

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



IN THE MATTER OF
AMERICAN AIR LIQUIDE, INC., A CORPORATION.

FTC Docket No. 4109

COMMENTS OF CITIZENS FOR VOLUNTARY TRADE

Proposed Decision and Order Announced April 29, 2004
Comments Filed May 25, 2004

Citizens for Voluntary Trade (CVT), a Virginia nonprofit corporation, respectfully files the following comments in response to the Federal Trade Commission's proposed Decision and Order in the above-captioned case.

L'Air Liquide, a French corporation, signed a contract dated January 19, 2004, with Messer Griesheim Group GmbH & Co. KgaA, a German corporation, to acquire Messer's indirect subsidiary, Messer Greisheim GmbH, for \$3.5 billion. As a result of this deal, American Air Liquide, L'Air Liquide's U.S. subsidiary, was to be combined with Messer's U.S. subsidiary, MGI. The FTC objected to this on the grounds that the combined American Air Liquide-MGI subsidiary would eliminate competition between the two firms in U.S. markets for liquid argon, liquid oxygen, and liquid nitrogen. The FTC also claimed the combined firm would "unilaterally exercise market power," thus forcing consumers to pay higher prices for the liquefied gases. The FTC insisted that Air Liquide and Messer change the terms of its contract such that six facilities used to produce the liquefied gases be divested to a single purchaser approved by the FTC. This, the FTC claims, will preserve competition in the three markets.

The FTC justifies its intervention on two economic grounds. First, the FTC said the markets for the three liquefied gases are "highly concentrated" under the Herfindahl-Hirschman Indices

(HHI) and other common measures used in FTC merger reviews.¹ This means the FTC presumes further consolidation within the markets will be anti-competitive. Second, the FTC claims that barriers to entry exist in all three markets, and that new competitors are unlikely to enter "in a timely manner."²

Neither of these arguments justifies the FTC's decision to forcibly alter the terms of Air Liquide's original contract with Messer. The allegedly high market concentration (the FTC never provides the actual HHI figure or other empirical data) is nothing more than a product of government whim. The HHI is an arbitrary statistic with of no economic importance. "Government merger guidelines may be useful in indicating to business the likelihood of antitrust action," economics professor Dominick Armentano said of the HHI and similar indicators, "but they are of no scientific value in theoretical discussions of market power, and they cannot justify government intervention."³

As for barriers to entry, the only "barrier" identified by the FTC is the high cost of entering the liquefied gas markets. This is not a barrier in the literal sense--the impossibility of entry because of physical force--but a barrier in the static sense of FTC thinking. The FTC assumes that there is no circumstance where a potential competitor to Air Liquide could raise the necessary capital (tens of millions of dollars) to compete for the incumbent's liquefied gases customers. This assumption is unfounded. Capital markets, when left unrestrained by *government* or other force, have always been able to shift capital where there is an inefficiency or other demand. It is the capital markets, after all, and not the FTC that bears responsibility for establishing markets and competitors in the first place.

Consider Air Liquide's parent company, L'Air Liquide. In 1896, French engineer Georges Claude invented a method to safely transport acetylene, a volatile compound then in high demand for its use in lighting. Having figured out how to transport acetylene, Claude then set out to mass produce the compound by reducing

¹ The HHI measures market concentration by squaring the market shares of existing competitors and adding them. For example, if a market has three competitors with shares of 40%, 30%, and 30%, the HHI will be 3400 (1600+900+900.) Under federal merger guidelines, an HHI over 1800 is considered "concentrated."

² Compl. ¶ 13.

³ Dominick T. Armentano, *Antitrust: The Case for Repeal* 85 (2d ed. 1999).

the cost of calcium carbide, which reacts with water to form acetylene. Since calcium carbide was produced in furnaces, Claude needed a way to generate higher temperatures in his furnace fires, which in turn led him to seek a cheaper supply of oxygen, the element that makes fires burn hotter.

Claude ended up improving upon a method, first developed by German chemist Carl von Linde, of liquefying air in order to separate its components--oxygen, nitrogen, argon, and other gases--for transport and industrial use. Claude spent two years experimenting with Linde's process, working in his spare time with second-hand parts. In May 1902, Claude finally discovered a workable method of producing liquid oxygen on a large scale.⁴

Throughout this developmental period, Claude struggled to obtain capital for his venture. Although Air Liquide is now a multi-billion dollar international conglomerate, it didn't start out wealthy:

Georges Claude originally sought out [Paul] Delorme's help in the quest to liquefy air . . . Together with Frédéric Gallier, a former infantry officer then working at Thomson-Houston, he raised the necessary funds by passing the hat among his relatives, eventually founding an association he called the "Syndicate".

Georges Claude, to his great frustration, had to use makeshift equipment for his project. Despite this concession to financial constraints, the money soon ran out. The amount invested rose to 16,000 Francs and then to 19,000. Literally on the eve of 1902, the association was replaced by a joint venture company with seed capital of 50,000 Francs. The share price was 25 Francs and Frédéric Gallier managed the company. Just five months later, in May 1902, Georges Claude produces the first few precious drops of oxygen from a process that liquefied air. The challenge shifted to industrializing the process, and the joint venture was transformed into a limited company.

The limited company was established on November 8, 1902, with 100,000 Francs in capital provided by 24 shareholders. The name of the new company was, "Air Liquide, Company for the

⁴ Ironically acetylene, the substance Claude ultimately wanted to produce, turned out to be of little value to the market. Nevertheless, the process of liquefying air turned out to be profitable in its own right.

