

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

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch

In the Matter of

**LINDE AG,
a corporation, and**

**THE BOC GROUP PLC,
a corporation.**

Docket No. C-

**DECISION AND ORDER
[Public Record Version]**

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Linde AG (“Linde”) of Respondent The BOC Group plc (“BOC”) hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with 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 Respondents 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents 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 Respondents that the law has been violated as alleged in such

issue stating its charges in that respect, and having thereupon issued its Complaint, its Order to Maintain Assets, and its Order to Hold Separate and Maintain Assets (“Hold Separate and Maintain Assets”) and accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Linde AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Abraham-Lincoln-Straße 21, 65030 Wiesbaden, Germany.
2. Respondent BOC is a corporation organized, existing, and doing business under and by virtue of the laws of England whose registered principal office is located at Chertsey Road Windlesham, Surrey GU206HJ, England.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Linde” means Linde AG, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups and affiliates controlled by Linde AG (including BOC, after Linde’s acquisition of BOC is consummated), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “BOC” means The BOC Group plc, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups and affiliates controlled by The BOC Group plc, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Linde and BOC, individually and collectively.
- D. “Commission” means the Federal Trade Commission.

- E. “Acquirer(s)” means each of the entities that acquire any of the Assets To Be Divested pursuant to Paragraphs II., III., or V. of this Order.
- F. “Acquisition Agreement” means the agreement or agreements pursuant to which Linde acquires BOC.
- G. “Allocation Percentage” means the minimum percentage of the normal helium requirements of the Helium Acquirer’s and Linde’s customers that those customers will receive while the supply of helium under the ExxonMobil Helium Contract is curtailed.
- H. “Assets To Be Divested” means
 - 1. Atmospheric Gases Assets To Be Divested,
 - 2. the Helium Assets To Be Divested, and
 - 3. the Escrow Transfills.
- I. “Atmospheric Gases” means oxygen, nitrogen, and argon.
- J. “Atmospheric Gases Acquirer” means the entity that acquires the Atmospheric Gases Assets To Be Divested pursuant to Paragraphs II. or V. of this Order.
- K. “Atmospheric Gases Assets To Be Divested” means the Atmospheric Gases Plants To Be Divested, and includes all of Linde’s interests in all tangible and intangible assets, business and goodwill used at or necessary for the production, refinement, distribution, marketing or sale of Atmospheric Gases at the Atmospheric Gases Plants To Be Divested including, but not limited to:
 - 1. all real property interests, including rights, title and interests in and to owned or leased property, together with all buildings, improvements, appurtenances, licenses and permits;
 - 2. all inventory; supplies; machinery; equipment; fixtures; furniture; tools and other tangible personal property, including vehicles and other distribution equipment (including trucks, tractors, trailers, and rail cars); dispatch facilities and equipment; storage tanks, vessels and cylinders; and equipment located at the facilities of customers whose supply agreements are divested to the Atmospheric Gases Acquirer(s), including but not limited to storage tanks, vessels and cylinders necessary for the operation of the Atmospheric Gases Assets To Be Divested;

3. all spare parts located at the Atmospheric Gases Plants To Be Divested; and, at the option of the Atmospheric Gases Acquirer(s), any shared critical spare parts for any of the Atmospheric Gases Plants To Be Divested that are stored at any other location;
4. all customer lists and customer databases; *provided, however*, that Linde may redact such customer lists and customer databases to retain information regarding customer supply arrangements not divested to the Atmospheric Gases Acquirer(s);
5. on a non-exclusive basis, all vendor lists, catalogs, sales promotion literature and advertising materials;
6. non-exclusive rights and licenses to, and copies of, all research materials, inventions, technology and intellectual property, including but not limited to, patents, trade secrets and know-how, reasonably necessary to service customers as currently served or operate the Atmospheric Gases Assets To Be Divested at no less than the rate of operation (including, but not limited to, rates of production and sales) as of the Effective Date of Atmospheric Gas Assets Divestiture;
7. at the option of the Atmospheric Gases Acquirer(s), all of the following: (a) all of the management information systems software, supply chain management software, dispatch, logistics and production software and any other software or proprietary information (including, but not limited to, LCS and any modifications and customizat

11. to the extent transferable or assignable, and, in the case of company-wide contracts, divisible, rights to

- M. “Atmospheric Gases Plant” means a facility that produces Atmospheric Gases.
- N. “Atmospheric Gases Plants To Be Divested” means the Bozrah Plant, Canton Plant, Carrollton Plant, Dayton Plant, Jefferson Plant, Madison Plant, Rock Hill Plant, and Waukesha Plant.
- O. “Bessemer Helium Transfill” means BOC’s Helium Transfill located in Bessemer, Alabama, and all other BOC assets on the property, but not including any Helium ISO Containers, Helium Tube Trailers, or Helium Dewars that are not Helium Containers To Be Divested or any assets related exclusively to BOC’s carbon dioxide or other non-helium businesses.

