearing in this Order to Maintain Assets is not defined below, the term shall be defined as that term is defined in the Decision and Order contained in the Consent Agreement):

- A. “Air Liquide” means (a) American Air Liquide Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns and includes its parent L’Air Liquide, S.A.; and the subsidiaries, divisions, groups, and affiliates in each case controlled by American Air Liquide Holdings, Inc. (including Airgas, Inc., after the Acquisition) 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 Gases Assets pursuant to this Order.
- D. “Acquisition” means the proposed merger described in the Agreement and Plan of Merger by and among Airgas, Inc., L’Air Liquide, S.A. and AL Acquisition Corporation, dated as of November 17, 2015.

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- E. “Acquisition Date” means the date the Acquisition is consummated.
- F. “Airgas” means Airgas, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of Delaware, with its corporate office and principal place of business located at 259 N. Radnor-Chester Road, Suite 100, Radnor, Pennsylvania 19087.
- G. “CO₂ Business” means the business of producing, distributing, marketing, or selling liquid CO₂ and dry ice conducted by Air Liquide prior to the Acquisition at the CO₂ and CO₂/dry ice locations identified in Appendix A of this Order to Maintain Assets.
- H. “Confidential Information” means any and all of the following information:
 - 1. all information that is a trade secret under applicable trade secret or other law;
 - 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;
 - 3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants’ materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications,

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client and customer lists and files, contracts, the names and backgrounds of key personnel, and personnel training techniques and materials); and

4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order to Maintain Assets; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

- I. “Decision and Order” means the:
 1. 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
 2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.
- J. “Divestiture Agreement” means any agreement between Respondent (or a Divestiture Trustee) and Acquirer that receives the prior approval of the Commission to divest the Gases Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto.
- K. “Divestiture Date” means the date on which Respondent (or the Divestiture Trustee) closes on the

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transaction to divest any of the Gases Assets to an Acquirer.

- L. “Gases Assets” means the assets identified in Paragraph I.O. of the Decision and Order.
- M. “Gases Business” means the I&M Gases Business, CO₂ Business, and the Retail Business.
- N. “Gases Employee” means any individual (i) employed on a full-time, part-time, or contract basis at any of the Gases Locations as of and after the date of the announcement of the Acquisition or (ii) identified by agreement between Respondent and an Acquirer and made part of a Divestiture Agreement.
- O. “Gases Locations” means the locations identified on Appendix A of this Order to Maintain Assets.
- P. “I&M Gases Business” means the business of producing, refining, distributing, marketing, or selling atmospheric gases (liquid oxygen, liquid nitrogen, and liquid argon) and nitrous oxide conducted by either Air Liquide or Airgas prior to the Acquisition at their respective atmospheric gases and nitrous oxide locations identified in Appendix A of this Order.
- Q. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- R. “Retail Business” means the business of selling hardgoods, welding products, and gases conducted by Airgas prior to the Acquisition at the retail locations identified in Appendix A of this Order to Maintain Assets.
- S. “Third Party Consent” means any consent, assignment, license, permit, or other authorization from any Person

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other than Respondent that is necessary to divest or operate the Gases Assets.

II.

IT IS FURTHER ORDERED that during the time period before the Divestiture Date, Respondent shall operate the Gases Business and Gases Assets in the ordinary course of business consistent with past practices as of the date that Respondent announced the Acquisition, including but not limited to, the following responsibilities:

- A. Respondent shall maintain (i) the Gases Business and Gases Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondent signs the Consent Agreement, and (ii) relations and good will with suppliers, customers, landlords, creditors, agents, and other having business relationships with the Gases Business and Gases Assets;
- B. Respondent shall provide the Gases Business with sufficient financial and other resources to (i) operate the Gases Business and Gases Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans, sales and promotional activities in place prior to the Acquisition; (ii) perform all maintenance to, and replacements or remodeling of, the assets of the Gases Business in the ordinary course of business and in accordance with past practice and current plans; (iii) carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to, existing or planned renovation, remodeling, or expansion projects; and (iv) maintain the viability, competitiveness, and marketability of the Gases Business and Gases Assets.

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- C. Respondent shall preserve the Gases Business and Gases Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondent's control, as a result of which the viability, competitiveness, and marketability of the Gases Business and Gases Assets would be diminished.

III.

IT IS FURTHER ORDERED that no later than the Divestiture Date, Respondent shall secure all Third Party Consents; *provided, however*, that if Respondent is unable to obtain any Third Party Consent, Respondent shall (i) provide such assistance as an Acquirer may reasonably request in its efforts to obtain a comparable consent or (ii) with the acceptance of an Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.

IV.

IT IS FURTHER ORDERED that:

- A. Until the Divestiture Date, Respondent shall staff the Gases Business and Gases Assets with sufficient employees to maintain the viability and competitiveness of the Gases Business and Gases Assets, including but not limited to, providing each Gases Employee with reasonable financial incentives, if necessary, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Gases Assets.
- B. Respondent shall cooperate with and assist an Acquirer to evaluate and hire any Gases Employee necessary to operate the I&M Gases Business, CO₂ Business, or Retail Business in substantially the same manner as Air Liquide or Airgas prior to the Acquisition, including, but not limited to:

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1. Not later than twenty (20) days before the Divestiture Date, Respondent shall (i) identify the relevant Gases Employees, (ii) allow an Acquirer to inspect the personnel files and other documentation of the relevant Gases Employees, to the extent permissible under applicable laws, and (iii) allow an Acquirer an opportunity to interview the relevant Gases Employees;
2. Respondent shall (i) not offer any incentive to any Gases Employee to decline employment with an Acquirer, (ii) remove any contractual impediments that may deter any Gases Employee from accepting employment with an Acquirer, including, but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondent that would affect the ability of such employee to be employed by an Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any 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 Gases Employee who accepts an offer of employment from Acquirer and (ii) provide each Gases Employee with a financial incentive as necessary to accept an offer of employment with an Acquirer; and
4. For a period of two (2) years after divestiture of any of the Gases Assets, Respondent shall not solicit the employment of any Gases Employee who becomes employed by an Acquirer at the time any of the Gases Assets are divested; *provided, however*, that a violation of this provision will not occur if: (i) the individual's employment has been terminated by an Acquirer, (ii) Respondent advertises for employees in newspapers, trade publications, or other media not targeted

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specifically at the employees, or (iii) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

