K&L|GATES

K&L Gates LLP
1601 K Street, NW
Washington D.C. 20006-1600

T 202.778.9000 www.klgates.com

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Donald S. Clark
Office of the Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Proposed Consent Order
In the Matter of Carlyle Partners IV, L.P., FTC File No. 071 0203

Dear Secretary Clark:

Rhodia Inc. hereby respectfully submits the following comments outlining its concerns with the Consent Order provisionally accepted by the Commission, which accepts the divestiture of a sodium silicate plant in Utica, Illinois, to remedy the anticompetitive effects stemming from the acquisition by Carlyle Partners IV, L.P., owners of PQ Corporation ("PQ"), of the worldwide sodium silicate and silicas business of INEOS Group Ltd. ("INEOS"). Rhodia is the primary purchaser of sodium silicate from merchant suppliers in the region the Consent Order is designed to address. It is in need of near-term competitive supply of sodium silicate, as its long-term contract with PQ will expire in September 2009.

Rhodia is concerned that the proposed Consent Order not only fails to preserve what little competition there currently is among merchant suppliers of sodium silicate by leaving very little production capacity that is independently owned, but also enables interdependency between PQ and the purchaser of the Utica plant. This can be remedied in large part by precluding PQ from looking to the divested plant for supply of sodium silicate. The Order should also assure there are incentives for expanding the plant, and that it cannot be sold back to PQ.

A. The Commission Has Found There Is a Competitive Problem Requiring Redress.

The complaint alleges that the combination of PQ and INEOS, the first and third largest producers of sodium silicate in the Midwest, will nominally reduce the number of potential sodium silicate suppliers to Rhodia from 4 to 3. In fact, Rhodia believes the reduction will be from 3 to 2, since W.R. Grace has historically produced sodium silicate

for its own use and has not been a significant supplier of sodium silicate into the merchant market. PQ, Occidental Chemical ("OxyChem") and INEOS are the only significant merchant suppliers in North America, and competition from INEOS will be eliminated by the merger.

The situation is in fact even worse. PQ and OxyChem have a history of not competing for each other's customers. Indeed, the "Analysis of Agreement Containing Consent Order To Aid Public Comment" ("Analysis") acknowledges that "the market is essentially a duopoly in which the top two firms, PQ and Occidental, operate interdependently." It also points out that the Herlindahl-Hirschmann Index (HHI) in the market would increase by 1181 to 4674, and that PQ has a 50% share that would go to 62% after the merger, not even taking the interdependence into account.

The complaint has identified a market for the supply of sodium silicate that, because of the high transportation cost of sodium silicate in liquid form, is regional — a 300 mile radius in the Midwestern United States. While sodium silicate can be produced and supplied in solid form (as is the case in much of the rest of the world), U.S. merchant suppliers currently produce it in liquid form only, ensuring that the market area for each plant remains small. PQ already has 4 plants in the market, at Gurnee, Illinois, Utica, Illinois, Jeffersonville, Indiana and St. Louis, Missouri. Utica and St. Louis are the smallest of these plants, each with a capacity of 27,000 metric tons per year (measured on a solid basis).

Within the market identified in the Complaint, Rhodia is the largest purchaser of sodium silicate. Its plant in Chicago Heights, Illinois is forecast for 2008 to use about 45,200 metric tons, measured on a solid basis. Rhodia sells precipitated silica primarily to manufacturers of so-called "green tires." These are low rolling resistance tires that increase fuel efficiency by up to 8%, thus reducing emissions and fuel use. Rhodia's use of sodium silicate has been growing, and is expected to continue to grow as the market for "green tires" expands. Thus, Rhodia is the party most harmed by the anticompetitive effects of the merger. Rhodia's global tire customers could also be hurt by noncompetitive pricing in the sodium silicate market to the extent that Rhodia is able to pass through its increased precipitated silica production costs.

B. Absent an Effective Divestiture, the Transaction Has Cut Off the Only Viable Competition in the Market.

The Commission's complaint confirms that entry into the market "would be unlikely to deter or defeat anticompetitive behavior." Substantial sunk investment would be required, and it would be lost if the entrant subsequently exited the market. Entry has been rare. PQ converted its Gurnee plant in 1997, and INEOS entered the merchant market recently when it agreed to sell sodium silicate to NALCO.

