ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of L'Air Liquide, S. A., and American Air Liquide Inc.
File No. 041 0020, Docket No. C-4109

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from L'Air Liquide, S.A., which is designed to remedy the anticompetitive effects resulting from L'Air Liquide, S.A.'s acquisition of the entire share capital of Messer Griesheim GmbH ("Messer') and the subsequent transfer of Messer Griesheim Industries, Inc. ("MGI") to its wholly-owned subsidiary American Air Liquide.

Under the terms of the Consent Agreement, American Air Liquide is required to divest the air separation units ("ASUs") and related assets currently owned and operated by MGI in the following six locations: (1) Vacaville, California; (2) Irwindale, California; (3) San Antonio, Texas, (4) Westlake, Louisiana; (5) DeLisle, Mississippi; and (6) Waxahachie, Texas. The divestiture will take place no later than six months from the date the Consent Agreement becomes final. The Consent Agreement also includes an Agreement to Hold Separate that requires American Air Liquide to preserve the ASUs as viable, competitive and ongoing operations until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) 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 or make it final.

Pursuant to a sale and purchase agreement dated January 19, 2004, L'Air Liquide, S.A. agreed to acquire the entire share capital of Messer. The aggregate purchase price of the transaction is approximately $3.5 billion and includes $1.3 billion of Messer's debt that L'Air Liquide, S.A. has agreed to assume. As a result of this agreement, L'Air Liquide, S.A. will immediately transfer MGI, a wholly-owned subsidiary of Messer, which produces and sells industrial gases in the United States, to American Air Liquide. The Commission's complaint alleges that the proposed acquisition and subsequent transfer of MGI, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for liquid argon in the continental United States and certain regional markets in the United States for liquid oxygen and nitrogen.

II. The Parties

L'Air Liquide, S.A. is a world leader in industrial and medical gases and related equipment. American Air Liquide is the parent corporation of the United States subsidiary that produces and supplies oxygen, nitrogen, and argon as well as many other industrial gases to customers for numerous applications in a variety of industries, including the petrochemical, manufacturing and fabrication industries as well as the medical field. American Air Liquide's subsidiary is the fourth largest supplier of industrial gases in the United States, with twenty seven (27) ASUs throughout the United States, most of which are in Texas and the Gulf Coast region.

Messer's U.S. subsidiary, MGI, is currently the fifth largest producer of liquid atmospheric gases (oxygen, nitrogen and argon) in the United States. MGI owns and operates twenty four (24) ASUs, including several located in Texas and the Gulf Coast region, as well as in northern and southern California.

III. Liquid Oxygen, Liquid Nitrogen, and Liquid Argon

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

Additionally, customers have three distinct distribution methods to choose from in receiving oxygen, nitrogen, or argon. These gases are available in cylinders, in liquid form, and through an on-site ASU or a pipeline. Customers choose a distribution method based on the volume of gas required. Customers who use liquid oxygen, liquid nitrogen, or liquid argon generally require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. In fact, even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, liquid oxygen and liquid nitrogen may only be purchased economically from a supplier with an ASU located within one hundred and fifty (150) to two hundred and fifty (250) miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition using local geographic markets for liquid oxygen and liquid nitrogen. The relevant local markets in which to analyze the effects of this proposed acquisition are: Southern California, Northern California, Southern Texas, Western Louisiana, and the Central Gulf Coast. Because liquid argon is a more rare and more expensive gas than liquid oxygen and liquid nitrogen, it may be economically transported much greater distances.

Therefore, the continental United States and regions of the United States are the appropriate geographic markets in which to analyze the competitive effects of the proposed acquisition for liquid argon.

The markets for liquid oxygen and liquid nitrogen are highly concentrated. In three of the five relevant geographic markets (Southern California, Northern California, and the Central Gulf Coast) American Air Liquide and MGI are two of only five companies supplying liquid oxygen and liquid nitrogen to customers. Additionally, MGI has been an aggressive participant in the market for these gases, offering low prices to customers and serving as a price restraint on the other suppliers. As a result, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market. Furthermore, in the Southern Texas and Western Louisiana markets, MGI and American Air Liquide are the only producers capable of supplying liquid oxygen and liquid nitrogen to customers in those markets economically. By eliminating competition between these two suppliers in these areas, the proposed acquisition would allow American Air Liquide to exercise market power unilaterally, thereby increasing the likelihood that purchasers of liquid oxygen or liquid nitrogen would be forced to pay higher prices in these areas.

