

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman  
Noah Joshua Phillips  
Rohit Chopra  
Rebecca Kelly Slaughter  
Christine S. Wilson

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In the Matter of	)	
<b>Linde AG</b>	)	
a corporation,	)	
<b>Praxair, Inc.</b>	)	Docket No. C- 4660
a corporation, and	)	File No. 171-0068
	)	
<b>Linde PLC</b>	)	
a corporation.	)	
_____	)	

**PETITION FOR APPROVAL OF AMENDMENTS TO CERTAIN ANCILLARY AGREEMENTS RELATING TO THE DIVESTITURE OF THE INDUSTRIAL GASES ASSETS AND HELIUM ASSETS TO MESSER INDUSTRIES, GMBH**

Pursuant to Section 2.41(f) of the Federal Trade Commission (“**Commission**”) Rules of Practice and Procedure, 16 C.F.R. § 2.41(f) (2011), and Paragraphs II.E.2(b) and III.C of the Decision and Order contained in the Agreement Containing Consent Orders issued in this matter (the “**Decision and Order**”), Linde AG, Praxair, Inc. and Linde PLC (together, “**Respondents**”) hereby petition the Commission to approve amendments to certain ancillary agreements relating to the divestiture of the Industrial Gases Assets and the Helium Assets to Messer Industries, GmbH (“**Messer**”). These amendments consist of (i) extensions to certain transitional services agreements for a small set of IT services necessary to complete the separation of Messer’s IT

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systems from Respondents and (ii) extensions to certain lease and shared facilities agreements necessary for administrative requirements associated with transitioning to certain alternative sites by Messer and Respondents (together the “**Amended Agreements**”).<sup>1</sup> The requested amendments reflect the operational realities associated with establishing standalone IT systems and administrative requirements for relocating certain specialty gas stocking sites.

Because, as described in more detail below, the Amended Agreements are unlikely under any plausible facts to affect achieving the remedial purposes of the Decision and Order, Respondents respectfully request that the Commission’s authorized delegates waive the requirement that this Application be approved, or else eliminate the comment period required for such approval, each as provided for under 16 C.F.R. § 2.41(f)(5)(ii).

### **I. Introduction**

On October 1, 2018, Respondents executed an Agreement Containing Consent Orders (the “**Consent Agreement**”) to settle the Commission’s charges related to the proposed combination of Linde and Praxair (the “**Transaction**”) and issued a Decision and Order approving the Transaction subject, in pertinent part, to the divestiture of the Industrial Gases Assets and the Helium Assets to Messer or another suitable buyer. On February 26, 2019, the Commission issued a revised final Decision and Order.

On July 16, 2018 Respondents entered into the Americas Sale and Purchase Agreement and additional ancillary agreements and amendments (together, the “**Messer Divestiture Agreements**”) to sell the Industrial Gases Assets and the Helium Assets to Messer. The Commission approved the application from Respondents for the sale of the Industrial Gases Assets and the Helium Assets to Messer on February 26, 2019. On March 1, 2019, Respondents

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<sup>1</sup> The Original Agreements with the requested Amended Agreements are attached, in agreed form, as **Confidential Appendices 1-6** set out in **Schedule 1** to this Application.

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completed the divestiture of the Industrial Gases Assets and the Helium Assets to Messer. Respondents notified the Commission of the date the divestiture was completed on March 11, 2019, submitting complete Messer Divestiture Agreements consistent with Paragraph IX.A.2. of the Decision and Order.

**II. Respondents and Messer’s Requested Amendments of Certain Ancillary Agreements**

The requested amendments of certain ancillary agreements to the Messer Divestiture Agreements are consistent with the remedial purposes of the Decision and Order. The extensions covered by the requested amendments are minor and reflect reliance on third parties and administrative requirements that are outside the control of Respondents and Messer.

**a. The Amendments to Transitional Assistance Related to Certain IT Services**

Respondents and Messer have agreed, subject to the Commission’s approval, to extend and amend certain Transitional Assistance set out in the Transitional Services Agreement (“TSAs”), executed on March 1, 2019 for services relating to ongoing separation of IT systems. Most of the services under ancillary agreements that were scheduled to expire within 12 months of closing of the Messer Divestiture Agreements will have been completed as intended and are expected to expire without incident. As of February 29, 2020, *[Redacted from the Public Record Version]* TSA services will have expired or been exited by Messer ahead of their expiration. The requested extensions for *[Redacted from the Public Record Version]* services reflect operational realities associated with the necessary Transitional Assistance for a small number of IT services.