In addition, at the time the proposed merger became known, INEOS was in active negotiations with Rhodia to retrofit a shutdown furnace at its Joliet plant that it had previously used for internal sodium silicate supply to a business it had shut down. That furnace would have fulfilled all of Rhodia's needs for sodium silicate at its Chicago Heights plant, and it would have had some additional capacity to sell on the merchant market. The Joliet plant currently has a nameplate capacity of 40,000 metric tons, and the expansion was planned to add as much as 73,000 additional tons (on a solid basis). In June 2007 Simon Wilson of INEOS advised Rhodia that the Joliet furnace project "remains one of INEOS's top priorities," and in July 2007 a proposal was forwarded to Rhodia for "preparation of a Capital Cost Estimate to an accuracy of +/- 10%." The parties conducted a site visit on August 8, 2007. Rhodia viewed the idled furnace at the site visit and it appeared suitable for conversion. However, the discussions with INEOS abruptly terminated in September 2007 when Rhodia learned that INEOS planned to merge with PQ, thus cutting off this source of potential entry into the market.

While Rhodia does produce sodium silicate elsewhere in the world, building its own plant in Illinois would not be financially feasible. Rhodia supplied the staff with a declaration that states it would not make sense for Rhodia itself to build its own sodium silicate plant, as the capital cost of constructing a plant would be prohibitive, involving a cost of $26,828,000 (estimated within a +/- 30% range). PQ recognizes this. A February 23, 2000 letter to Rhodia from PQ's Vice President and General Manager, North America, stated that "PQ cannot imagine" that the option of Rhodia "back integrat[ing]" its Chicago Heights plant to supply its own precipitated silica production "would be financially attractive."

Rhodia also did not have any opportunity to purchase the INEOS plant because Rhodia did not know it was for sale until its acquisition by PQ was announced. Indeed, as discussed above, Rhodia was well into discussions with INEOS about a long-term supply agreement without receiving any hint that INEOS was planning to sell the plant. In any event, Rhodia is not in the sodium silicate business in the U.S. and if it were to buy or build a silicate plant for its internal needs without extra capacity to service the merchant market it would not be a good investment. That is why the Utica plant was not attractive to Rhodia (or to Woellner, a European manufacturer of sodium silicate, whom PQ also approached to sell it). Indeed, Rhodia has been exiting sodium silicate production business worldwide, except for Europe where its production assets have already been fully depreciated.

C. The Proposed Order Does Not Provide Any Meaningful Redress of the Competitive Problems the Commission Has Found.

1. At Most 9,000 Metric Tons of Capacity Will Be Available for the Merchant Market at Utica.

Rhodia does not have access to the Asset Purchase Agreement that is incorporated by reference into the provisionally accepted Order as the "Remedial Agreement." Because of this, neither Rhodia nor any other member of the public other than the parties to the Remedial Agreement themselves can know for certain what it provides, or what obligations PQ or the other Respondents may have under that Agreement. As to key remedial terms such as the amount of sodium silicate that will be available for the merchant market from the Utica plant, Rhodia respectfully submits that this information should be made publicly available in the terms of the Consent Order rather than being confined to a nonpublic agreement.

Rhodia's understanding is that the Utica plant has a nameplate capacity of 27,000 metric tons (in solid form) of sodium silicate per year. PQ also produces sodium metasilicate at the plant, but we understand those assets are not included in the divestiture. Based on the information Rhodia has been able to obtain, it appears that at least two-thirds of the sodium silicate production at the Utica plant will be retained by PQ to be used in its production of metasilicate. The Consent Order approves a long-term contract between the Commission-approved Acquirer and PQ that will tie up most of the sodium silicate production at the plant for an indefinite term. Thus, little or no sodium silicate will be available from the plant to sell in competition with PQ unless the silicate production dedicated to PQ at Utica is backed out. Rhodia believes that requiring PQ to source its sodium silicate from another of its four plants in the market is a necessary part of the remedy to assure that the full 27,000 tons of production, and potentially more, at Utica can be made available to the merchant market.

The efficiency of the remedy has been further undermined by PQ's actions since January 2006, when it purchased INEOS's metasilicate production assets. During that period, PQ has moved its metasilicate production from Joliet to Utica, increasing its demand for sodium silicate produced at Utica. This may be of benefit to PQ, but of course it further eliminates the availability of a competitive source of sodium silicate supply, and it seems to assure that the buyer of the plant will be largely dependent on PQ for its survival. This is further exacerbated by the buyer's dependence on PQ for its technology, plant operations, and utilities, PQ's continued operations in the same plant, and the buyer's reliance on and use of former PQ employees.