PROVIDED, HOWEVER, if assets used in the operation of BOC’s Bessemer Helium Transfill are also used by BOC or Linde for other purposes, then the “Bessemer Helium Transfill” shall include BOC and Linde’s right to use those assets in exchange for a one-time paid-up fee, but shall not include the assets themselves. This would include, for example, roads and parking areas used not only by persons or vehicles participating in the operation of the Bessemer Helium Transfill, but also by persons or vehicles employed by Respondents for other purposes.

- P. “Bozrah Plant” means Linde’s Atmospheric Gases Plant located in Bozrah, Connecticut.
- Q. “Candidate Atmospheric Gases Employees” means those Employees identified in Confidential Appendix A attached to this Order.
- R. “Canton Plant” means Linde’s Atmospheric Gases Plant located in Canton, Ohio.
- S. “Carrollton Plant” means Linde’s Atmospheric Gases Plant located in Carrollton, Georgia.
- T. “Dayton Plant” means Linde’s Atmospheric Gases Plant located in Dayton, Ohio.
- U. “Direct Cost” means actual cost of labor, including employee benefits plus actual input costs, such as materials and fuel, plus the actual cost of any third-party charges.
- V. “Divestiture Agreements” means the Atmospheric Assets Divestiture Agreement and the Helium Divestiture Agreement.
- W. “Effective Date of Acquisition” means the date on which Linde acquires BOC.
- X. “Effective Date of Atmospheric Gas Assets Divestiture” means the date on which the mandated divestiture of the Atmospheric Gases Assets To Be Divested occurs.
- Y. “Effective Date of the Helium Acquirer’s New Transfills” means the date on which the Commission determines the Helium Acquirer has constructed a helium transfill that is a

Standard Industry Helium Transfill or the date on which the Escrow Transfills are divested to the Helium Acquirer.

- Z. “Effective Date of Helium Assets Divestiture” means the date on which the mandated divestiture of the Helium Assets To Be Divested is completed.

- CC. “ExxonMobil” means ExxonMobil Gas & Power Marketing Company.
- DD. “ExxonMobil Helium Contract” means the contract between BOC Inc. and ExxonMobil that became effective on February 24, 2003, and that provides for the purchase of 337 million cubic feet of helium per annum by BOC.
- EE. “Held Separate Business” means the Atmospheric Gases Assets To Be Divested and all Held Separate Business Employees of the Atmospheric Gases Assets To Be Divested.
- FF. “Held Separate Business Employees” means all full-time, part-time, or contract employees whose duties take place at, or primarily relate to, the Held Separate Business or have taken place at, or primarily related to, the Held Separate Business at any time during the period commencing twelve months prior to the Effective Date of Acquisition.
- GG. “Helium Acquirer’s Expected Worldwide Helium Supply” means an estimate of the Helium Acquirer’s then available worldwide helium supply based on contractual supply obligations as reflected by recent helium deliveries from third-party sources.
- HH. “Helium Assets To Be Divested” means the Helium Containers To Be Divested, the Helium Delivery Assets To Be Divested, the Helium Supply Rights To Be Divested, the Helium Transfill Facilities To Be Divested, and the Helium Customer Contracts To Be Divested.
- II. “Helium Acquirer” means the Person that acquires the Helium Assets To Be Divested pursuant to Paragraph III. or V. of this Order
- JJ. “Helium Containers To Be Divested” means sufficient Helium ISO Containers, Helium Tube Trailers, and Helium Dewars, when combined with containers owned or leased by the Helium Acquirer prior to the Effective Date of Helium Assets Divestiture, for the Helium Acquirer to deliver economically and efficiently to its customers, its joint ventures, its subsidiaries, and itself the helium it purchases pursuant to the Helium Supply Rights To Be Divested, where all such containers are in good condition, where the average age of such Helium ISO Containers is not greater than the average age of all of BOC’s Helium ISO Containers, where the average age of such Helium Tube Trailers is not greater than the average age of all of BOC’s Helium Tube Trailers, and where the average age of such Helium Dewars is not greater than the average age of all of BOC’s Helium Dewars.