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

- A. Respondent shall (i) keep confidential (including as to Respondent's employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondent relating to the Gases Assets or Gases Business; *provided, however*, that Respondent may disclose or use such Confidential Information in the course of:
 - 1. Performing its obligations or as permitted under this Order to Maintain Assets, Decision and Order, or Divestiture Agreement; or
 - 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Gases Assets, Gases Business, or as required by law or rules or regulations of any stock exchange.
- B. If disclosure or use of any Confidential Information related to the Gases Assets or Gases Business is permitted to Respondent's employees or to any other Person under Paragraph V.A. of this Order to Maintain Assets, Respondent shall limit such disclosure or use (i) only to the extent such information is required; (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph V.A.; and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

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- C. Respondent shall enforce the terms of this Paragraph V. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph V., including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

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

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person (“Monitor”) to monitor Respondent’s compliance with its obligations under this Order to Maintain Assets and the Decision and Order. The Monitor may be the same person appointed as Monitor under the Decision and Order.
- B. The Commission shall select the Monitor, subject to the consent of 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 Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor.
- C. Respondent shall, no later than five (5) days after the Commission appoints a Monitor, enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order

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to Maintain Assets and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order to Maintain Assets and the Decision and Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
2. Respondent shall (i) ensure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order to Maintain Assets or the Decision and Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order to Maintain Assets;
3. The Monitor (i) shall serve at the expense of Respondent, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
4. Respondent shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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 the Monitor's gross negligence or willful misconduct; and

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5. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- D. The Monitor shall report in writing to the Commission concerning Respondent's compliance with this Order to Maintain Assets and the Decision and Order on a schedule as determined by Commission staff, including a final report after Respondent has completed all obligations required by Paragraph II. of the Decision and Order.
 - E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
 - F. The Monitor's power and duties shall terminate fifteen (15) days after the Monitor has completed his final report pursuant to Paragraph VI.D. of this Order to Maintain Assets, or at such other time as directed by the Commission.
 - G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor in the manner described in this Paragraph VI.
 - H. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets.

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

- A. Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and Decision and Order within thirty (30) days from the date Respondent signs the Consent Agreement (as set forth in the Consent Agreement) and every thirty (30) days thereafter until this Order to Maintain Assets terminates.
- B. With respect to any divestiture required by Paragraph II.A. of the Decision and Order, Respondent shall include in its compliance reports (i) the status of the divestiture and transfer of the Gases Assets; (ii) a description of all substantive contacts with a proposed acquirer (in the event that the Gases Assets are divested pursuant to Paragraph II.A.1. of the Decision and Order); and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondent completed such divestiture and the date the divestiture was accomplished.

VIII.

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to (i) preserve the Gases Business and Gases Assets as a viable, competitive, and ongoing business until the divestiture required by the Decision and Order is achieved; (ii) prevent interim harm to competition pending the relevant divestiture and other relief; and (iii) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

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IX.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger, or consolidation of Respondent; or
- C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, 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 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 related to compliance with this Order to Maintain Assets, which copying services shall be provided by the Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

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XI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate:

- 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. Three (3) business days after the date that Respondent completes the divestiture required by Paragraph II.A. of the Decision and Order; *provided, however*, that if at the time such divestiture has been completed, the Decision and Order in this matter is not yet final, then this Order to Maintain Assets shall terminate three (3) business days after the Decision and Order becomes final.

By the Commission.

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Appendix A**Appendix A****Gases Locations**

Pre-Acquisition	Products	Property Address
Air Liquide	Atmospheric Gases	815 McHenry Street Burlington, Wisconsin 53105
Air Liquide	Atmospheric Gases	4531 North Access Road Chattanooga, Tennessee 37415
Air Liquide	Atmospheric Gases	1297 Feura Bush Road Feura Bush, New York 12067
Air Liquide	Atmospheric Gases	1720 Trade Road Holland, OH 43528
Air Liquide	Atmospheric Gases	7700 West Wheeler Road Mapleton, Illinois 61547
Air Liquide	Atmospheric Gases	c/o AK Steel 1801 Crawford Street Door 360 Middletown, Ohio 45042
Air Liquide	Atmospheric Gases	1101 Holler Road Mount Vernon, Indiana 47620
Air Liquide	Atmospheric Gases	8000 North County Road 225 East Pittsboro, Indiana 46167
Air Liquide	Atmospheric Gases	203 West Creek Road St. Marys, Pennsylvania 15857
Air Liquide	Atmospheric Gases	125 Brooks Boulevard Spartanburg, South Carolina 29307
Air Liquide	Atmospheric Gases	1540 Dewberry Road Spartanburg, South Carolina 29307
Air Liquide	Atmospheric Gases	326 Forestville Road Wake Forest, North Carolina 27587
Air Liquide	Atmospheric Gases	300 Dupont Street West Point, Virginia 23181
Airgas	Atmospheric Gases	109 Tom Harris Road Carrollton, Kentucky 41008

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Pre-Acquisition	Products	Property Address
Airgas	Atmospheric Gases	180 Frontage Road Gaston, South Carolina 29053
Airgas	Atmospheric Gases	1302 SW 112 th Street Lawton, Oklahoma 73505
Airgas	Atmospheric Gases	500 Industrial Park Drive Mulberry, Arkansas 72947 305 East Mulberry Highway 64 Mulberry, Arkansas 72947
Air Liquide	Nitrous Oxide	1 Nitrous Lane Donora, Pennsylvania 15033
Air Liquide	Nitrous Oxide	1100 Hensley Street Richmond, California 94801
Air Liquide	Liquid CO ₂ / Dry Ice	2300 Fairlanes Boulevard Borger, Texas 79007
Air Liquide	CO ₂ Rail Depot	3301 Highway 630 West Fort Meade, Florida 33841
Air Liquide	Liquid CO ₂ / Dry Ice	1584 Market Avenue Galva, Iowa 51020
Air Liquide	Liquid CO ₂	218 Weisenberger Road Madison, Mississippi 39130
Air Liquide	Liquid CO ₂ / Dry Ice	651 Solano Way Martinez, California 94553
Air Liquide	Liquid CO ₂ / Dry Ice	1182 260 th Street Sergeant Bluff, Iowa 51054
Air Liquide	Liquid CO ₂	1285 South 300 West Washington, Indiana 47501
Airgas	Retail	6350 Arctic Boulevard Anchorage, Alaska 99518
Airgas	Retail	641 Hughes Avenue Fairbanks, Alaska 99701
Airgas	Retail	42400 Kenai Spur Highway Kenai, Alaska 99611

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The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of a wholly owned subsidiary of Respondent American Air Liquide Holdings, Inc. (“Air Liquide,” a wholly owned subsidiary of L’Air Liquide, S.A.) with and into Airgas, Inc. (“Airgas”) and Respondent having been furnished thereafter with a copy of a 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 (“Consent Agreement”) containing consent orders, 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 thereupon issued its complaint and its Order to 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, and having duly considered the comments received from an interested person, 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 enters the following Decision and Order (“Order”):

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1. Respondent American Air Liquide Holdings, Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 9811 Katy Freeway, Suite 100, Houston, Texas 77024. American Air Liquide Holdings, Inc., is an indirect wholly owned subsidiary of L’Air Liquide, S.A., a French *société anonyme*.
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 shall apply:

- A. “Air Liquide” means American Air Liquide Holdings, Inc., its directors, officers, employees, agents, representatives, successors, and assigns and includes its parent L’Air Liquide, S.A.; and the subsidiaries, divisions, groups, and affiliates in each case controlled by American Air Liquide Holdings, Inc. (including Airgas, Inc., after the Acquisition) 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 Gases Assets pursuant to this Order.
- D. “Acquisition” means the proposed merger described in the Agreement and Plan of Merger by and among Airgas, Inc., L’Air Liquide, S.A. and AL Acquisition Corporation, dated as of November 17, 2015.

