ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of Air Products and Chemicals, Inc.,
File No. 101 0093

I. Introduction

The Federal Trade Commission ("Commission") has accepted from Air Products and Chemicals, Inc. ("Air Products"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects resulting from Air Products' proposed acquisition of Airgas, Inc. ("Airgas"). Under the terms of the Consent Agreement, Air Products is required, among other things, to divest 15 air separation units ("ASUs") and related assets currently owned and operated by Airgas in the following locations: (1) Bozrah, Connecticut; (2) Carrollton, Kentucky; (3) Canton, Ohio; (4) Dayton, Ohio; (5) New Carlisle, Indiana; (6) Madison, Wisconsin; (7) Waukesha, Wisconsin; (8) Carrollton, Georgia; (9) Jefferson, Georgia; (10) Gaston, South Carolina (2 ASUs); (11) Rock Hill, South Carolina; (12) Chester, Virginia; (13) Mulberry, Arkansas; and (14) Lawton, Oklahoma. With the divestiture of these ASUs and related assets, the competition that would otherwise be eliminated through the proposed acquisition of Airgas by Air Products will be fully preserved.

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

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

The Commission's complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in certain regional markets in the United States for the manufacture and sale of bulk liquid oxygen and bulk liquid nitrogen.

II. The Parties

Air Products is a global supplier of industrial, medical, and specialty gases for use in a variety of industries, including health care, technology, and energy. Air Products is the second-largest industrial gas supplier in the United States with 32 liquid atmospheric gas-producing plants throughout the United States.

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

III. The Products and Structure of the Markets

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

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

Due to high transportation costs, bulk liquid oxygen and nitrogen may only be purchased economically from a supplier with an ASU located within 150 to 250 miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for bulk liquid oxygen and nitrogen. The relevant geographic markets in which to analyze the effects of the proposed acquisition are (1) the Northeast (including Connecticut, Maine, Massachusetts, New Hampshire, Eastern New York, Rhode Island, and Vermont), (2) the Eastern Midwest (including Eastern Indiana, Northern Kentucky, Southeastern Michigan, Ohio, Western Pennsylvania, and Northern West Virginia), (3) the Chicago-Milwaukee metropolitan area (including the area 150 miles around Chicago), (4) the Southeast (including part of Alabama, all of Georgia, North Carolina, and South Carolina, part of Tennessee, and Southern Virginia), and (5) Oklahoma and surrounding areas (including Western Arkansas, Southeastern Kansas, Southwestern Missouri, Oklahoma, and Northeastern Texas). Because the boundaries of the relevant geographic markets at issue are largely determined by the

proximity of overlapping ASUs, those geographic markets with a greater number of proximate, overlapping ASUs – for example, the Southeast market – tend to be larger in size than those markets with fewer such ASUs – for example, the Chicago-Milwaukee market.

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

IV. Effects of the Acquisition

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

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

V. Entry

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

suppliers to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entry, it is unlikely that new entry could be accomplished in a timely manner in the bulk liquid oxygen and nitrogen markets to defeat a likely price increase caused by the proposed acquisition.

VI. The Consent Agreement

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

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

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

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

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