ExxonMobil 0 Td(n sh, an8 Tdre lessge ag)Tj4qu

KK. “Helium Customer Contracts To Be Divested” means:

1. BOC’s rights to and in all contracts for the sale of helium by BOC to the Helium Acquirer or to any subsidiaries or joint ventures of the Helium Acquirer;
2. BOC’s rights to and in all contracts for the sale of helium by BOC existing as of June 11, 2006, where any helium delivered pursuant to any such contract was delivered from a Helium Transfill Point, except for contracts identified in Confidential Appendix D,

PROVIDED, HOWEVER, that if after Linde uses it commercially reasonable efforts, the consent to the assignment of, or renewal, modification, or waiver of any conflict in, any customer supply contract is not obtained (“Excluded Customer Contracts”), then Linde shall remove such Excluded Customer Contracts from the Helium Customer Contracts to be Divested, and replace such Excluded Customer Contracts with alternative contracts (“Alternative Customer Contracts”), selected by the Helium Acquirer, provided that the selected Alternative Customers contracts do not cause the overall gas to liquid ratio to decline to less than 1.5:1 at the Helium Transfill Point from which the customer is currently served, until the total annual helium volume requirements of these Alternative Customer Contracts equals the Excluded Customer Contracts; provided that in each case such customer shall not be (i) a national account customer that takes a material amount of its supply at any location outside the Helium Transfill Points or (ii) a customer of Linde’s magnetic resonance imaging Business that is part of a national account customer.

3. Linde’s or BOC’s rights to and in the contracts for the sale of helium by Linde or BOC to customers located in Europe or Turkey that are identified in Confidential Appendix E; and
4. All of Linde’s rights and interests in supplying up to 90 million cubic feet per annum of helium with a term to Linde Gas UK Ltd. pursuant to the Linde AG/TNSC Supply Agreement.

PROVIDED, HOWEVER, if TNSC is not the Helium Acquirer, then “Helium Customer Contracts To Be Divested” means

- i. BOC’s rights to and in any contracts for the sale of helium up to an aggregate volume of 240 mmscf by BOC to the Helium Acquirer or to any subsidiaries or joint ventures of the Helium Acquirer,
- ii. BOC’s rights to and in all contracts for the sale of helium by BOC where any helium delivered pursuant to any such contract was delivered from a Helium Transfill Point except for contracts identified in Confidential Appendix F, provided that the contracts divested shall not cause the overall gas to liquid ratio to decline to less than 1.5:1 at the Helium Transfill Point from which the customer is currently served.,

PROVIDED, HOWEVER, that if the annual volume of such contracts does not total at least 61 million cubic feet of helium, then Linde shall provide supplemental contracts for the sale of helium delivered from one or more Helium Transfills (excluding contracts identified in Confidential Appendix F.) (“Supplemental Contracts”) until the total annual volume of the divested contracts for sale of helium delivered from Helium Transfill Points plus the Supplemental Contracts equals at least 61 million cubic feet of helium. These Supplemental Contracts shall be acceptable to the Helium Acquirer and the weighted average gross profit after distribution expense of such Supplemental Contracts shall not be less than the weighted average gross profit after distribution expense of the divested contracts for sale of helium delivered from Helium Transfill Points, provided that the Supplemental Contracts divested shall not cause the overall gas to liquid ratio to decline to less than 1.5:1 at the Helium Transfill from which the customer is currently served.

PROVIDED, FURTHER, HOWEVER, the total annual volume requirements of distributor customers will not exceed 20% of the total volume of the Helium Customer Contracts To Be Divested pursuant to Paragraph I.KK.ii. of this Order.

- iii. Linde’s or BOC’s rights to and in the contracts for the sale of helium by Linde or BOC to customers located in Europe or Turkey that are listed in Confidential Appendix G, and
- iv. All of Linde’s rights and interests in supplying up to 90 million cubic feet per annum of helium with a term of at least four (4) years to Linde Gas UK Ltd. pursuant to the Linde AG/TNSC Supply Agreement.

LL. “Helium Delivery Assets To Be Divested” means sufficient Dewar Trailers, Dewar Trucks, and Tractors, when combined with delivery assets owned or leased by the Helium Acquirer prior to the Effective Date of Helium Assets Divestiture, for the Helium Acquirer to deliver economically and efficiently to its customers, its joint ventures, its subsidiaries, and itself the helium it purchases pursuant to the Helium Supply Rights To Be Divested, where all such delivery assets are in good condition, where the average age of such Dewar Trailers is not greater than the average age of all of BOC’s Dewar Trailers, where the average age of such Dewar Trucks is not greater than the average age of all of BOC’s Dewar Trucks, and where the average age of such Tractors is not greater than the average age of all of BOC’s Tractors.

