

**COMMERCE ACT 1986: BUSINESS ACQUISITION
SECTION 66: NOTICE SEEKING CLEARANCE**

Date: 12 December 2007

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to s66(1) of the Commerce Act 1986 notice is hereby given seeking **clearance** of a business acquisition.

EXECUTIVE SUMMARY

- 1.1 Air Liquide New Zealand Limited ("**Air Liquide**") seeks clearance to acquire all of the shares in ASCOGAS Limited, the carbon dioxide business of the ASCO Group in New Zealand.
- 1.2 Air Liquide has entered into a conditional agreement for the acquisition of the shares.
- 1.3 The proposed transaction affects the North Island market for the wholesale supply and distribution of carbon dioxide and the South Island market for the wholesale supply and distribution of carbon dioxide. However, the proposed transaction will not have the effect of substantially lessening competition in either of these markets for the following reasons:
 - (a) the aggregation arising out of the proposed transaction in each of these markets is *de minimus*. There will be virtually no aggregation in the North Island market where ASCOGAS' market share is in the order of **[CONFIDENTIAL]** percent. In the South Island there is also very little aggregation, where Air Liquide's market share is in the order of **[CONFIDENTIAL]** percent, and even then is limited only to the supply of carbon dioxide in cylinders to a select group of customers (wineries) in the Marlborough region;
 - (b) Air Liquide's limited involvement in the South Island market does not currently provide any real competitive constraint, with the result that the proposed transaction will have little impact on competition in the South Island market; and
 - (c) there is very little prospect of the merged entity being able to increase prices in a material and sustained way following the acquisition given the strong competition from BOC in particular. The strength of the existing competition between Air Liquide and BOC will be the predominant feature of both the factual and the counterfactual. In the counterfactual, there is little prospect of

ASCOGAS expanding its presence in the North Island market for the wholesale supply of carbon dioxide.

- 1.4 Moreover, procompetitive effects in the factual mean that, in Air Liquide's view, the proposed transaction is likely to have the effect of improving competition.

OUTLINE/TABLE OF CONTENTS3

PART I: TRANSACTION DETAILS.....4

PART II: IDENTIFICATION OF THE MARKETS AFFECTED.....9

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION.....13

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION17

PART V: OTHER POTENTIAL CONSTRAINTS18

APPENDIX 1: CARBON DIOXIDE SITES IN NEW ZEALAND20

PART I: TRANSACTION DETAILS

2. THE TRANSACTION

- 2.1 Clearance is sought in respect of the acquisition by Air Liquide New Zealand Limited ("**Air Liquide**") of all of the shares in ASCOGAS Limited ("**ASCOGAS**").
- 2.2 The Parties have entered into a conditional agreement for the sale and purchase of the shares relevant to the transaction.

Details of the proposal

- 2.3 Under the proposed transaction, Air Liquide will acquire ASCOGAS's carbon dioxide business.

3. NOTICE GIVEN BY AIR LIQUIDE NEW ZEALAND LIMITED

- 3.1 This notice is given by:

Air Liquide New Zealand Limited
19 Maurice Road
Penrose
AUCKLAND 1642

Attn: Kevin Walsh
Managing Director
Ph: +64 9 622 3880

- 3.2 All correspondence and notices in respect of this application should be directed in the first instance to:

Russell McVeagh
Barristers & Solicitors
P O Box 8
Level 30, Vero Centre
48 Shortland Street
AUCKLAND

Attn: Andrew Peterson / Chris Graf
Ph: (09) 367 8315 / 8232
Fax: (09) 367 8596

4. CONFIDENTIALITY

- 4.1 Confidentiality is sought in respect of all items deleted from the public copy of this application ("**confidential information**"). The items are indicated in the non-public version in square brackets ("**[]**"), the entire contents of which are confidential.
- 4.2 In respect of the confidential information, confidentiality is claimed under section 9(2)(b)(ii) of the Official Information Act 1982, on the grounds that the information is commercially sensitive and valuable information which is confidential to the participants,

and disclosure of it is likely to give unfair advantage to competitors of the participants and/or unreasonably to prejudice the commercial position of the persons involved.