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- E. “Acquisition Date” means the date the Acquisition is consummated.
- F. “Airgas” means Airgas, Inc., a corporation organized, existing, and doing business under, and by virtue of the laws of Delaware, with its corporate office and principal place of business located at 259 N. Radnor-Chester Road, Suite 100, Radnor, Pennsylvania 19087.
- G. “CO₂ Business” means the business of producing, distributing, marketing, or selling liquid CO₂ and dry ice conducted by Air Liquide prior to the Acquisition at the CO₂ and CO₂/dry ice locations identified in Appendix A of this Order.
- H. “Confidential Information” means any and all of the following information:
 - 1. all information that is a trade secret under applicable trade secret or other law;
 - 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, software and computer software and database technologies, systems, structures, and architectures;
 - 3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants’ materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications,

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client and customer lists and files, contracts, the names and backgrounds of key personnel, and personnel training techniques and materials); and

4. all notes, analyses, compilations, studies, summaries, and other material to the extent containing or based, in whole or in part, upon any of the information described above;

Provided, however, that Confidential Information shall not include information that (i) was, is, or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary, or other obligation restricting disclosure.

- I. “Contract” means any agreement, contract, lease, license agreement, consensual obligation, promise, or undertaking (whether written or oral and whether express or implied).
- J. “Corporate Trade Names” means all trademarks, trade names, service marks, trade dress, logos, corporate names, domain names, emblems, signs or insignia, and other source identifiers whether registered or common law, including but not limited to all such items containing or comprising the brands and marks “Air Liquide,” “Airgas,” “EMIXAL,” “Penguin,” “Blue Ice,” “Red-D-Arc,” and “Radnor.”
- K. “Cost” means the actual cost of raw materials or parts, direct labor, utilities, administrative and third party expenses, and reasonably allocated operations, distribution, and factory expenses and shared corporate services overhead used to develop, manufacture, and supply the relevant good or service.

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- L. “Divestiture Agreement” means any agreement between Respondent (or a Divestiture Trustee) and Acquirer that receives the prior approval of the Commission to divest the Gases Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto.
- M. “Divestiture Date” means the date on which Respondent (or the Divestiture Trustee) closes on the transaction to divest any of the Gases Assets to an Acquirer.
- N. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph V. of this Order.
- O. “Gases Assets” means all of Respondent’s right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to operation of the Gases Business, including, but not limited to:
 - 1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, and appurtenances, 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 (outside of the ordinary course of business) from any Gases Location since the date of the announcement of the Acquisition and not replaced;
 - 3. all inventories;
 - 4. all Contracts and all outstanding offers or solicitations to enter into any Contract, and all rights thereunder and related thereto;

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5. all consents, licenses, 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 assignable;
6. all data and Records, including client and customer lists and Records, 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, notices, orders, inquiries, correspondence, and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law);
7. all intangible rights and property, including Intellectual Property owned or licensed (as licensor or licensee) by Respondent (to the extent transferable or licensable), going concern value, goodwill, and telephone and telecopy listings; and
8. all rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof;

Provided, however, that the Gases Assets need not include (i) the Retained Assets, (ii) the Retained Intellectual Property, or (iii) any part of the Gases Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- P. “Gases Business” means the I&M Gases Business, CO₂ Business, and the Retail Business.
- Q. “Gases Employee” means any individual (i) employed on a full-time, part-time, or contract basis at any of the Gases Locations as of and after the date of the

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announcement of the Acquisition or (ii) identified by agreement between Respondent and an Acquirer and made a part of a Divestiture Agreement.

- R. “Gases Locations” means the locations identified on Appendix A of this Order.
- S. “I&M Gases Business” means the business of producing, refining, distributing, marketing, or selling atmospheric gases (liquid oxygen, liquid nitrogen, and liquid argon) and nitrous oxide conducted by either Air Liquide or Airgas prior to the Acquisition at their respective atmospheric gases and nitrous oxide locations identified in Appendix A of this Order.
- T. “Intellectual Property” means all intellectual property, including (i) commercial names, all assumed fictional business names, trade names, “doing business as” (d/b/a names), registered and unregistered trademarks, service marks and applications, and tradenames; (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 rights in mask works; (v) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; and (vi) all rights in internet web sites and internet domain names currently used.
- U. “License” means a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive, transferable, and sublicensable license and such tangible embodiments of the licensed rights (including, but not limited to, physical and electronic copies) as may be necessary or appropriate to enable Acquirer to use the rights.
- V. “Multi-Product Customer” means any customer who purchased from Respondent, as of the Acquisition Date, both (i) atmospheric gases (liquid oxygen, liquid

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nitrogen, and liquid argon) or nitrous oxide and (ii) any other products or services.

- W. “Multi-Location Customer” means any customer who purchased from Respondent atmospheric gases (liquid oxygen, liquid nitrogen, and liquid argon) or nitrous oxide, as of the Acquisition Date, both (i) from the Gases Locations and (ii) from other facilities of Respondent.
- X. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- Y. “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.
- Z. “Retail Business” means the business of selling hardgoods, welding products, and gases conducted by Airgas prior to the Acquisition at the retail locations identified in Appendix A of this Order.
- AA. “Retained Assets” means:
1. Corporate Trade Names and portions of website content, domain names, or e-mail addresses that contain Corporate Trade Names;
 2. Software that can readily be purchased or licensed from sources other than Respondent and which has not been materially modified (other than through user preference settings), or enterprise software that Respondent also uses to manage and account for businesses other than the Gases Business;
 3. Corporate headquarters of Air Liquide and Airgas;
 4. Assets located outside of the United States;