The market for liquid argon is also highly concentrated, with only five suppliers producing sufficient amounts of liquid argon to supply customers around the United States. The remaining firms are very small and local in nature, and produce liquid argon primarily to meet internal needs. Additionally, the five large suppliers of liquid argon all transport the product from ASUs in the middle and eastern part of the United States to customers on the West Coast, where the ASUs owned and operated by these suppliers do not produce enough argon to meet customers' demands. Over the past few years, MGI has had excess capacity in liquid argon which it has used to win new customers by offering low prices, especially to customers in Texas, Gulf Coast and California. By eliminating MGI as a competitor in the liquid argon market, particularly on the West Coast, the proposed acquisition would enhance the likelihood of coordinated action or collusion between or among the remaining firms, and could result in customers paying higher prices for liquid argon.

Significant impediments to new entry exist in the markets for liquid oxygen, liquid nitrogen, and liquid argon. In order to be cost competitive in these markets, an ASU must produce at least two hundred and fifty (250) to three hundred (300) tons per day of liquid product. The cost to construct a plant of this size can be thirty ($30) to forty ($40) million, most of which is sunk and cannot be recovered. While an ASU can theoretically be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's daily capacity, either to an on-site customer or to several liquid customers. On-site customers normally sign long-term contracts, and as such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise at any time in the near future in any of the areas affected by the acquisition. It is even more difficult and time-consuming for a potential new entrant to try to contract with enough liquid gas customers to justify building a new ASU in a market. These customers are generally locked into contracts with existing suppliers that typically last between five (5) and seven (7) years. Even if

the new entrant was able to contract with enough liquid customers to justify constructing a new ASU in any of the affected markets, the new entrant would still need to rely on suppliers already in the market to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entering the market, it is unlikely that new entry could be accomplished in a timely manner in any of the markets for liquid oxygen or liquid nitrogen, and even more unlikely that entry would occur in a timely manner in all of the relevant markets. Additionally, as an ASU must produce large amounts of oxygen and nitrogen in order to produce any argon, a new entrant into the liquid argon market would not be able to economically build an ASU to produce only liquid argon, rather it would need to find customers to purchase all three gases. Therefore, it is unlikely that new entry would occur in the liquid argon market absent concurrent new entry in the liquid oxygen and nitrogen markets.

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the markets for liquid oxygen, liquid nitrogen and liquid argon. Pursuant to the Consent Agreement, American Air Liquide will divest the six (6) air separation units listed in Section I to a single purchaser that will operate the ASUs as a going concern. The Consent Agreement provides that American Air Liquide must find a buyer for the assets, at no minimum price, that is acceptable to the Commission, no later than six (6) months from the date the Consent Agreement becomes final. If the Commission determines that American Air Liquide has not provided an acceptable buyer within this time period or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee will have the exclusive power and authority to accomplish the divestiture.

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 buyer of divested assets must not itself present competitive problems. Numerous entities are interested in purchasing the divested assets, including industrial gas suppliers that currently have a regional presence in the industry, but do not compete in the areas affected by the acquisition, as well as entities in related fields that are interested in entering into the production and sale of industrial gases. The Commission is therefore satisfied that sufficient potential buyers for the divested assets exist.

The Consent Agreement also contains an Agreement to Hold Separate. This will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until it is divested to a buyer approved by the Commission. The Agreement to Hold Separate became effective on the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until American Air Liquide successfully divests the divestiture asset package according to the terms of the Decision and Order.

The Consent Agreement contains a provision for the Commission to appoint a monitor-trustee to oversee the management of the divestiture asset package until the divestiture is complete, and for a brief transition period after the sale. In order to ensure that the Commission remains informed about the status of the asset package pending divestiture, about the efforts being made to accomplish the divestiture, and the provision of services and assistance during the transition period, the Consent Agreement requires the monitor-trustee to file periodic reports with the Commission until the divestiture is accomplished and the transition period has ended.

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