- 4.3 Air Liquide requests that it be notified of any request made to the Commission under the Official Information Act for release of the confidential information, and that the Commission seeks its views as to whether the information remains confidential and commercially sensitive, at the time responses to such requests are being considered.

5. DETAILS OF THE PARTICIPANTS

Acquirer

- 5.1 The proposed acquirer is Air Liquide.
- 5.2 Air Liquide is a separately incorporated company in New Zealand and is part of the Air Liquide Group of companies that are specialised in the supply of industrial and medical gases and related services. Air Liquide is based in Auckland and supplies oxygen, nitrogen, argon, acetylene, carbon dioxide and other industrial gases to the North Island market (in addition, it does have a small presence supplying industrial gases, including carbon dioxide in cylinders, to the Marlborough region of the South Island to a select group of customers - wineries). It has four branches, all of which are in the North Island, and 53 retail agents (all of which, except one, are based in the North Island).
- 5.3 Air Liquide sources its carbon dioxide by converting stack gas from the New Zealand Refining Company Limited's Marsden Point refinery in Whangarei. Air Liquide also produces atmospheric gases (other than carbon dioxide) from its facility at the Pacific Steel plant in Otahuhu, Auckland.
- 5.4 **[CONFIDENTIAL]**.
- 5.5 Further information concerning the Air Liquide Group's gas operations may be found at: <http://www.airliquide.com/en/our-offer/products.html>

Target

- 5.6 ASCOGAS Limited is a privately owned company incorporated in New Zealand. ASCOGAS is a wholly owned subsidiary of Swiss company ASCOSWISS AG and is part of the ASCO Group in New Zealand.
- 5.7 ASCOGAS is based in Christchurch and supplies carbon dioxide to customers almost entirely in the South Island. Historically ASCOGAS obtained carbon dioxide by burning fuel oil, a process which has become increasingly uneconomic. Within the last two years ASCOGAS has entered into an agreement with **[CONFIDENTIAL]** and has since dismantled its fuel burning carbon dioxide generator.
- 5.8 ASCOGAS has effectively been carved out from the rest of the ASCO Group in New Zealand since September 2005. In addition to the supply of carbon dioxide to the South Island, ASCOGAS also supplies a small amount of industrial gases.

5.9 Contact details for ASCOGAS are:

ASCOGAS Limited
7 Canterbury Street
Hornby
CHRISTCHURCH

Attn: Graham Jack
Ph: +64 3 349 7029
Fax: +64 3 349 4337

5.10 All correspondence and notices addressed to ASCOGAS in respect of this application should be directed in the first instance to:

Anthony Harper
Lawyers
Anthony Harper Building
47 Cathedral Square
CHRISTCHURCH 8140

Attn: Chris Weir
Ph: +64 3 364 3805
Fax: +64 3 366 7277

6. INTERCONNECTED AND ASSOCIATED PARTIES

Air Liquide

6.1 Air Liquide is wholly owned by Air Liquide Australia Limited. Air Liquide has no subsidiaries or shareholdings in other companies.

ASCOGAS

6.2 ASCOGAS is a privately owned company, wholly owned by ASCOSWISS AG. ASCOGAS has no subsidiaries or shareholdings in other companies. ASCOSWISS AG also wholly owns ASCO Carbon Dioxide Limited, a company incorporated in New Zealand. ASCO Carbon Dioxide Limited is involved in the manufacture of carbon dioxide generating plants and related equipment.

6.3 Under the proposed acquisition, Air Liquide will purchase only the shares in ASCOGAS.

7. BENEFICIAL INTERESTS

7.1 Neither Air Liquide nor ASCOGAS holds any relevant beneficial interest.

8. LINKS BETWEEN PARTICIPANTS

8.1 The only link between the participants is Air Liquide's very recent supply of industrial gases (other than carbon dioxide) in cylinders to ASCOGAS.