PQ also has a history of buying companies and shutting down their sodium silicate production. In 1997, Vinings Industries, Inc. purchased a 50,000 ton sodium silicate plant in Fortville, Indiana and became a merchant supplier of sodium silicate. In 1999, Rhodia obtained a competitive quote from Vinings at a time it was seeking competitive alternatives to PQ. PQ purchased the Vinings plant about 5 years ago and shut it down, thus eliminating a merchant competitor and keeping capacity tight in the market. PQ's current acquisition is part of the same pattern of activity.

2. The Merchant Capacity Available at Utica Will Not Replace the Lost Competition From Joliet

The 9,000 metric tons, at most, of capacity that would not be subject to use by PQ under what we understand the terms of its contract with the proposed Acquirer to be is far less than would have been available from the Joliet plant even without the expansion, and far from sufficient to allow Rhodia to bargain with PQ for the additional competitive supply it will need. If, on the other hand, the full 27,000 tons of capacity at Utica were available, and the potential for plant expansion were real, then Rhodia (or another purchaser) would have a realistic possibility to obtain supply at a competitive price.

At the time PQ agreed to buy INEOS, the Joliet plant had become a significant merchant supplier of sodium silicate, and was likely to continue to be so even if it is assumed for purposes of discussion, and contrary to Rhodia's belief throughout these discussions, that the second furnace at the plant would not have been retrofitted. INEOS, the lost competitor, was already competing in the merchant market, and had at least 18,800 metric tons available on a solid basis (50,000 tonnes on a liquid basis) to serve the merchant market (based upon information Rhodia received in June 2005). INEOS was already using some or all of this capacity to supply NALCO, a customer INEOS had won from OxyChem in a first crack in breaking the longstanding merchant supply duopoly of OxyChem and PQ. The Commission's complaint recognizes that INEOS was in fact a significant competitor, stating its share as 12%, which would increase PQ's share from 50% to 62% absent any divestiture.

INEOS also had a strong incentive to expand its production of sodium silicate. INEOS advised Rhodia in July 2006 that INEOS converted one of its furnaces devoted to metasilicate to silicate production in 1991, and then used that silicate to make zeolites and silica gels. The market for zeolites disappeared in 2005 when INEOS lost its business to produce them for Procter & Gamble, requiring INEOS to seek alternative buyers for the sodium silicate that had been used to make these zeolites. INEOS's second furnace was shut down in 2006 when it sold its metasilicate business to PQ. INEOS further advised Rhodia that a good deal of existing equipment was available for the retrofit of this second furnace, and confirms that the shipment would have been in the form of glass or cullet.

All of this shows the serious competitive threat that the Joliet plant posed to PQ even absent any expansion, consisting of at least 18,800 metric tons freed up by the loss of the zeolite business, plus another 13,300 metric tons it was using for silica gel production. (The nameplate capacity of the plant is 40,000 metric tons, but INEOS was conservative in estimating what it could provide Rhodia and INEOS.) By acquiring the Joliet plant, PQ has taken at least 18,800 metric tons of merchant capacity out of play, even assuming no expansion of the plant, and the proposed remedy replaces it with at most 9,000 metric tons of available merchant capacity.

Rhodia discerns no plausible reason to grant PQ rights to two-thirds of the output of the divested Utica plant, eliminating over 18,000 tons for merchant customers like Rhodia. PQ will have four other plants in the region with 152,000 tons of capacity to provide its captive needs for sodium silicate. To allow PQ to retain additional capacity at Utica would allow it for the first time to restrict merchant capacity by means of divestiture, instead of acquisition as it has done in the past. Allowing PQ to maintain control over the divested plant and two-thirds of its output merely perpetuates the anticompetitive effects that caused the Commission to conclude that a new competitor is needed.

Finally, the likelihood of an expansion by INEOS at Joliet, even if the Commission concludes it was not a certainty, would certainly have been greater given a merchant player such as INEOS, with a surplus furnace and plenty of room for a cost-effective expansion up to 73,000 tons with a guaranteed payback, than possible expansion at Utica by a financial investor at a plant physically restricted for expansion, in the face of sophisticated players in the market (such as Woellner) who have concluded otherwise. A Joliet expansion would, of course, have further eroded the duopoly by allowing INEOS to take this time a PQ customer, Rhodia, after having taken an OxyChem customer, NALCO.