PROVIDED, HOWEVER, if TNSC is the Helium Acquirer, then the number of Helium Delivery Assets To Be Divested shall not be less the amount designated in Confidential Appendix H.

PROVIDED, FURTHER, HOWEVER, if TNSC is not the Helium Acquirer, then “Helium Delivery Assets To Be Divested” shall not be less than an amount designated in Confidential Appendix I.

- MM. “Helium Dewar” means a container that is designed to hold 1,000 liters or less of liquid helium.
- NN. “Helium Divestiture Agreement” means any agreement pursuant to which Linde divests, pursuant to this Order and with the prior approval of the Commission, any of the Helium Assets To Be Divested or any of the Escrow Transfills.
- OO. “Helium Employees” means all employees of Respondents who devote a majority of their working time to matters relating to helium, as well as all employees listed in Confidential Appendix J attached to this Order, as well as BOC’s tube trailer logistics employees at Bethlehem, PA., with the exception of employees who work at Helium Transfills.
- PP. “Helium ISO Container” means a container that has a nominal capacity of 11,000 gallons of liquid helium, that conforms to relevant manufacturing standards of the International Organization for Standardization, and that is insulated, in part, by liquid nitrogen shielding.
- QQ. “Helium Supply Rights To Be Divested” means, collectively and in full, BOC’s rights to and in the ExxonMobil Helium Contract, the Russian Helium Contract, and the Polish Helium Contract.
- RR. “Helium Transfill” means a facility where helium is transferred from Helium ISO Containers to smaller containers.
- SS. “Helium Transfill Employees” means all full-time, part-time or contract employees, including, but not limited to drivers, whose duties primarily relate to the Helium Transfills To Be Divested or the Escrow Transfills.
- TT. “Helium Transfill Points” means the locations in the United States of the Helium Transfills To Be Divested and the Escrow Transfills.

PROVIDED, HOWEVER, if TNSC is not the Helium Acquirer, then “Helium Acquirer’s Transfill Points” means the locations of the Helium Transfills To Be Divested, the Escrow Transfills, and any Helium Transfills owned by the Helium Acquirer prior to the Effective Date of Helium Assets Divestiture.

- UU. “Helium Transfills to Be Divested” means the Houston Helium Transfill and the Orlando Helium Transfill.

PROVIDED, HOWEVER, if TNSC is not the Helium Acquirer, then “Helium Transfills To Be Divested” means the Bessemer Helium Transfill and Montgomery Helium Transfill.

VV. “Helium Transfill Tolling Services” means the following service

- LLL. “Russian Helium Contract” means the contract among BOC Helex Ltd., JSC Cryor, and JSC Orenburggazprom that was dated March 31, 2002, and that provides for the purchase of approximately 60 million cubic feet of helium per annum by BOC.
- MMM. “Shute Creek” means ExxonMobil’s refining facility in Shute Creek, Wyoming.
- NNN. “Standard Industry Helium Transfill” means a facility capable of transfilling helium from Helium ISO Containers into gaseous Helium Tube Trailers and Helium Dewars and which includes at least the following types of equipment: one (1) helium compressor capable of filling to 3,000 psig; one (1) ambient air vaporizer; two (2) Helium Tube Trailer filling manifolds; two (2) Helium Dewar filling scale; one (1) vacuum pump; one (1) bulk nitrogen storage tank; one (1) helium dewar recovery manifold; analytical equipment (oxygen analyzer, moisture analyzer, total hydrocarbon analyzer, and gas chromatograph); compressor oil traps; trailer scale; surge tank; flash gas recovery system; vacuum insulated hoses and piping from the liquid container to liquid fill manifolds; and other associated piping instruments and controls.
- OOO. “TNSC” means Taiyo Nippon Sanso Corporation.
- PPP. “TNSC Divestiture Agreement” means the Asset Purchase Agreement, Transition Services Agreement, the Transportation and Tolling Agreement dated June 11, 2006, by and among Linde AG, The BOC Group plc, and Taiyo Nippon Sanso Corporation, and the Linde AG/TNSC Supply Agreement dated June 11, 2006, and the annexes thereto, as amended and restated July 7, 2006.
- QQQ. “Waukesha Plant” means Linde’s Atmospheric Gases Plant located in Waukesha, Wisconsin.