9. BUSINESS ACTIVITIES OF EACH PARTICIPANT

- 9.1 Air Liquide and ASCOGAS both distribute and supply carbon dioxide. They both distribute and supply carbon dioxide in three forms:¹
- (a) bulk;
 - (b) cylinders; and
 - (c) dry ice.
- 9.2 As noted above, Air Liquide manufactures its carbon dioxide from its plant at Marsden Point. This plant manufactures carbon dioxide by converting stack gas from the New Zealand Refining Company Limited's Marsden Point refinery in Whangarei.
- 9.3 Up until two years ago, ASCOGAS manufactured carbon dioxide by burning fuel oil. However, this practice became sufficiently expensive that it opted to switch to obtaining supply from [CONFIDENTIAL].
- 9.4 ASCOGAS is [CONFIDENTIAL].²

10. THE COUNTERFACTUAL

- 10.1 Air Liquide understands that [CONFIDENTIAL]. Accordingly, Air Liquide submits that in the counterfactual the ASCO Group will seek to sell ASCOGAS.
- 10.2 However, [CONFIDENTIAL]. ASCOGAS made a [CONFIDENTIAL]. In 2007, [CONFIDENTIAL] it is only likely to attract an industry purchaser who was interested in either entering or expanding its presence in the South Island and who would benefit from the acquisition through greater efficiencies and synergies. Air Liquide is aware that another party may have expressed an initial interest in purchasing ASCOGAS, but Air Liquide is unaware of the nature and extent of any discussions between that party and ASCOGAS.
- 10.3 On this basis, although there is a possibility that ASCOGAS could simply elect to exit the market, Air Liquide is of the view that the most likely counterfactual is the status quo (whether in current ownership or possibly being owned by a third party).

¹ In respect of the three commercial forms in which carbon dioxide may be sold Air Liquide notes:

- Bulk form: carbon dioxide is transported in bulk form by ASCOGAS, BOC and Air Liquide from their respective sources to regional distribution centres where it is either compressed into cylinders, processed into dry ice or distributed in bulk form. Air Liquide further notes the Commission's comment in Decision No. 414 (at para 116): "It is not economic for [Air Liquide] to transport bulk carbon dioxide from its Marsden Point source to supply the South Island."
- Dry ice form: The Commission also commented in Decision No. 414 (at para 65): "Dry ice would not be economic to transport from Wellington because of the characteristics of the product. It sublimates during transportation, resulting in a reduced quantity and increased cost."
- Cylinder form: carbon dioxide in this form is used by small users, and [CONFIDENTIAL]. It is considerably more expensive to transport carbon dioxide in cylinder form compared to bulk form. The Commission noted in Decision No. 414 (at para 116): "It is not profitable for Air Liquide to expand from its Wellington base because of the high cost of transporting cylinders of carbon dioxide to the majority of the South Island."

² [CONFIDENTIAL].

Comparison with the factual

- 10.4 Air Liquide submits that the competitive dynamic between Air Liquide and BOC in the North Island market would be the same in the counterfactual and the factual because ASCOGAS, with its negligible market share, does not bring any competitive constraint to the market, either presently or in the future. In the South Island market, ASCOGAS would be removed from the market, but would be replaced by the combined entity - in effect a bare transfer of market share. As such, in the South Island market, the competitive dynamic will be the same in the counterfactual and the factual.
- 10.5 There are, however, several pro-competitive aspects to the factual, which are likely to lead to improved competition. In the factual, the combined entity will be better placed to compete against BOC in the lower part of the North Island market and also in the South Island market. BOC is the largest competitor in the South Island market and has a competitive advantage in the lower North Island, due to efficiencies arising out of obtaining carbon dioxide from Kapuni.
- 10.6 In addition, Air Liquide notes that BOC has approximately [CONFIDENTIAL]% percent market share in the South Island industrial gases market where it faces little competition. The proposed transaction will provide Air Liquide with a platform from which it can compete with BOC across the full range of industrial gases in the South Island. This would provide real competition to BOC.

11. THE REASONS FOR THE PROPOSAL**11.1 [CONFIDENTIAL.]**

11.2 The acquisition will also give Air Liquide a platform from which it can offer a full range of industrial and medical gases to customers in the South Island and provide some real competition to the incumbent, BOC. Air Liquide considers that the acquisition of ASCOGAS will provide sufficient synergies and physical presence to gain customer credibility, enabling it to become a viable competitor in the South Island market for all industrial gases.