Since PQ will have long-term control over what appears to be most or all of the production capacity of the Utica plant in order to serve its metasilicate needs, the divestiture will result in no appreciable reduction in PQ's market share over what would be the case without the divestiture. In accordance with the Merger Guidelines, given that the Utica capacity is committed to PQ, it should be accounted for as part of PQ's market share and not as that of the Commission-approved Acquirer. *See* Merger Guidelines § 1.41 ("In measuring a firm's market share, the Agency will not include its sales or capacity to the extent that the firm's capacity is committed or so profitably employed outside the relevant market that it would not be available to respond to an increase in price in the market").

We note that the Order includes "at the option of the proposed Acquirer, an option for additional space for expansion." Par. I.AA.1. However, this does not appear to be feasible at the Utica site. It is bounded by a rail line and a creek, and is close to a residential neighborhood. Nor does the Order or the Analysis provide any discussion as to whether it would be feasible to expand the Utica plant, much less whether there has been any commitment by the buyer to expand it. Moreover, the Analysis and the Order do not provide any discussion of what incentives might exist to expand production of the plant.

Finally, given the prospective purchaser's reliance on PQ for the operation and the output of the plant, there remains a serious question as to the purchaser's long-term commitment to the business. Financial investors, as opposed to industrial competitors, usually need to have an exit strategy to recover their investment within a reasonable time frame. Under the current arrangements as we understand them, a likely potential purchaser down the road would be PQ itself, since PQ would remain at the plant producing metasilicate. We note in this regard that the Order does not contain a requirement that PQ notify the Commission prior to making any further acquisitions of sodium silicate or metasilicate plants, including Utica itself.

D. Proposed Changes to the Order.

1. Alternative Divestiture Arrangements.

Rhodia respectfully submits that under these circumstances the divestiture order is of no value in remedying the loss of competition caused by the proposed transaction. Indeed, it effectively divests at most only 9,000 tons of the 27,000 tons available at the Utica plant, since the remainder would be tied up for PQ's captive production. Thus, the order would further entrench PQ's dominant share of the market.

If the purpose of allowing the long-term contract is to keep the sodium silicate and sodium metasilicate production in one plant, then Utica should not be the divested plant – the Joliet plant should be divested. If, however, PQ cannot be required to divest the Joliet plant, it should be required to divest a different plant or to terminate its sodium silicate contract at Utica by September 2009. This would allow sufficient time for PQ to make alternative arrangements and to wean it off the supply contract at Utica.

Preventing PQ from acquiring Utica-produced sodium silicate would not adversely affect its competitiveness in metasilicate. Rhodia is not aware of any impediment to PQ using another of its plants for metasilicate production. For example, there are facilities at Joliet that were used for metasilicate production before PQ bought INEOS's metasilicate business two years ago. Those plants would also be a source of

sodium silicate for PQ's production of metasilicate at Utica, should it be necessary for it to remain there.

In this regard, Rhodia is also concerned about language in the Order that PQ is required to make available "personnel, assistance and training to enable the Commission-approved Acquirer to operate the [plant] in substantially the same manner as [PQ] operated the [plant] immediately prior to the closing date." Par. II. D. This appears to be a standard provision intended to assure that the Acquirer, which does not have prior experience in the manufacture of sodium silicate, is able to run the plant to provide competitive product. Read literally, however, the provision could be interpreted to give PQ a right to demand continued production of sodium silicate for its metasilicate needs at the same level of production that existed immediately prior to the closing date.

The Order and Asset Purchase Agreement (or any other Remedial Agreement) should have language that confirms the opposite intent – that PQ's captive metasilicate production should be backed out of the plant in order to allow additional competitive production of sodium silicate. Rhodia submits that the following language should be added to paragraph II.D:

> *provided, however*, that should the Commission-approved Acquirer have the opportunity to sell sodium silicate on commercially reasonable terms to a purchaser other than PQ, sodium silicate currently used for the production of sodium metasilicate shall be made available to such other purchaser, and *provided further*, that on or after September 30, 2009 no sodium silicate produced at the Utica site shall be sold to PQ.

See U.S. v. USA Waste Services, Inc., No: 1:98 CV 1616 (N.D. Ohio 1998) (requiring that a contract with the divesting party at a waste transfer station in Philadelphia be transferred to another facility to free up capacity at the station).