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5. Assets relating to the Gases Business that are shared with, or also pertain to, retained businesses of Respondent, including but not limited to, plants and facilities, computers, telecommunications equipment, and Tangible Personal Property, unless such assets primarily relate to the operation of any or all of the Gases Business;
 6. Data and Records that contain information (a) that relates to both the Gases Business and to retained businesses of Respondent, or (b) of which Respondent has a legal obligation to retain the original copies; *provided, however*, that Respondent shall provide copies of those portions of such data and Records that relate to the Gases Business;
 7. Insurance benefits, including rights and proceeds; and
 8. Any assets, rights, or interests relating to the production, refinement, distribution, marketing, or sale of packaged gases (including packaged atmospheric gases), such as dewars, cylinders, or cylinder fill plants, other than the Retail Business.
- BB. “Retained Intellectual Property” means any Intellectual Property, other than Retained Assets, that relates to the operation of the Gases Business and is shared with, or also pertains to, businesses operated by Respondent other than the Gases Business unless such Intellectual Property primarily relates to the operation of any or all of the Gases Business.
- CC. “Tangible Personal Property” means all machinery, equipment, spare parts, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, and other items of tangible personal property (other than inventories) of every kind owned or leased, together with any express or implied warranty by the manufacturers or sellers or lessors (to the extent

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transferable) of any item or component part thereof and all maintenance records and other documents relating thereto.

- DD. “Third Party Consent” means any consent, assignment, license, permit, or other authorization from any Person other than Respondent that is necessary to divest or operate the Gases Assets.
- EE. “Transitional Assistance” means logistical, administrative, and technical support, as required by Acquirer.

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

- A. No later than 120 days after the Acquisition Date, Respondent shall divest the Gases Assets, absolutely and in good faith, at no minimum price, as on-going businesses, to a Person or Persons that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission (including execution of a Divestiture Agreement); *provided, however*, that Respondent shall divest the Gases Assets relating to operation of the I&M Gases Business to no more than one Person.
- B. No later than the Divestiture Date, Respondent shall secure all Third Party Consents; *provided, however*, that if Respondent is unable to obtain any Third Party Consent, Respondent shall (i) provide such assistance as an Acquirer may reasonably request in its efforts to obtain a comparable consent or (ii) with the acceptance of an Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- C. Respondent shall cooperate with and assist an Acquirer to evaluate and hire any Gases Employee necessary to operate the I&M Gases Business, CO₂

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Business, or Retail Business in substantially the same manner as Air Liquide or Airgas prior to the Acquisition, including, but not limited to:

1. Not later than twenty (20) days before the Divestiture Date, Respondent shall (i) identify the relevant Gases Employees, (ii) allow an Acquirer to inspect the personnel files and other documentation of the relevant Gases Employees, to the extent permissible under applicable laws, and (iii) allow an Acquirer an opportunity to interview the relevant Gases Employees;
2. Respondent shall (i) not offer any incentive to any Gases Employee to decline employment with an Acquirer, (ii) remove any contractual impediments that may deter any Gases Employee from accepting employment with an Acquirer, including, but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondent that would affect the ability of such employee to be employed by an Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any 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 Gases Employee who accepts an offer of employment from Acquirer and (ii) provide each Gases Employee with a financial incentive as necessary to accept an offer of employment with an Acquirer; and
4. For a period of two (2) years after divestiture of any of the Gases Assets, Respondent shall not solicit the employment of any Gases Employee who becomes employed by an Acquirer at the time any of the Gases Assets are divested; *provided, however,* that a violation of this provision will not

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occur if: (i) the individual's employment has been terminated by an Acquirer, (ii) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (iii) Respondent hires employees who apply for employment with Respondent, so long as such employees were not solicited by Respondent in violation of this paragraph.

D. At the option of an Acquirer, Respondent shall:

1. For a period of twelve (12) months after the divestiture of any of the Gases Assets, provide Transitional Assistance to Acquirer at a price not to exceed Cost and in quality and quantity sufficient to enable Acquirer to operate the relevant Gases Business in substantially the same manner (including allowing for growth of the Gases Business) as Air Liquide or Airgas prior to the Acquisition;
2. For a period of three (3) years after the divestiture of any of the Gases Assets, provide Acquirer a supply of products at a price not to exceed Cost and in quality and quantity sufficient to enable Acquirer to operate the relevant Gases Business in substantially the same manner (including allowing for growth of the Gases Business) as Air Liquide or Airgas prior to the Acquisition; and
3. For a period of three (3) years after the divestiture of the Gases Assets relating to operation of the I&M Gases Business, purchase products from Acquirer as a customer in volumes equivalent to the historical internal transfers to Respondent's businesses other than the I&M Gases Business;

Provided, however, that the period of time for providing any assistance under this Paragraph II.D.

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shall be extended at the request of an Acquirer, subject to the prior approval of the Commission.

- E. With respect to Intellectual Property, Respondent:
1. Shall grant a License to an Acquirer under the Retained Intellectual Property sufficient for Acquirer to operate the relevant Gases Business in substantially the same manner as Air Liquide or Airgas prior to the Acquisition with the freedom to extend existing products and services and develop new products and services; and
 2. May enter into an agreement with an Acquirer for a License back under any Intellectual Property included in the Gases Assets that also relates to operation of a business other than the Gases Business for use in such other business.
- F. Respondent's obligations pursuant to Paragraphs II.D. and II.E. of this Order shall be set forth in one or more agreements incorporated into the Divestiture Agreement, subject to the prior approval of the Commission. Respondent shall not terminate its obligations pursuant to Paragraphs II.D. and II.E. because of a material breach by an Acquirer of any such agreement in the absence of a final order of a court of competent jurisdiction.
- G. For a period of two (2) years after divestiture of the Gases Assets relating to operation of the I&M Gases Business, Respondent shall not solicit any Multi-Product or Multi-Location Customer to discontinue or reduce such customer's purchases from the Gases Locations relating to the I&M Gases Business; *provided, however*, that a violation of this provision will not occur if: (1) a customer initiates communications with Respondent to purchase atmospheric gases or nitrous oxide or (2) Respondent advertises in newspapers, trade publications, or other

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media in a manner not targeted specifically at customers of an Acquirer.