11.3 In addition, Air Liquide [CONFIDENTIAL]. The proposed acquisition of ASCOGAS would provide Air Liquide with an alternative source of carbon dioxide in the lower North Island.

PART II: IDENTIFICATION OF MARKETS AFFECTED
--

12. HORIZONTAL AGGREGATION**Market Definition**

- 12.1 The proposed acquisition will result in aggregation (albeit *de minimus*) in the wholesale supply and distribution of carbon dioxide.
- 12.2 The Commission has previously considered the carbon dioxide industry. In *Decision No. 414: BOC Gases New Zealand Limited / ASCO Carbon Dioxide Limited ("Decision 414")*, the Commission specifically considered the market for the wholesale supply and distribution of carbon dioxide. The Commission concluded that the relevant market was the market for the wholesale supply and distribution of carbon dioxide in the South Island of New Zealand.

Product Dimension

- 12.3 From a supply-side perspective, as acknowledged by the Commission in Decision 414, substitutability exists between all three forms of carbon dioxide. However, from a demand-side perspective, carbon dioxide has various applications including in the production of soft drinks and carbonated water, carbonation in beer and wine, as a compressed gas in portable pressure tools, and in welding processes.³ Air Liquide agrees with the Commission's observations in Decision 414 that for most of these applications, there are no close substitutes in terms of price and functionality.
- 12.4 Air Liquide broadly agrees with the Commission's more detailed comments on product dimension in Decision 414. It notes though that the Commission did not consider, in Decision 414, whether there might exist separate product markets for particular industrial gases, or other permutations of product market definition. However, for present purposes it is unnecessary for Air Liquide to consider the point further since, irrespective of the product market definition ultimately arrived at, the proposed transaction will not result in a substantial lessening of competition. Air Liquide accordingly adopts the Commission's conclusions on product dimension in Decision 414.

Functional Dimension

- 12.5 As noted previously, Air Liquide manufactures most of its carbon dioxide requirements at its Marsden Point plant. **[CONFIDENTIAL].**⁴ As noted by the Commission in Decision 414, this somewhat blurs the distribution functions performed in relation to the wholesale supply of carbon dioxide.
- 12.6 Air Liquide agrees with the Commission's conclusions on the functional dimension of the market in Decision 414. Aside from ASCOGAS' switch from production of carbon dioxide by burning fuel as a by-product of its carbon dioxide generator business to acquiring supply from **[CONFIDENTIAL]** there have been no material changes in the market since Decision 414. Air Liquide accordingly adopts the Commission's conclusion in Decision 414 that the relevant functional dimension is for the wholesale supply and distribution of carbon dioxide.

³ <http://en.wikipedia.org/wiki/Carbon-dioxide>.

⁴ **[CONFIDENTIAL]**.