II.

IT IS FURTHER ORDERED that:

- A. Linde shall divest, within six (6) months from the date this Order becomes final, the Atmospheric Gases Assets To Be Divested to a single Atmospheric Gases Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, absolutely and in good faith and at no minimum price.
- B. Linde shall divest the Atmospheric Gases Assets To Be Divested on the terms set forth in this Paragraph II.B., in addition to other terms that may be required by this Order and by the Atmospheric Assets Divestiture Agreements; and Linde shall agree with the Atmospheric Gases Acquirer of the Atmospheric Gases Assets To Be Divested, as part of the

Atmospheric Assets Divestiture Agreements, to comply with the terms set forth in this Paragraph II.B.:

1. Not later than forty-five (45) days before the Effective Date of Atmospheric Gas Assets Divestiture, Linde shall (a) provide to the Atmospheric Gases Acquirer a list of all Held Separate Business Employees and Candidate Atmospheric Gases Employees; (b) allow the Atmospheric Gases Acquirer to interview any Held Separate Business Employees and Candidate Atmospheric Gases Employees; and (c) subject to compliance with all laws, allow the Atmospheric Gases Acquirer to inspect the personnel files and other documentation relating to such Held Separate Business Employees and Candidate Atmospheric Gases Employees;
2. Not later than thirty (30) days before the Effective Date of Atmospheric Gas Assets Divestiture, Linde shall provide an opportunity for the Atmospheric Gases Acquirer to (a) meet personally, and outside the presence or hearing of any employee or agent of Linde, with any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees; and (b) make offers of employment to any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees;
3. Linde shall not directly or indirectly interfere with the Atmospheric Gases Acquirer's offer of employment to any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees, not directly or indirectly attempt to persuade any one or more of the Held Separate Business Employees and Candidate Atmospheric Gases Employees to decline any offer of employment from the Atmospheric Gases Acquirer, and not offer any incentive to any of the Held Separate Business Employees and Candidate Atmospheric Gases Employees to decline employment with the Atmospheric Gases Acquirer;
4. Linde shall irrevocably waive any legal or equitable right to deter any Held Separate Business Employee or Candidate Atmospheric Gases Employee from accepting employment with Atmospheric Gases Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Linde that relate to Atmospheric Gases;
5. Linde shall not interfere with the employment by the Atmospheric Gases Acquirer of any Held Separate Business Employee or Candidate Atmospheric Gases Employee;
6. Linde shall continue employee benefits to Held Separate Business Employees and Candidate Atmospheric Gases Employees until the Effective Date of Atmospheric Gas Assets Divestiture consistent with the requirements of the Acquisition Agreement and the employee benefits provided to other similarly situated Linde employees that become employees of Linde after the Effective Date of Atmospheric Gas Assets Divestiture,

including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;

7. Linde shall provide a retention incentive bonus to Key Atmospheric Gases Employees who accept employment with the Atmospheric Gases Acquirer, equal to ten (10) percent of such employees' annual salary to be paid upon the employees' completion of one (1) year of continuous employment with the Atmospheric Gases Acquirer after the Effective Date of Atmospheric Gas Assets Divestiture;

8. Linde, subject to the provisions of Paragraph II.B.9. below, for a period of one (1) year from the Effective Date of Atmospheric Gas Assets Divestiture, shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Held Separate Business Employees and Candidate Atmospheric Gases Employees who have accepted offers of employment with the Atmospheric Gases Acquirer(s) to terminate their employment with the Atmospheric Gases Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Atmospheric Gases Acquirer; (2) Linde advertises for employees in newspapers, trade publications, or other mass media.

D. The purpose of the divestiture of the Atmospheric Gases Assets To Be Divested, and of the

whole and not in part and only in a manner that receives the prior approval of the Commission, and

- ii. within two (2) years after the Effective Date of Helium Assets Divestiture, divest the Escrow Transfills absolutely and in good faith, at no minimum price, as on-going businesses to the acquirer of the Helium Assets To Be Divested in whole and not in part in a manner that receives the prior approval of the Commission.

PROVIDED, FURTHER, HOWEVER, Linde shall not be required to divest an Escrow Transfill if:

- i. pursuant to Paragraph III.B.6.b. of this Order, the Commission determines, based on certification by the Monitor pursuant to Paragraph IV.D.1.c. of this Order, that the Helium Acquirer has constructed a Helium Transfill that is a Standard Industry Helium Transfill and approves Linde's retention of that Escrow Transfill, and
- ii. Linde complies with the other requirements of Paragraph III.B.6.b.