- H. The purpose of the divestiture of the Gases Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondent and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Respondent shall (i) keep confidential (including as to Respondent's employees) and (ii) not use for any reason or purpose, any Confidential Information received or maintained by Respondent relating to the Gases Assets or Gases Business; *provided, however*, that Respondent may disclose or use such Confidential Information in the course of:
1. Performing its obligations or as permitted under this Order, the Order to Maintain Assets, or Divestiture Agreement; or
 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Gases Assets, Gases Business, or as required by law or rules or regulations of any stock exchange.
- B. If disclosure or use of any Confidential Information related to the Gases Assets or Gases Business is permitted to Respondent's employees or to any other Person under Paragraph III.A. of this Order, Respondent shall limit such disclosure or use (i) only to the extent such information is required; (ii) only to those employees or Persons who require such

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information for the purposes permitted under Paragraph III.A.; and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

- C. Respondent shall enforce the terms of this Paragraph III. as to its employees or any other Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

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

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person (“Monitor”) to monitor Respondent’s compliance with its obligations under this Order. The Monitor may be the same person appointed as Monitor under the Order to Maintain Assets issued in this matter.
- B. The Commission shall select the Monitor, subject to the consent of 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 Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor.
- C. Respondent shall, no later than five (5) days after the Commission appoints a Monitor, enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the

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Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:

1. The Monitor shall (i) monitor Respondent's compliance with the obligations set forth in this Order and (ii) act in a fiduciary capacity for the benefit of the Commission;
2. Respondent shall (i) ensure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;
3. The Monitor (i) shall serve at the expense of Respondent, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
4. Respondent shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his 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

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expenses result from the Monitor's gross negligence or willful misconduct; and

5. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- D. The Monitor shall report in writing to the Commission concerning Respondent's compliance with this Order on a schedule as determined by Commission staff, including a final report after Respondent has completed all obligations required by Paragraph II. of this Order (other than any obligations pursuant to any extensions of the agreements contemplated by Paragraph II.D. beyond the earlier of (i) their respective initial terms or (ii) three years after the divestiture of the relevant Gases Assets).
- E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. The Monitor's power and duties shall terminate fifteen (15) days after the Monitor has completed his final report pursuant to Paragraph IV.D. of this Order, or at such other time as directed by the Commission.
- G. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor in the manner described in this Paragraph IV.

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- H. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

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

- A. If Respondent has not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Gases Assets and perform Respondent's other obligations in a manner that satisfies the requirements of this Order.
- B. In the event that the Commission or the Attorney General brings an action pursuant to Section 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 Section 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

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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 other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent shall consent to the following terms and 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, and to take such other action as may be required to divest the Divestiture Assets.
 - 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, or in the case of a court-appointed Divestiture Trustee, by the court.

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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.
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 Acquirer as required by this Order; *provided, however*, 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* 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

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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 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.

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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 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*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. 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 confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. 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.
- H. 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 divestitures and other obligations or action required by this Order.
- I. The Divestiture Trustee may be the same person as the Monitor appointed under this Order.

Decision and Order

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

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and Respondent shall comply with all terms of such agreement. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order and nothing in this Order shall be construed to reduce any rights or benefits of Acquirer or to reduce any obligations of Respondent under such agreement.
- B. If any term of the Divestiture Agreement varies from Paragraphs I.-IX. 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 not modify, replace, or extend the terms of the Divestiture Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

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

- A. Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:
 - 1. Every thirty (30) days from the date this Order is issued until Respondent has fully complied with Paragraph II.D.1. of this Order;
 - 2. Every six (6) months thereafter until Respondent has fully complied with Paragraphs II.D.2. and II.D.3. of this Order (other than any obligations

Decision and Order

under any extension of the agreements contemplated by those Paragraphs beyond the earlier of (i) the respective initial terms of such agreements or (ii) three years after the divestiture of the Gases Assets); and

3. One (1) year from the date this Order is issued, annually thereafter for the next four (4) years on the anniversary of the date this Order is issued, and at such other times as the Commission staff may request.
- B. With respect to any divestiture required by Paragraph II.A. of this Order, Respondent shall include in its compliance reports (i) the status of the divestiture and transfer of the Gases Assets; (ii) a description of all substantive contacts with a proposed acquirer; and (iii) as applicable, a statement that the divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondent completed such divestiture and the date the divestiture was accomplished.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger, or consolidation of Respondent; or
- C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

Decision and Order

IX.

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 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 related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on July 15, 2026.

By the Commission.

Decision and Order

Appendix A**Appendix A****Gases Locations**

Pre-Acquisition	Products	Property Address
Air Liquide	Atmospheric Gases	815 McHenry Street Burlington, Wisconsin 53105
Air Liquide	Atmospheric Gases	4531 North Access Road Chattanooga, Tennessee 37415
Air Liquide	Atmospheric Gases	1297 Feura Bush Road Feura Bush, New York 12067
Air Liquide	Atmospheric Gases	1720 Trade Road Holland, OH 43528
Air Liquide	Atmospheric Gases	7700 West Wheeler Road Mapleton, Illinois 61547
Air Liquide	Atmospheric Gases	c/o AK Steel 1801 Crawford Street Door 360 Middletown, Ohio 45042
Air Liquide	Atmospheric Gases	1101 Holler Road Mount Vernon, Indiana 47620
Air Liquide	Atmospheric Gases	8000 North County Road 225 East Pittsboro, Indiana 46167
Air Liquide	Atmospheric Gases	203 West Creek Road St. Marys, Pennsylvania 15857
Air Liquide	Atmospheric Gases	125 Brooks Boulevard Spartanburg, South Carolina 29307
Air Liquide	Atmospheric Gases	1540 Dewberry Road Spartanburg, South Carolina 29307
Air Liquide	Atmospheric Gases	326 Forestville Road Wake Forest, North Carolina 27587
Air Liquide	Atmospheric Gases	300 Dupont Street West Point, Virginia 23181
Airgas	Atmospheric Gases	109 Tom Harris Road Carrollton, Kentucky 41008

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Pre-Acquisition	Products	Property Address
Airgas	Atmospheric Gases	180 Frontage Road Gaston, South Carolina 29053
Airgas	Atmospheric Gases	1302 SW 112 th Street Lawton, Oklahoma 73505
Airgas	Atmospheric Gases	500 Industrial Park Drive Mulberry, Arkansas 72947 305 East Mulberry Highway 64 Mulberry, Arkansas 72947
Air Liquide	Nitrous Oxide	1 Nitrous Lane Donora, Pennsylvania 15033
Air Liquide	Nitrous Oxide	1100 Hensley Street Richmond, California 94801
Air Liquide	Liquid CO ₂ / Dry Ice	2300 Fairlanes Boulevard Borger, Texas 79007
Air Liquide	CO ₂ Rail Depot	3301 Highway 630 West Fort Meade, Florida 33841
Air Liquide	Liquid CO ₂ / Dry Ice	1584 Market Avenue Galva, Iowa 51020
Air Liquide	Liquid CO ₂	218 Weisenberger Road Madison, Mississippi 39130
Air Liquide	Liquid CO ₂ / Dry Ice	651 Solano Way Martinez, California 94553
Air Liquide	Liquid CO ₂ / Dry Ice	1182 260 th Street Sergeant Bluff, Iowa 51054
Air Liquide	Liquid CO ₂	1285 South 300 West Washington, Indiana 47501
Airgas	Retail	6350 Arctic Boulevard Anchorage, Alaska 99518
Airgas	Retail	641 Hughes Avenue Fairbanks, Alaska 99701
Airgas	Retail	42400 Kenai Spur Highway Kenai, Alaska 99611