Geographic Dimension

- 12.7 Carbon dioxide is a bulky and low value, low margin product. Accordingly, transport costs represent a high proportion of the cost of the supply and distribution of carbon dioxide. Therefore, as a starting point, Air Liquide notes that the Commission's approach to defining product market states where transport costs are high relative to the final value of a product, a narrower geographic market is more appropriate.⁵
- 12.8 In Decision 414, the Commission concluded that due to high transport costs, it would not be profitable for Air Liquide to either divert existing production, or expand production, to the majority of the South Island. This continues to be the case. Air Liquide estimates that its delivered cost would be approximately \$[CONFIDENTIAL] per tonne⁶ if it were to transport bulk carbon dioxide from Marsden Point to Christchurch. By contrast, Air Liquide understands ASCOGAS's delivered cost per tonne to transport carbon dioxide from Kapuni to Christchurch to be \$[CONFIDENTIAL]. Further, Air Liquide estimates BOC's delivered cost per tonne from its source at Kapuni to Christchurch to be in the order of \$[CONFIDENTIAL] per tonne less than the cost would be for Air Liquide to transport bulk carbon dioxide from Marsden Point to Christchurch.
- 12.9 The typical selling price for ASCOGAS' bulk carbon dioxide in Christchurch is approximately \$[CONFIDENTIAL] per tonne. Given the additional overheads required for Air Liquide to enter the South Island (including labour, head office costs, and after sales service), and [CONFIDENTIAL]. This is particularly the case given the South Island market for carbon dioxide is a relatively small market: Air Liquide estimates that the entire South Island market is only worth between NZ\$[CONFIDENTIAL] per annum.
- 12.10 The Commission's guidelines to defining the geographic dimension of a market requires an analysis of who consumers could turn to for supply in the event that a hypothetical monopolist was to impose a small yet significant and non-transitory increase in price ("SSNIP") on acquirers.⁷ Given that with the exception of the Marlborough region (a small part of the South Island market in which a select group of customers acquire carbon dioxide and other industrial gases in cylinders only, and especially as the majority of bulk carbon dioxide is supplied to Christchurch and destinations south of Christchurch), Air Liquide does not supply the South Island, and as such, consumers would not be able to source supply from Air Liquide.
- 12.11 Further support for drawing market boundaries between the North and South Islands is borne out by a comparison of the delivered market prices for carbon dioxide between the two markets. Indeed, the variance in price between the two markets is [CONFIDENTIAL]. This reflects the different cost structures in respect of supply to the two markets, namely transportation costs and further delineates the markets. As noted, Air Liquide does supply a small amount of carbon dioxide to the Marlborough region. However, this supply occurs only in respect of cylinders of carbon dioxide, which [CONFIDENTIAL]. Moreover, Air Liquide submits that it is well placed to supply to this northern most region of the South Island because of its expertise and reputation in supplying to the wine industry.⁸ Although BOC also supplies bulk carbon dioxide, it is Air Liquide's commitment to the industry and focus on service that has allowed it to establish a foothold in the region. However, given BOC's cost advantage, BOC is well

⁵ Commerce Commission, Mergers & Acquisitions Guidelines, 1 January 2004, p. 18. See also *Commerce Commission v Carter Holt Harvey Building Products Ltd* (2000) 9 TCLR, 597.

⁶ All weights are expressed as metric tonnes.

⁷ Mergers & Acquisitions Guidelines, p. 19.

⁸ The Air Liquide Group has an international reputation for expertise in the application of carbon dioxide in the wine industry.

placed to expand its presence in the Marlborough region and provide a continuing material competitive constraint.

- 12.12 While ASCOGAS supplies a very limited amount of carbon dioxide to one customer, [CONFIDENTIAL] in [CONFIDENTIAL] and also supplies a limited amount of carbon dioxide to [CONFIDENTIAL] in the North Island (who in turn supplies carbon dioxide in cylinder and dry ice form at a wholesale level in its own right), Air Liquide submits that this does not alter the geographic scope of the market. The central feature still remains the fact that the significant transport costs relative to the value of carbon dioxide, means that, as the Commission has previously determined, geographic markets are for all practical purposes confined to the North Island and South Island respectively.
- 12.13 A diagrammatic representation of the locations of carbon dioxide sources in New Zealand is set out in Appendix 1 of this Application.
- 12.14 Furthermore, Air Liquide submits that the considerable variation between the market shares of the participants in the North Island and South Island markets points to the existence of separate geographic markets. In the North Island market, Air Liquide has an approximate [CONFIDENTIAL]% market share, compared to ASCOGAS' [CONFIDENTIAL] market share, whereas in the South Island, the reverse occurs - ASCOGAS has approximately [CONFIDENTIAL]% market share to Air Liquide's approximate [CONFIDENTIAL]% market share (comprised only of carbon dioxide in cylinders to the wineries in the Marlborough region). This comparison illustrates the geographic limitations upon supply.
- 12.15 For these reasons, Air Liquide agrees with the Commission's conclusions on the geographic dimension of the market in Decision 414. Whilst, since Decision 414, ASCOGAS has switched its source of carbon dioxide from its carbon dioxide generator business, this has not altered the fact that, in the wholesale supply and distribution market, it is not viable for Air Liquide to supply into the vast majority of the South Island. As such, Air Liquide adopts the Commission's conclusions on geographic dimension in Decision 414 and submits that separate geographic markets for the North and South Islands are appropriate.