2. If Linde or BOC has divested the Helium Assets To Be Divested or the Escrow Transfills prior to the date this Order becomes final, and if, at the time the Commission makes this Order final, the Commission determines that TNSC is not an acceptable acquirer or that the TNSC Divestiture Agreement is not an acceptable manner of divestiture, and so notifies Respondents, then Linde or BOC shall within three (3) business days of receiving such notification, rescind the transaction with TNSC and shall divest the Helium Assets To Be Divested in whole and not in part and the Escrow Transfills in accordance with the first proviso to Paragraph III.A.1. of this Order.

- B. Linde shall divest the Helium Assets To Be Divested on the terms set forth in this Paragraph III.B., in addition to other terms that may be required by this Order and by the Helium Divestiture Agreements; and Linde shall agree with the Helium Acquirer, as part of the Helium Divestiture Agreements, to comply, a

equivalent to the amount that Linde receives under the Helium Supply Rights To Be Divested that could not be assigned at Linde's then-current price under the contract for a period of fifteen (15) years.

PROVIDED, HOWEVER, if, after using its commercially reasonable efforts, Linde is unable to obtain any renewals of any Helium Supply Rights To Be Divested that could not be assigned during the fifteen year period as provided in this Paragraph III.B.2., Linde shall sell to the Helium Acquirer a quantity of refined helium equivalent to the average amount it received over the last three years of the Helium Supply Rights To Be Divested that could not be assigned, at the average price paid over the last three years of the Helium Supply Rights To Be Divested that could not be assigned.

3. Neither Linde nor BOC shall:

- a. on, or prior to, the first opportunity of the Helium Acquirer to renew the ExxonMobil Helium Contract, compete with the Helium Acquirer for the rights that the Helium Acquirer would obtain if the ExxonMobil Helium Contract were renewed;
- b. on, or prior to, the first opportunity of the Helium Acquirer to renew the Russian Helium Contract, compete with the Helium Acquirer for the rights that the Helium Acquirer would obtain if the Russian Helium Contract were renewed; and
- c. on, or prior to, the first opportunity of the Helium Acquirer to renew the Polish Helium Contract, compete with the Helium Acquirer for the rights that the Helium Acquirer would obtain if the Polish Helium Contract were renewed.

4. With respect to the Allocation Percentage, Linde shall do the following:

- a. From the Effective Date of Helium Assets Divestiture until the expiration date of the ExxonMobil Helium Contract in accordance with its terms, in the event that supply of helium under the ExxonMobil Helium Contract is curtailed for any reason outside of the Helium Acquirer's control, then, during that period of time, Linde shall allocate its then available worldwide supply of helium between the Helium Acquirer and the helium customers of Linde on a pro rata basis based on their respective aggregate sales volume of helium so that the Helium Acquirer and Linde's customers shall receive an equal Allocation Percentage, which percentage shall not exceed one hundred percent (100%). The Allocation Percentage, which shall apply equally to both the Helium Acquirer's and Linde's customers, shall be calculated in accordance with the following formula:

$$AP = 1 - \frac{[SSL + SSP]}{[MDL + MDP]}, \text{ where}$$

AP= the Allocation Percentage (not to exceed 1).

SSL= The total anticipated short

- b. If, prior to the divestiture of an Escrow Transfill to the Helium Acquirer, the Commission determines, based on certification by the Monitor pursuant to Paragraph IV.D.1.c. of this Order, that the Helium Acquirer has constructed a Standard Industry Helium Transfill, then Linde shall retain such Escrow Transfill, and return to the Helium Acquirer the purchase price (including interest accrued in escrow) for that Escrow Transfill within three (3) days after it receives the Commission's approval to retain the Escrow Transfill.
 - c. Until the divestiture of an Escrow Transfill or until Linde receives the approval of the Commission to retain an Escrow Transfill, whichever is earlier, but in no event longer than two (2) years, Linde shall provide Helium Transfill Tolling Services to the Helium Acquirer at that Escrow Transfill on the following terms and conditions:
 - (1) Price shall be equal to Linde's actual Direct Cost of providing such services.
 - (2) Quantity shall not exceed the helium volume purchased by the Helium Acquirer pursuant to the ExxonMobil Helium Contract.
 - (3) In performing Helium Transfill Tolling Services, Linde shall provide all such services in substantially the same manner and applying substantially the same standards and practices that it applies when performing similar services for its own customers, consistent in all material respects with standard industry practices and standards and the standards and practices applied by BOC in carrying out similar services in connection with the sale of helium to the Helium Acquirer prior to the effective date of the Order.
7. Neither Linde nor BOC shall restrict, preclude, or influence any supplier of goods or services to its retained helium business from supplying goods or services to the helium business of the Helium Acquirer.
- PROVIDED, HOWEVER*, nothing in this Order shall preclude Linde from contracting for helium sources, except as provided in Paragraph III.B.3.
8. With respect to Helium Employees, Respondents shall do the following:
- a. Not later than fifteen (15) business days before the Effective Date of Helium Assets Divestiture, Respondents shall (1) provide to the Helium Acquirer a list of all Helium Employees; (2) allow the Helium Acquirer to interview any Helium Employees; and (3) subject to compliance with all laws, allow the Helium Acquirer to inspect the personnel files and other documentation relating to such Helium Employees;