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. INTRODUCTION**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) designed to remedy the anticompetitive effects resulting from the proposed acquisition of Airgas, Inc. (“Airgas”) by American Air Liquide Holdings, Inc. (“Air Liquide”). Pursuant to the Consent Agreement, Air Liquide will divest sixteen air separation units (“ASUs”), four vertically integrated dry ice and liquid carbon dioxide plants, two separate liquid carbon dioxide plants, two nitrous oxide plants, and three retail packaged welding gas and hardgoods stores. Air Liquide has agreed to divest the required facilities to one or more Commission-approved buyers within four months of consummating its transaction with Airgas. The divestiture of these facilities and related assets will preserve the competition between Air Liquide and Airgas that the proposed acquisition would otherwise eliminate.

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”).

II. THE TRANSACTION

Pursuant to an Agreement and Plan of Merger dated November 17, 2015, a wholly owned subsidiary of Air Liquide will merge with and into Airgas in a transaction valued at approximately \$13.4 billion. The Commission’s Complaint alleges 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 substantially lessening competition in various

Analysis to Aid Public Comment

geographic markets for bulk oxygen, bulk nitrogen, bulk argon, bulk nitrous oxide, bulk liquid carbon dioxide, dry ice, and retail packaged welding gases.

III. THE PARTIES

Air Liquide is an international company specializing in industrial gases and related services. Air Liquide is the fourth-largest atmospheric gas producer in the United States, operating forty-nine liquid ASUs spread throughout the country. In the United States, Air Liquide also operates two nitrous oxide production facilities and eleven liquid carbon dioxide production facilities, six of which also produce dry ice. Air Liquide has largely exited its retail packaged gas and hardgoods business in the United States, but still operates five branch locations in Alaska. In 2015, Air Liquide's revenue totaled €16.4 billion, with €3.9 billion coming from the United States.

Airgas, headquartered in Radnor, Pennsylvania, is the leading U.S. distributor of packaged industrial, medical, and specialty gases and hardgoods, such as welding equipment and supplies. Airgas is the fifth-largest atmospheric gas producer in the United States, operating seventeen liquid ASUs, most of which are concentrated in the eastern half of the country. Airgas also operates a number of other industrial gas production plants, including three nitrous oxide production facilities, eleven liquid carbon dioxide production facilities, and fourteen dry ice production facilities. Airgas operates a network of approximately nine hundred retail branches where it sells hardgoods and packaged gas. For the fiscal year ending March 31, 2015, Airgas's consolidated net sales were approximately \$5.3 billion, with over 98% of those revenues coming from the United States.

IV. THE RELEVANT MARKETS FOR BULK OXYGEN, BULK NITROGEN, AND BULK ARGON

Atmospheric gases are gases that are present in the Earth's atmosphere. Industrial gas suppliers like Airgas and Air Liquide produce atmospheric gases for use in a wide range of applications, including oil and gas, steelmaking, health care, and food manufacturing. Liquid oxygen, nitrogen, and argon are three of

Analysis to Aid Public Comment

the most widely used atmospheric industrial gases, and each has specific properties that make it uniquely suited for the applications for which it is used. For most of these applications, there is no substitute for the use of oxygen, nitrogen, or argon.

Atmospheric gases are distributed to customers in different forms and methods depending on the volume of gas the customer requires. Customers who require large volumes are supplied either by on-site ASUs that are located at the customer's facility or by a pipeline connecting a plant to that customer. Bulk customers are those who have significant volume requirements, but are not large enough to justify on-site or pipeline gas delivery. Bulk customers typically are supplied with bulk oxygen, bulk nitrogen, or bulk argon in cryogenic trailers carrying the gas in liquid form. The liquid form is more condensed than the gaseous form and therefore easier to transport and store in large quantities. The bulk liquid gases are then stored in tanks located at the customer site. From there, customers can either use the product in its liquid form or convert it back to gas. Small-volume customers purchase nitrogen, oxygen, or argon in cylinders containing the product in gaseous form. These smaller customers are usually served by distributors, who receive their product from industrial gas suppliers in bulk liquid form. It is not feasible for bulk oxygen, bulk nitrogen, or bulk argon customers to switch distribution methods because their demand is too great for cylinder delivery and too small for on-site, or pipeline delivery.

For atmospheric gases, the ratio of the product's value to its transportation costs largely determines the relevant geographic market. Due to the relatively low sales price of bulk oxygen and nitrogen and the significant freight costs associated with transporting them, these gases can generally only be shipped economically a maximum distance of approximately 100 to 250 miles from the ASU that produces the gas. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for bulk oxygen and bulk nitrogen. The relevant geographic markets in which to analyze the effects of the proposed acquisition are: (1) the Northeast; (2) the Mid-Atlantic; (3) the Southeast; (4) Atlanta and surrounding areas; (5) Arkansas and surrounding areas; (6) Oklahoma and surrounding areas; (7) Western Kentucky and

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surrounding areas; (8) Chicago, Milwaukee, and surrounding areas; (9) Western Ohio and surrounding areas; and (10) Pittsburgh, Cleveland, and surrounding areas. Because bulk argon is a rarer and more expensive product than bulk oxygen and bulk nitrogen, it may be economically transported over greater distances. Therefore, the relevant geographic area in which to analyze the effects of the proposed acquisition on the bulk argon market is the United States.

The proposed acquisition would harm competition in the relevant markets for bulk oxygen and bulk nitrogen. Each market includes areas in which both Air Liquide and Airgas have plants that are particularly well situated to economically serve a large set of customers. The proposed acquisition would eliminate an important source of competition for those customers, would increase concentration in the relevant markets, and would cause prices to rise. For bulk argon, there are six significant suppliers in the United States, the largest of which is Air Liquide. The proposed acquisition would substantially increase concentration in bulk argon, creating a highly concentrated market.