Market Definition summary

- 12.16 Based on the above analysis, Air Liquide considers that the relevant markets affected by the proposed transaction are:
- (a) the North Island market for the wholesale supply and distribution of carbon dioxide ("**North Island market**"); and
 - (b) the South Island market for the wholesale supply and distribution of carbon dioxide ("**South Island market**").

13. DIFFERENTIATED PRODUCT MARKETS

Extent of Product Differentiation

Differentiation on the basis of marketing

- 13.1 Carbon dioxide is a largely homogenous product. In terms of its molecular structure, there are no differences between the carbon dioxide supplied to either the North Island market or the South Island market by their respective participants. Although various participants in both markets have reputational strengths in certain industries, such as Air Liquide's in the wine industry, participants differentiate themselves principally on the basis of service and price.

Customer base and relationships

- 13.2 The majority of Air Liquide's carbon dioxide customers are large, well resourced businesses. Air Liquide estimates that around **[CONFIDENTIAL]**% of its customers' contracts come up for negotiation in any given year, ensuring that a significant proportion of the market remains contestable.

14. VERTICAL INTEGRATION

- 14.1 At present, ASCOGAS has no manufacturing facility. Although through its manufacturing plant at Marsden Point, Air Liquide is a vertically integrated competitor in the North Island market, the proposed transaction will not give rise to any further vertical integration. This is because, as stated above, Air Liquide's Marsden Point plant cannot economically supply carbon dioxide to the South Island market, which ASCOGAS competes in.

15. PREVIOUS ACQUISITIONS AND COMMISSION NOTIFICATIONS

- 15.1 There have been no previous acquisitions involving Air Liquide or ASCOGAS (or any interconnected body corporate or predecessor thereof) as an applicant or target notified to the Commission in the last three years.
- 15.2 Air Liquide has not undertaken any other acquisition of assets of a business or shares in any markets material to the Commission's present investigation in the past three years.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION
--

16. EXISTING COMPETITORS IN MARKET*North Island carbon dioxide market*

16.1 There are two existing competitors in the North Island market who will continue to provide competitive constraint as against the combined entity in the factual, although as noted above, the central competitive dynamic will continue to be as between BOC and Air Liquide:

(a) **BOC Gases New Zealand Limited:** BOC is the largest supplier and distributor of carbon dioxide in New Zealand. BOC is wholly owned by Linde Group AG, a global supplier of industrial and speciality gases. In addition to carbon dioxide, BOC also supplies and distributes a number of industrial gases.

BOC supplies and distributes carbon dioxide in both the North Island market and the South Island market. BOC has a good reputation for the reliability of its gas products and a strong distribution network. Air Liquide considers BOC its strongest competitor in the North Island market, particularly in the upper North Island area which Air Liquide is concentrated in.

(b) **SupaGas Limited:** SupaGas is a New Zealand owned company based in Hamilton and Auckland and mainly competes in the upper North Island wholesaling and distributing cylinder and dry ice carbon dioxide. SupaGas also supplies and distributes a number of other industrial gases, which make up the majority of its sales.

16.2 Air Liquide estimate the entire value of the North Island market to be approximately \$[CONFIDENTIAL] million. The below table sets out estimated market share⁹ for the North Island market:

Company	Market share
BOC	[CONFIDENTIAL]%
Air Liquide	[CONFIDENTIAL]%
ASCOGAS	[CONFIDENTIAL]%
<i>Combined entity</i>	<i>[CONFIDENTIAL]%</i>
SupaGas	[CONFIDENTIAL]%
TOTAL	100%

Figure 1: North Island carbon dioxide market share estimates,

⁹ Air Liquide estimate.

- 16.3 As figure 1 illustrates, aggregation in the North Island market is *de minimus*. Indeed, in reality, any aggregation resulting from the proposed transaction will in effect be even less than the [CONFIDENTIAL]% shown in the table, as Air Liquide predominantly competes in the upper North Island, in the region framed by Whangarei to the north, Mount Maunganui to the east, and Hamilton to the south. By contrast, ASCOGAS' only direct North Island customer is located in Wanganui in the lower North Island. ASOGAS also supplies bulk carbon dioxide to SupaGas in the North Island market. Hence, levels of aggregation in the North Island market can properly be characterised as *de minimus*.
- 16.4 In addition, the merged entity will continue to be constrained by BOC. BOC has an established presence and strong distribution network based in the upper North Island where Air Liquide is concentrated. Further, BOC is better placed than Air Liquide to service the lower North Island from its source at Kapuni.