- b. Not later than ten (10) business days before the Effective Date of Helium Assets Divestiture, Respondents shall provide an opportunity for the Helium Acquirer to (1) meet personally, and outside the presence or hearing of any employee or agent of Linde or BOC, with any one or more of the Helium Employees; and (2) make offers of employment to any one or more of the Helium Employees;
- c. Respondents shall not directly or indirectly interfere with the Helium Acquirer's offer of employment to any one or more of the Helium Employees, not directly or indirectly attempt to persuade any one or more of the Helium Employees to decline any offer of employment from the Helium Acquirer, and not offer any incentive to any of the Helium Employees to decline employment with the Helium Acquirer;
- d. Respondents shall irrevocably waive any legal or equitable right to deter any Helium Employee from accepting employment with the Helium Acquirer, including, but not limited to, waiving any non-compete or confidentiality provisions of employment or other contracts with Respondents that relate to helium;
- e. Respondents shall not interfere with the employment by the Helium Acquirer(s) of any Helium Employee;
- f. Linde or BOC shall continue employee benefits to Helium Employees until fifteen (15) days after the Effective Date of Helium Assets Divestiture consistent with the requirements of the Acquisition Agreement and the employee benefits provided to other similarly situated BOC employees that become employees of Linde after the Effective Date of the Acquisition, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;
- g. Linde or BOC shall pay, for the benefit of any Helium Employee working outside of the United States who accepts employment with the Helium Acquirer, all accrued bonuses, vested pensions, and other accrued benefits, to the extent that such benefits are not transferable;
- h. Linde or BOC shall pay any Key Helium Employee who accepts employment with the Helium Acquirer an incentive equal to thirty (30) percent of the employee's annual salary (including any other bonuses), payable upon the beginning of his or her employment by the Commission-approved Acquirer.
- i. Linde, subject to the provisions of Paragraph III.B.8.j. below, for a period of two (2) years from the Effective Date of Helium Assets Divestiture, shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Helium Employees who have accepted offers of employment with the Helium Acquirer to terminate their employment with the Helium Acquirer; *provided, however*, a violation of this

provision will not occur if: (1) the individual's employment has been terminated by the Helium Acquirer; (2) Linde advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees; or (3) Linde hires employees who apply for employment with Linde, as long as such employees were not solicited by Linde in violation of this paragraph; and

- j. Notwithstanding the provisions of Paragraph III.B.8.i.

- e. Respondents shall not interfere with the employment by the Helium Acquirer(s) of any Helium Transfill Employee;
- f. Respondents shall continue employee benefits to Helium Transfill Employees until fifteen (15) days after the Effective Date of Helium Assets Divestiture consistent with the requirements of the Acquisition Agreement and the employee benefits provided to other similarly situated BOC employees that become employees of Linde after the Effective Date of the Acquisition, including regularly scheduled or merit raises and bonuses, regularly scheduled vesting of all pension benefits, and reimbursement of relocation expenses;
- g. Linde or BOC shall pay any Key Helium Transfill Employee who accepts employment with the Helium Acquirer an incentive equal to twenty-five (25) percent of the employee's annual salary (including any other bonuses) to be paid upon the employee's completion of one (1) year of employment with the Commission-approved Acquirer;
- h. Respondents, subject to the provisions of Paragraph III.B.8.i. below, for a period of two (2) years from the Effective Date of Helium Assets Divestiture, shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Helium Transfill Employees who have accepted offers of employment with the Helium Acquirer to terminate their employment with the Helium Acquirer; *provided, however,* Acquirers to BOC (25))Tj 0.005 Tc -0.005 Tw - unless75 0 Td (een(upo