V. THE RELEVANT MARKET FOR BULK NITROUS OXIDE

Nitrous oxide is a clear, odorless gas that is produced by heating and purifying ammonium nitrate. Commonly known as “laughing gas,” nitrous oxide is mainly used by dentists as an analgesic or a weak anesthetic. Other uses for nitrous oxide include augmenting combustion in automotive products, oxidizing rocket fuel, and manufacturing whipped cream and semiconductors. Customers who purchase nitrous oxide in bulk form are typically distributors who repackage the gas in smaller quantities. Most sales for end-use are made in cylinders to dental offices. Because of the unique properties of nitrous oxide, other gases are not considered substitutes. Consequently, customers would not switch to another gas or product even if the price of bulk nitrous oxide increased by five to ten percent.

Currently only five nitrous oxide production facilities service the entire United States and Canada. Bulk nitrous oxide is typically transported in tanker trucks. When purchasing bulk

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nitrous oxide, customers are not concerned with finding the closest production facility when choosing a supplier. Therefore, the relevant geographic area in which to analyze the effects of the proposed acquisition on the bulk nitrous oxide market is the United States and Canada.

Air Liquide and Airgas are the only two producers of nitrous oxide in the United States and Canada. Airgas is the largest producer of nitrous oxide in North America and maintains three separate facilities located Cantonment, Florida, Yazoo City, Mississippi, and Maitland, Ontario. Air Liquide operates two North American nitrous oxide plants in Donora, Pennsylvania and Richmond, California. The proposed acquisition would produce a monopoly in the market for bulk nitrous oxide.

VI. THE RELEVANT MARKETS FOR BULK LIQUID CARBON DIOXIDE

Carbon dioxide is a “process gas,” meaning that it is captured as a by-product of other manufacturing processes, such as ethanol, ammonia, and hydrogen. It is also captured from natural sources such as natural gas wells. The carbon dioxide is then put in liquid form through a cryogenic process in plants typically located adjacent to carbon dioxide gas sources. The most common application for liquid carbon dioxide is food and beverage production, where it is used to carbonate beverages, chill and freeze food, and stun animals before they are slaughtered. For the vast majority of applications, there are no viable substitutes for liquid carbon dioxide.

Suppliers deliver liquid carbon dioxide to customers in bulk trailers or rail cars. Most customers store liquid carbon dioxide in tanks located at their manufacturing facilities until it is used. Customers would not switch to micro-bulk or cylinder delivery because bulk delivery is far cheaper and they would have to contend with managing significantly more deliveries to meet their needs. In addition, customers would not consider self-sourcing liquid carbon dioxide unless the cost increased significantly more than ten percent because extracting carbon dioxide requires expensive infrastructure and the supply of carbon dioxide is shrinking.

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Significant freight costs associated with transporting liquid carbon dioxide relative to its sales price make it economical to ship liquid carbon dioxide no more than 250 miles by truck. In areas with few or no carbon dioxide sources, liquid carbon dioxide is shipped as much as 750 miles by rail. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for bulk liquid carbon dioxide. For bulk liquid carbon dioxide, the relevant geographic markets in which to analyze the effects of the proposed acquisition are: (1) Indiana, Kentucky, and surrounding areas; (2) Mississippi and surrounding areas; and (3) the Texas Panhandle and surrounding areas.

Two of the three relevant markets for bulk liquid carbon dioxide are highly concentrated and the proposed acquisition would substantially increase concentration. While the Indiana, Kentucky and surrounding areas market is moderately concentrated, the proposed acquisition would produce a significant increase in concentration and would leave the combined entity as the leading supplier. In addition, for some customers in that region, the merging firms are the closest competitors.

VII. THE RELEVANT MARKETS FOR DRY ICE

In the United States, both parties produce and sell dry ice. Dry ice is the solid form of carbon dioxide, and a significant portion of the carbon dioxide market. It is produced when liquid carbon dioxide is injected into an atmospheric chamber, which causes some of the liquid carbon dioxide to vaporize into a gas, while reducing the temperature of the remaining liquid. The remaining liquid solidifies into a snow-like consistency. This snow is then collected and pressed into dry ice blocks or pellets, and distributed to customers in standard or bulk pellet bags, or in blocks, slices, or sticks. Dry ice has many applications, including shipping of frozen food and medical supplies, cooling of materials during production, and industrial blast cleaning. It is used in a variety of industries such as food processing, transportation, and biotechnology. Suppliers of dry ice either sell directly to end users, or wholesale to distributors or resellers. For the vast majority of applications, there are no viable substitutes for dry ice.

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Dry ice begins to dissipate as soon as it is produced. As a result, dry ice is not typically transported more than 150 miles to a customer, although where local supply is insufficient, customers are willing to have dry ice shipped up to 350 miles. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for dry ice. The relevant geographic markets in which to analyze the effects of the proposed acquisition are: (1) the San Francisco Bay Area; (2) Iowa and surrounding areas; and (3) the Texas Panhandle and surrounding areas.

Air Liquide and Airgas are the only two producers of dry ice in the San Francisco Bay Area. Consequently, the proposed acquisition, without remedy, would lead to Air Liquide holding a monopoly. In the two remaining dry ice markets, the proposed acquisition would substantially decrease competition in an already highly concentrated market, and would leave the combined entity as the leading supplier.

VIII. THE RELEVANT MARKETS FOR RETAIL PACKAGED WELDING GASES

Air Liquide and Airgas operate retail packaged gas stores in close proximity to each other in Anchorage, Fairbanks, and Kenai, Alaska. Packaged welding gas and hardgoods stores are outlets where customers can purchase cylinders of various gases and related hardgoods used for welding, such as safety gear and other physical goods. While customers may choose to purchase both their packaged welding gases and hardgoods at the same retail location, they are also willing to purchase packaged welding gas from one store and hardgoods from another. Customers cannot turn to alternatives for their packaged welding gases, such as bulk delivery from ASUs or filling their own cylinders because their purchasing volumes are too low to justify large quantity purchases. Additionally, for the vast majority of applications, there are no viable substitutes for packaged welding gases.

Generally, purchasers of packaged welding gases travel approximately twenty-five miles to make purchases at retail outlets. Even in Alaska, where there are fewer retail stores and customers may be willing to travel further, it is unlikely that

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customers would travel over fifty miles to a retail location to purchase packaged welding gases. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in local geographic markets for retail packaged welding gas. Accordingly, the relevant geographic markets at issue in this case are the local areas of: (1) Anchorage, Alaska; (2) Fairbanks, Alaska; and (3) Kenai, Alaska. The proposed acquisition would reduce the number of competitors from two to one in each of these markets.

VIII. EFFECTS OF THE ACQUISITION

The proposed acquisition would eliminate direct and substantial competition between Air Liquide and Airgas in each of the relevant markets, provide Air Liquide 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 limited. The proposed acquisition, therefore, likely would allow Air Liquide to exercise market power unilaterally, increasing the likelihood that purchasers of bulk oxygen, bulk nitrogen, bulk argon, bulk nitrous oxide, bulk liquid carbon dioxide, dry ice, or retail packaged welding gas would be forced to pay higher prices in the relevant areas.