South Island carbon dioxide Market

- 16.5 Air Liquide estimate the entire value of the South Island market to be approximately \$[CONFIDENTIAL] million. The below table sets out estimated market share by value for the South Island market:

Company	Market share
BOC	[CONFIDENTIAL]%
Air Liquide (Comprised only of the supply of carbon dioxide in cylinders to the Marlborough region)	[CONFIDENTIAL]%
ASCOGAS	[CONFIDENTIAL]%
<i>Combined entity</i>	[CONFIDENTIAL]%
Southern Gas	[CONFIDENTIAL]%
TOTAL	100%

Figure 2: South Island carbon dioxide market shares

- 16.6 On one view of the information set out in Figure 2, the fact that Air Liquide's supply to the market is limited to carbon dioxide in cylinders, and moreover, to a specific set of customers in a discrete region, could suggest a separate market. However, it is unnecessary to take this point further so long as it is recognised that in practical reality, Figure 2 overstates the degree of aggregation which will occur as a result of the proposed transaction.
- 16.7 Air Liquide submits that for all practical purposes, and as a matter of commercial common sense, the proposed acquisition will not result in any aggregation in the South Island market.
- 16.8 Furthermore, as Air Liquide understands, the majority of sales of carbon dioxide in the South Island market occur in the lower South Island,¹⁰ meaning any effect on

¹⁰ Air Liquide estimates that [CONFIDENTIAL] percent of sales in the South Island market occur in Christchurch and the area south of Christchurch.

competition in the South Island market will be negligible. When considering the degree to which competition is lessened in the market, it is appropriate for the Commission to have regard to the proportion of economic activity in an area of the market as a proportion to the whole market.¹¹ As such, given the complete absence of aggregation in the lower South Island, any *de minimus* aggregation in the upper South Island will not have any effect on competition in the market.

- 16.9 In addition, the combined entity will continue to be constrained by existing competitors and specifically BOC. Even when taking a conservative approach to aggregation arising out of the proposed transaction, BOC will continue to have a market share [CONFIDENTIAL] to that of the combined entity. BOC has a strong presence in the lower South Island making it well placed to provide vigorous competition to the combined entity in this key area of the South Island market. Southern Gas will also provide some additional competitive constraint.
- 16.10 Air Liquide further submits that since BOC acquired Shell's LPG business and shareholding in Liquigas in 2007, it has become an even stronger competitor. For example, [CONFIDENTIAL].

17. CONDITIONS TO EXPANSION BY EXISTING COMPETITORS

- 17.1 Air Liquide agrees with the Commission's conclusions in Decision 414 that Air Liquide cannot readily and profitably expand, beyond its existing supply of carbon dioxide in cylinders to Marlborough, to compete in the South Island market.¹² As set out in paragraphs 12.8 and 12.9, transport costs are too high, relative to the value of carbon dioxide, to make expansion viable.
- 17.2 Air Liquide considers that in both the North Island market and the South Island market, BOC has the resources and reputation to enable it to expand without any material impediment. As such, the threat of expansion by BOC will continue to act as a very real constraint on the combined entity in the factual.

18. CONCLUSIONS ON CONSTRAINT BY EXISTING COMPETITION ON EXERCISE OF UNILATERAL MARKET POWER

- 18.1 Air Liquide is currently constrained in both of the geographic markets in which it competes, and the combined entity will remain so after the proposed transaction. Given the *de minimus* aggregation in both markets (including the lack of real constraint offered by the participants on one another), none of the factors that generate the current intensity of competition would be altered as a result of Air Liquide acquiring ASCOGAS.
- 18.2 Accordingly, there is, in Air Liquide's view, very little prospect of it being able to increase prices in a material and sustained way for two years following the acquisition, given the strong competition from BOC and other existing competitors. The strength of the existing competition between Lion Nathan and DB in the beer market was a feature recognised by the Commission as being present in the counterfactual and the factual in *Lion Nathan/Independent Liquor (NZ) Ltd*, Decision No 586, sufficient to constrain any attempt to increase prices post acquisition, an approach which is equally applicable here.