Therefore, Respondents and Messer request approval for amendments to the following services under the Transitional Services Agreement:

- *[Redacted from the Public Record Version]*

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Respondents and Messer have been diligent in their efforts to complete the Transitional Services as set out in the Decision and Order. The request to amend these Transitional Services Agreements reflects commercial realities caused by operational delays associated with creating standalone IT services. The requested amendments to the Transitional Services Agreement are minor and are consistent with the requirements of the Decision and Order. Respondents and Messer expect to have completed all of the extended services within an additional [Redacted from the Public Record Version]. Extensions would therefore still allow for significant completion within the 24-month period for Transitional Assistance as set out in paragraph 11.E.1 of the Decision and Order. The relevant services are not competitively sensitive, and protections are already in place to protect any Confidential Information associated with Respondents and Messer's IT systems.

### **b. The Amendments to Certain Lease and Shared Facilities Agreements**

The Respondents and Messer have agreed, subject to the Commission's approval, to amend and renew certain lease and shared facilities agreements ("LSFAs"). Respondents and Messer are only seeking these amendments for a small number of specialty gas stocking sites. Other shared sites will have been exited, [Redacted from the Public Record Version]. The requested amendments reflect a commercial agreement between Respondents and Messer to extend and renew a small number of facilities on subleased sites, in line with the lease terms associated with some of the other shared facilities where a longer relocation period was expected.

The portions of these sites under sublease function mainly as stocking sites for specialty gases with certain permitting requirements and none of the sites relate to the Laser Gas Businesses. Respondents and Messer both require extensions to the LSFA terms for those sites owing to administrative requirements in transitioning to alternative sites caused by regulatory, permitting and operational requirements associated with alternative locations. While the Parties

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have been diligent in pursuing alternative locations, they have agreed that additional time for the transition of these sites is required.

Therefore, Respondents and Messer request approval for amendments to the following facilities:

- *[Redacted from the Public Record Version]*

The requested amendments are minor and are consistent with the requirements of the Decision and Order. Respondents and Messer have been diligent in their search for alternative locations but have been delayed by third party administrative issues beyond their control due to the nature and complexity of the facilities operations. Furthermore, these three facilities represent only a small set of sites initially shared between Respondents and Messer. Other shared sites remain unaffected because they do not face the same administrative restrictions on relocation.

Notably, the subleases to the relevant sites do not include any productive assets but instead cover storage or exterior inventory space for specialty gas cylinders. The facilities at issue are also independent, self-contained stocking centers for specialty gases located adjacent to unrelated production or distribution sites. The subleases present no unnecessary entanglements and to the extent they are entangled for limited services such as utility and maintenance services. To the extent any Confidential Information is implicated at these sites, protections for such Confidential Information are already in place and do not pose a competitive risk. The agreements are consistent with an arm's length commercial lease transaction. Respondents and Messer expect to have completed all relocation efforts within 30 months.

### **III. Conclusion**

As described above, the Amended Agreements reflect minor changes that implement necessary extensions caused by (i) third party vendors in the installation of a small number of

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certain IT services and (ii) administrative requirements for relocating certain specialty gas stocking facilities at shared facilities to alternative sites. These changes are unlikely under any plausible facts to affect achieving the remedial purposes of the divestiture of the Industrial Gases Assets and the Helium Assets. Accordingly, we request that the Commission's authorized delegates waive the requirement that this Application be approved, or else eliminate the comment period required for such approval, each as provided for under 16 C.F.R. § 2.41(f)(5)(ii).

**IV. Request for Confidential Treatment**

This Application and its attachments contain confidential and competitively sensitive business information relating to the Respondents and the divestiture of the Industrial Gases Assets and the Helium Assets. Disclosure of this information may prejudice the Respondents and Messer, cause harm to the ongoing competitiveness of the Industrial Gases Assets and the Helium Assets and impair the Respondents' ability to comply with their obligations under the Consent Agreement.

Pursuant to Section 4.2(d)(4) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.2(d)(4), the Respondents are submitting two versions of this Application. The confidential version contains nonpublic or commercially or competitively sensitive information. The public version redacts confidential information. Pursuant to Sections 2.41(f)(4) and 4.9(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. §§ 2.41(f)(4) and 4.9(c), the Respondents request, on their own behalf and on behalf of Messer, that the confidential version of this petition and its attachments and the information contained herein be accorded confidential treatment under all applicable statutes and regulations.

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Dated: March 6, 2020

Respectfully submitted,



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**Schedule 1**

*[Redacted from the Public Record Version]*

**Confidential Appendix 1**

*[Redacted from the Public Record Version]*

**Confidential Appendix 2**

*[Redacted from the Public Record Version]*

**Confidential Appendix 3**

*[Redacted from the Public Record Version]*

**Confidential Appendix 4**

*[Redacted from the Public Record Version]*

**Confidential Appendix 5**

*[Redacted from the Public Record Version]*

**Confidential Appendix 6**

*[Redacted from the Public Record Version]*