The proposed acquisition would also enhance the likelihood of collusion or coordinated action between or among the remaining firms in the relevant markets for bulk oxygen, bulk nitrogen, bulk argon, bulk liquid carbon dioxide, and dry ice because a significant competitor would be eliminated, and only a small number of viable competitors would remain. In addition, certain conditions prevalent in these relevant markets, including the relative homogeneity of the firms and products involved and availability of detailed market information, are conducive to collusion or coordinated action.

X. ENTRY

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 proposed acquisition.

Analysis to Aid Public Comment

Entry into the bulk oxygen, nitrogen, and argon markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct the ASUs that produce these products. Constructing an ASU at a scale sufficient to be viable in the market would cost at least \$30 to \$100 million, most of which are sunk costs. Moreover, it is not economically justifiable to build an ASU unless a significant amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably and can take several years to secure.

Entry into the bulk nitrous oxide market is costly, difficult, and unlikely because of, among other things, the time and cost required to construct a plant capable of producing nitrous oxide. Constructing such a plant would cost at least \$5 to \$10 million, and the demand for nitrous oxide is generally insufficient to justify the investment in building a nitrous oxide plant. In addition, there are regulatory barriers to overcome due to the hazardous nature of producing nitrous oxide.

Entry into the bulk liquid carbon dioxide and dry ice markets would also not be timely, likely, or sufficient to deter or counteract the adverse competitive effects of the proposed acquisition. Constructing a plant capable of producing bulk liquid carbon dioxide would cost at least \$10 to \$30 million. In addition, successful entry into the bulk liquid carbon dioxide market requires access to raw carbon dioxide supply sources, which are typically unavailable due to long-term contracts with incumbent liquid carbon dioxide suppliers. For dry ice production, there are similar entry barriers. Because liquid carbon dioxide is the primary input in dry ice production, the most significant barrier to entering the market for dry ice is obtaining a liquid carbon dioxide source. The entrant would also have to build a dry ice facility, but sales opportunities would likely be too small to justify the sunk costs associated with the required investment.

Entry into the retail packaged welding gases market would also not be timely, likely or sufficient to deter or counteract the likely adverse competitive effects of the proposed acquisition.

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Currently, Air Liquide is the only entity capable of filling packaged gases in the relevant geographic markets for retail packaged welding gas, all of which are in Alaska. A new entrant would be required either to purchase bulk gases and construct a fill plant to put the gases in packaged form or to establish a supply network to transport packaged gases from a fill plant outside of Alaska to the relevant geographic markets. Because of these obstacles, new entry into the relevant markets is unlikely to occur.

XI. THE CONSENT AGREEMENT

The proposed Consent Agreement is designed to eliminate the competitive concerns raised by Air Liquide's proposed acquisition of Airgas in each relevant market. Under the terms of the proposed Consent Agreement, Air Liquide is required to divest sixteen ASUs, twelve of which are currently owned and operated by Air Liquide and four of which are currently owned and operated by Airgas. The Air Liquide-operated ASUs are located in: (1) Burlington, Wisconsin; (2) Chattanooga, Tennessee; (3) Feura Bush, New York; (4) Holland, Ohio; (5) Mapleton, Illinois; (6) Middletown, Ohio; (7) Mount Vernon, Indiana; (8) Pittsboro, Indiana; (9) St. Marys, Pennsylvania; (10) Spartanburg, South Carolina; (11) Wake Forest, North Carolina; and (12) West Point, Virginia. The Airgas-operated ASUs are located in: (1) Carrollton, Kentucky; (2) Gaston, South Carolina; (3) Lawton, Oklahoma; and (4) Mulberry, Arkansas. Air Liquide is also required to divest both of its nitrous oxide plants, one located in Denora, Pennsylvania and the other in Richmond, California. Air Liquide must also divest four co-located liquid carbon dioxide and dry ice facilities, which comprise its entire dry ice business, located in: (1) Borger, Texas; (2) Galva, Iowa; (3) Sioux City, Iowa; (4) and Martinez, California.

Additionally, Air Liquide will divest two liquid carbon dioxide-only facilities in Madison, Mississippi and Washington, Indiana along with the associated rail depot located in Fort Meade, Florida. Lastly, Air Liquide will divest Airgas's retail packaged welding gas and hardgoods stores located in Anchorage, Fairbanks, and Kenai, Alaska. Additionally, with regard to the ASU assets, although the anticompetitive effects of Air Liquide's acquisition of Airgas are related to the bulk liquid oxygen,

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nitrogen, and argon markets, the pipeline oxygen and nitrogen businesses and contracts located at the ASUs are also being divested because they are critical to the viability, efficiency, and competitiveness of each plant. Air Liquide has agreed to divest the required facilities, together with all related equipment, customer and supply contracts, technology, and goodwill, to one or more Commission-approved buyers within four months of consummating its transaction with Airgas.

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 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 assets in each relevant market currently exist.

The proposed Consent Agreement incorporates a proposed Order to Maintain Assets to ensure the continued operations of the divestiture assets while a sale is conducted, and for a brief transition period once the Commission approves a buyer for the assets. The proposed Order to Maintain Assets also allows the Commission to appoint an interim monitor to oversee compliance with all the obligations and responsibilities under the proposed Order and requires Air Liquide to execute an agreement conferring upon the interim monitor all of the rights, powers, and authorities necessary to permit the monitor to ensure the continued health and competitiveness of the divested businesses.

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

ASUSTEK COMPUTER, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4587; File No. 142 3156
Complaint, July 18, 2016 – Decision, July 18, 2016

This consent order addresses ASUSTeK Computer, Inc.'s marketing of its routers, and related software and services, intended for consumer use. The complaint alleges that despite respondent's representations, ASUS engaged in a number of practices that, taken together, failed to provide reasonable security in the design and maintenance of the software developed for its routers and related "cloud" features. The consent order requires ASUS to establish and implement, and thereafter maintain, a comprehensive security program that is reasonably designed to (1) address security risks related to the development and management of new and existing covered devices; and (2) protect the privacy, security, confidentiality, and integrity of covered information.

Participants

For the *Commission*: Jarad Brown, and Nithan Sannappa.

For the *Respondent*: Law Offices of David A. Balto.

COMPLAINT

The Federal Trade Commission, having reason to believe that ASUSTeK Computer, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent ASUSTeK Computer, Inc. is a Taiwanese corporation with its principal office or place of business at 15, Li-Te Rd., Peitou, Taipei 11259, Taiwan.
2. The acts and practices of respondent as alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.