¹¹ *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] All ER 289, at 297.

¹² Decision 414, para 74.

19. MARKET CHARACTERISTICS FACILITATING OR IMPEDING COORDINATION

19.1 Both markets have a number of characteristics which would impede coordinated effects post-acquisition, including:

- (a) Vigorous competition;
- (b) No history of coordinated conduct;
- (c) Innovation and research initiatives; and
- (d) **[CONFIDENTIAL]**.

19.2 As there will be no real change in the factual to impact on coordinated market power the proposed transaction cannot be said to facilitate coordination.

20. NO EVIDENCE OF PRICE CO-ORDINATION, PRICE MATCHING OR PRICE FOLLOWING

20.1 Air Liquide is not aware of any past or current co-ordination of its activities with any other competitors in supply to the New Zealand market.

21. NO RISK OF CO-ORDINATED BEHAVIOUR

21.1 In summary, Air Liquide currently competes vigorously with all of its competitors in supplying and distributing to the North Island market for carbon dioxide, and the combined entity will continue to do so after the proposed transaction in both the North Island Market and the South Island Market.

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

22. CONCLUSIONS ON POTENTIAL ENTRY

- 22.1 Air Liquide agrees with the Commission's conclusions in Decision 414 that *de novo* entry into the South Island market is not likely, nor sustainable. Air Liquide submits that *de novo* entry into the North Island market is similarly unlikely.
- 22.2 Air Liquide submits that the minimal aggregation in both the North Island market and the South Island market is such that the proposed transaction will not have the effect of substantially lessening competition in either market.

PART V: OTHER POTENTIAL CONSTRAINTS
--

23. CONSTRAINTS ON MARKET POWER BY THE CONDUCT OF ACQUIRERS

- 23.1 Air Liquide submits that, in light of the *de minimus* aggregation in both the North Island market and the South Island market, it is not strictly necessary to take into account the countervailing power of acquirers to conclude that the proposed transaction will not have the effect of substantially lessening competition in the market. However, Air Liquide makes the following submissions.
- 23.2 Air Liquide's five largest carbon dioxide customers are:
- (a) [CONFIDENTIAL];
 - (b) [CONFIDENTIAL];
 - (c) [CONFIDENTIAL];
 - (d) [CONFIDENTIAL]; and
 - (e) [CONFIDENTIAL].
- 23.3 These acquirers are all large, well resourced sophisticated purchasers. Given the homogeneity of carbon dioxide, coupled with the fact that a significant proportion of the market is contestable each year, this provides acquirers with a real degree of countervailing power. This countervailing power is present in both the North Island market and the South Island market.
- 23.4 This countervailing power is reflected in the fact that prices have barely kept up with inflation over the past three years.

This Notice is given by Air Liquide New Zealand Limited

The company hereby confirms that:

- (a) all information specified by the Commission has been supplied;
- (b) all information known to the applicant/s which is relevant to the consideration of this application/notice has been supplied; and
- (c) all information supplied is correct as at the date of this application/notice.

The company undertakes to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated December 2006.

Signed by Air Liquide New Zealand Limited

Kevin Walsh
Managing Director

I am a director/officer of the company and am duly authorised to make this application/notice.

APPENDIX 1

Carbon Dioxide sites in New Zealand



Index	Reference
1	Marsden Point: ALNZ CO2 source
2	Auckland: ALNZ ASU + Filling Centre + HO; BOC ASU + Filling Centre + HO
3	Kapuni: BOC and ASCO CO2 source
4	Wellington: ALNZ Branch servicing South Island.
5	Blenheim: ALNZ Marlborough Region Agency. Our only agent in the South Island.
6	Christchurch: ASCO base with CO2 filling; BOC South Island Filling Centre
7	Mackenzie Basin: BOC ASU dedicated to a customer.