Paragraph IV.D.1.c. of this Order,

1. The Monitor shall have the power and authority to monitor Linde's and BOC's compliance with Paragraph III. of this Order, the Order To Maintain Assets, and the Helium Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
 - a. Assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by Paragraph III. of this Order and the Helium Divestiture Agreements, and the Order To Maintain Assets;
 - b. Monitoring any transition services agreements; and
 - c. Determining the completion of a Standard Industry Helium Transfill.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Linde's and BOC's compliance with the provisions of Paragraph III. of this Order, the Order To Maintain Assets, and the Helium Divestiture Agreements.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Linde's and BOC's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Linde's and BOC's compliance with their obligations under Paragraph III. of this Order and the Helium Divestiture Agreements. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Linde's and BOC's compliance with Paragraph III. of this Order, the Order to Maintain Assets, and the Helium Divestiture Agreements.
5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any

claim, whether or not resulting in any 1

V.

IT IS FURTHER ORDERED that:

- A. If Linde has not divested all of the Assets To Be Divested as required by Paragraphs II. and III. of this Order, the Commission may appoint a trustee to divest (“Divestiture Trustee”) the remaining Assets To Be Divested in a manner that satisfies the requirements of Paragraphs II. and III. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Linde shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Linde to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Linde, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Linde has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Linde of the identity of any proposed Divestiture Trustee, Linde shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Within ten (10) days after appointment of a Divestiture Trustee, Linde shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Linde shall consent to the following terms and conditions regarding the Divestiture Trustee’s powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve

(12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete ac

6. Linde shall indemnify the Divestiture Tr

divestiture and the identity of all parties contacted. Respondents shall each include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and rec

**NON-PUBLIC
APPENDIX A
TO THE DECISION AND ORDER**

**CANDIDATE ATMOSPHERIC GASES EMPLOYEES
[Redacted From the Public Record Version But Incorporated By Reference]**

**NON-PUBLIC
APPENDIX B
TO THE DECISION AND ORDER**

**HELIUM CONTAINERS TO BE DIVESTED IF TNSC IS THE HELIUM ACQUIRER
[Redacted From the Public Record Version But Incorporated By Reference]**

**NON-PUBLIC
APPENDIX C
TO THE DECISION AND ORDER**

**HELIUM CONTAINERS TO BE DIVESTED IF TNSC IS NOT THE HELIUM
ACQUIRER**

[Redacted From the Public Record Version But Incorporated By Reference]

**NON-PUBLIC
APPENDIX D
TO THE DECISION AND ORDER**

EXCEPTED

**NON-PUBLIC
APPENDIX F
TO THE DECISION AND ORDER**

**EXCEPTED CONTRACTS FOR HELIUM FROM TRANSFILL POINTS IF TNSC IS
NOT THE HELIUM ACQUIRER**

[Redacted From the Public Record Version But Incorporated By Reference]

**NON-PUBLIC
APPENDIX G
TO THE DECISION AND ORDER**

**HELIUM CUSTOMER CONTRACTS IN EUROPE AND TURKEY IF TNSC IS NOT
THE HELIUM ACQUIRER**

[Redacted From the Public Record Version But Incorporated By Reference]

**NON-PUBLIC
APPENDIX H
TO THE DECISION AND ORDER**

**HELIUM DELIVERY ASSETS TO BE DIVESTED IF TNSC IS THE HELIUM
ACQUIRER**

[Redacted From the Public Record Version But Incorporated By Reference]

**NON-PUBLIC
APPENDIX K
TO THE DECISION AND ORDER**

KEY ATMOSPHERIC GAS EMPLOYEES
[Redacted From the Public Record Version But Incorporated By Reference]

**NON-PUBLIC
APPENDIX M
TO THE DECISION AND ORDER**

KEY HELIUM TRANSFILL EMPLOYEES
[Redacted From the Public Record Version But Incorporated By Reference]

**NON-PUBLIC
APPENDIX O
TO THE DECISION AND ORDER**

**TNSC DIVESTITURE AGREEMENT
[Redacted From the Public Record Version But Incorporated By Reference]**

**NON-PUBLIC
APPENDIX P
TO THE DECISION AND ORDER**

**CONSENT TO ASSIGNMENT FROM EXXONMOBIL HELIUM CONTRACT,
POLISH HELIUM CONTRACT, AND RUSSIA HELIUM CONTRACT
[Redacted From the Public Record Version But Incorporated By Reference]**