Absent such a provision, Rhodia does not believe there will be sufficient incentives for the Acquirer to sell sodium silicate to others besides PQ. PQ, already present on the site, would likely be able to outbid any other prospective purchaser due to the absence of transportation costs. This provision is thus necessary to allow purchasers other than PQ to be given the opportunity to acquire an adequate supply of sodium silicate at a competitive price.

2. Incentives for Expansion of the Utica Plant.

Although staff has stated that the Asset Purchase Agreement contains incentives for the Acquirer to expand production at the plant, and that the expansion could be done within the existing footprint of the plant, there is nothing in the Consent Order or other public documentation that confirms this. The Order should make explicit whether the Utica plant is in fact expandable given current site, permitting and other constraints, and confirm that there are adequate incentives for expansion of the Utica plant to increase sodium silicate production. As an analogy, a consent Order filed in *United States v. Waste Management, Inc., and Allied Waste Industries, Inc.,* Civil No.: 1:03-CV-01409 (D.D.C. 2003), required divestiture of a "fully permitted" Chestnut Ridge waste transfer station, which facility had to be re-built and re-permitted to operate. In the event that the Chestnut Ridge station could not be sold to an acceptable buyer that would be able to get it open again, the Respondents would have had to sell one of three alternative transfer stations set out in the Order. *See also Occidental Petroleum Corp.*, 140 F.T.C. 1, 20-21 (2005)(providing purchaser with the right to request that defendant assign, modify or enter into new terminal contracts); *Magellan Midstream Partners*, 138 F.T.C. 901, 912 (2003) (providing purchaser with the right to request assistance to obtain permits, licenses or rights); *In re DTE Energy Co.*, 131 F.T.C. 962 , 977, 980 (2001)(requiring divesting company to "maintain, repair, and replace all components and other aspects" of a divested natural gas distribution system or, if divested to an alternative acquirer, grant such "capacity and other rights" as necessary to allow the acquiring company to "operate and expand" the system*); In re Dow Chemical Co.,* 125 F.T.C. 377 (1998)(requiring Respondent to assist in "such improvements, additions, and expansions to the Lima Facility to produce no less than 175 million pounds per annum (on a solution pound basis)" of certain product and to exclusively toll manufacture for the divestee at historical cost until such expansion is completed); *U.S. v. Westinghouse Corp.*, 1988-2 Trade Cas (CCH) Par. 68,328, at 59,855 (D.D.C. 1988)(approving divesture of line of business to buyer but requiring buyer to use its best efforts to become a "fully viable, established and independent competitor," and specifying minimum capitalization requirements and levels of investment to be made in the business).

3. Prior Notice Requirement for Further Acquisitions.

Given what appears would be PQ's close relationship with the Acquirer at the Utica plant, and PQ's dominant position in the market, we believe the Order should also require that the Commission receive prior notice if PQ makes any attempt in the future to acquire, directly or indirectly, control of the Utica plant, or any other sodium silicate assets. We believe the circumstances of the divestiture make such an attempt a credible enough risk to require such a provision.

E. Conclusion.

Rhodia very much appreciates the FTC's efforts on this transaction, and agrees with the FTC's conclusion that the transaction will reduce competition in the market for the manufacture, production and sale of sodium silicate. Rhodia believes that the remedy must be modified, however, as the current remedy would not help competition in general; nor would it help Rhodia, the prime victim of the current duopoly market, and of this specific anticompetitive transaction, in any way.

Before the Order is finally adopted, therefore, Rhodia respectfully submits that the Order should be amended to require divesture of the Joliet or another plant rather than the Utica plant. Alternatively, the Order should (a) require that PQ move its sodium metasilicate production from Utica to another facility within a reasonable period of time (i.e., no more than 15 months) to allow the full capacity of the plant to be used for production of sodium silicate for the merchant market or, in the alternative, require PQ to source its sodium silicate used for production of sodium metasilicate from a plant other than the Utica plant; (b) confirm that the Utica plant is in fact expandable given the site constraints and any necessary permitting, rail requirements, and other logistical requirements, and that adequate incentives exist to expand the plant; and (c) include a prior notice provision should PQ attempt to reacquire the Utica assets or any other sodium silicate assets.

We very much appreciate your consideration of these comments and the requests they contain.

Respectfully submitted,

James R. Weiss
John Longstreth

Counsel for Rhodia Inc.