Study and Application of Processes developed by Georges Claude."⁵

Georges Claude was able to "compete" despite an initial lack of capital. He created the very industry the FTC now claims his company tried to illegally reduce competition in. But as Air Liquide's story demonstrates, new markets do not arise through government efforts to maintain competition, but through the innovation and risk-taking of entrepreneurs. Had the FTC been in charge of France at the turn-of-the-century, the Commission would probably have concluded Claude's early struggles finding capital were the result of "unfair competition" by larger, better-financed businesses. In 1895, when Claude began his research, no government planner could have predicted with any accuracy how the marketplace for liquefied gases would grow over the next ten years, to say nothing of the next century. But today, the FTC has the luxury of taking Air Liquide's productive capacity as a metaphysical given; the Commission looks at the company and sees a potentially harmful monopolist, rather than a champion of the free market.

The gases derived from liquefied air have hundreds of uses that even Georges Claude would not have imagined when he was searching for a way to make cheap acetylene. But none of these uses would be relevant had Claude and Air Liquide (and their eventual competitors) not created and improved the liquefied air process in the first place. Production is a prerequisite of consumption. That should be an obvious statement, yet it's lost on the FTC in the context of this case. The Commission's complaint focuses exclusively on the alleged rights of *consumers* that would be injured by the *possible* actions of a producer. The FTC brazenly asserts the original Air Liquide-Messer deal was illegal because it increased "the likelihood that consumers would be *forced* to pay higher prices for liquid oxygen, liquid nitrogen and liquid argon."⁶ (Italics added.) This statement is false. No consumer is *forced* to pay any price for liquefied gas. Force would mean Air Liquide commits fraud or misrepresentation in its dealings with customers. The mere fact a price rises or falls, or that Air Liquide has a particular market share at a given moment, is irrelevant. Force is force, period. That

⁵ 100 Years of Inspiration: The Air Liquide Story 14-15 (2002) (available online at <http://www.100ans.airliquide.com/en/index.asp>).

⁶ Compl. ¶ 15(f).

customers may be unhappy with a given price does not make them victims.

A producer's right to seek a certain price for his goods is inherent in the producer's property rights. When the FTC intervenes, as it has here, and argues that consumers are entitled to a particular price, this violates the producer's property rights. The FTC, not the producer, has initiated *force* to compel action.

The FTC's authority to control prices and abridge property rights does not exist under the United States Constitution. The FTC's legal authority--specifically Section 5 of the FTC Act, which is the basis for the complaint in this case--is said to derive from the Commerce Clause of Article I. That clause grants *Congress* the exclusive power to "regulate Commerce . . . among the several States." Nothing in that grant authorizes the FTC's action against Air Liquide.

First, the Commerce Clause only authorizes the legislative branch, Congress, to regulate interstate commerce. The FTC is not a branch of Congress. It is nominally an agency of the executive branch; as such, the FTC has no power to enact regulations over specific commercial acts. If the constitutional authority to prevent mergers like the Air Liquide-Messer deal exists, Congress would have had to make that policy clear *before* the executive branch acted. Congress has not done so. The FTC Act bans "unfair methods of competition," a term so vague that it has no controlling legal authority. The Clayton Act, which the FTC claims was also violated in this case, bans mergers that are likely to lessen competition. As discussed above, the FTC cannot prove such a circumstance, because competition is not a fixed quantity, but a dynamic process.

Second, even assuming the FTC had the constitutional authority to regulate interstate commerce as Congress's proxy, the Commission's intervention in the Air Liquide-Messer merger is not a proper form of "regulation" under the Commerce Clause. At the time of the Constitution's adoption, the plain meaning of "regulate" was "to make regular." That is, "[t]he power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it.'"⁷ Regulation is nothing more than a

⁷ Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 302-303 (2004).

uniform set of rules that lets individuals know *in advance* how to go about executing a particular commercial act. The content of that commercial act is not a proper subject for federal review, unless it falls under another constitutional power.⁸

Third, even conceding both legislative and subject-matter jurisdiction, the FTC cannot abridge Air Liquide's property rights--including its right to acquire Messer and set prices for its goods thereafter--without "due process of law."⁹ The FTC cannot act as both a prosecutor and a court of law. Article III of the Constitution vests exclusive judicial power in "one supreme Court, and such inferior Courts as the Congress may from time to time ordain establish." Judges of Article III courts must be life-tenured and are only removable through impeachment. FTC members are political appointees who serve fixed seven-year terms but may be dismissed by the president for cause¹⁰; they do not qualify as Article III judges. This is not a technical requirement that can be casually overlooked. As the Supreme Court itself has said, "The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."¹¹ Because the FTC's complaint against Air Liquide falls under the exercise of judicial power--it is a case arising under federal law where the United States itself is a party¹²--this matter must be brought before an Article III court of competent jurisdiction. The FTC has no authority to issue any type of final, judicially-enforceable judgment against Air Liquide.

Because the FTC lacks the legal authority to adjudicate its complaint against Air Liquide, the resulting proposed Decision and Order should be withdrawn. And for the other reasons discussed

⁸ For example, the Copyright Clause of Article I grants Congress the power to provide for copyrights and patents, which restrict the ability of infringers to use protected works for commercial gain. Neither the copyright nor patent powers, however, are inherent in the Commerce Clause; otherwise the Framers would not have written a separate clause in the first place.

⁹ U.S. Const. amend. V.

¹⁰ See 15 U.S.C. § 41 (FTC commissioners may be removed for "inefficiency, neglect of duty, or malfeasance in office.")

¹¹ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

¹² See U.S. Const. art. III, § 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party).

IN THE MATTER OF AMERICAN AIR LIQUIDE, INC.

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above, the complaint should be dismissed for lacking a rational basis in fact or law.

Respectfully Submitted,

A handwritten signature in cursive script that reads "S.M. Oliva". The signature is written in dark ink and is positioned above a horizontal line.

S.M. Oliva
President

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