

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Maureen K. Ohlhausen
 Terrell McSweeney

In the Matter of

American Air Liquide Holdings, Inc.,
a corporation.

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) **Docket No. C-4574**
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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 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.
- 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, 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 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 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.
- 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:
 - 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 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.
- 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 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

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.

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.

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.

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.

Donald S. Clark
Secretary

SEAL:
ISSUED: May 12, 2016