

REGULAR

***8**

NUMBER: 220.2

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS AMENDING CHAPTER 19 OF TITLE III OF THE MILPITAS MUNICIPAL CODE REGARDING NON-EXCLUSIVE FRANCHISE FOR NITROGEN GAS FACILITIES

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of June 4, 2013, upon motion by Vice Mayor Polanski, and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

***8**

WHEREAS, revisions and updates to the City’s ordinance for the non-exclusive franchise for nitrogen gas facilities are needed; and

WHEREAS, the franchise license agreements with the franchise companies have expired; and

WHEREAS, the franchise companies have desired to amend the franchise license agreements.

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF CHAPTER 19 OF TITLE III OF THE MILPITAS MUNICIPAL CODE

Chapter 19 of Title III of the Milpitas Municipal Code is hereby amended as follows:

III-19-4.00 is amended in its entirety to read as follows:

“III-19-4.00 - Term:

A franchise license shall be for fifteen (15) years and for future renewable terms of fifteen (15) years as agreed in writing by officials of both parties, or until the franchise license is voluntarily surrendered or abandoned by Grantee, or until the State or a municipal or public corporation, including City, duly authorized by law shall purchase by voluntary agreement or shall condemn and take under the power of eminent domain, all property actually used and useful in the exercise of said franchise license and situated in the territorial limits of the municipal or public corporation purchasing or condemning such property, or until said franchise license shall be forfeited for noncompliance with its terms by Grantee. Also, see Section 17 of this Chapter.”

III-19-5.00 is amended in entirety to read as follows:

“III-19-5.00 - Fees:

Grantees shall, during the term of said franchise license, pay to City as follows:

- (a) An annual fee equal to four thousand thirty nine dollars (\$4,039) per mile for the calendar year 2013 (rounded up to the nearest mile) of the total gas-carrying pipe installed within the streets of City.
- (b) An additional annual fee per customer location within City having a connection to the franchise license system equal to the product of seven hundred seventy seven dollars (\$777) for the calendar year 2013 and nominal inside diameter of the pipe, expressed in inches and fraction thereof at the property line of each customer location connected to each gas-carrying pipe. In calculating the annual fee per customer location connection, Grantee shall include any customer who has a connection for service during any part of the calendar year or portion thereof for which the fee is payable. Each separate location receiving nitrogen gas shall occasion payment of the above annual fee.
- (c) In no event shall a Grantee pay City pursuant to this Section 5 an amount less than two thousand dollars (\$2,000) per calendar year, or portion thereof, for the term of the franchise license.

(d) The fees stated above in (a) and (b) of this section will be increased annually at a rate of seven percent (7%) per annum over the fee amount of the preceding calendar year throughout the term of the franchise license or any extension thereto.”

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III-19-6.00 is amended in its entirety to read as follows:

“III-19-6.00 - Payment and Filing:

For each calendar year or portion thereof during the term of a franchise license, Grantee shall file with the City Clerk of City a verified statement showing in detail the lineal feet of gas pipes installed within the streets of City and the customer locations within City having a connection to its franchise license system. Said statement shall be filed for each calendar year on or before January 30th of the calendar year following the calendar year to which the statement applies or within 30 days after the termination of its franchise license, whichever is sooner. The initial filing shall be the first January 30 after the execution of the agreement for the franchise license. Grantee shall pay City the amount of the license fees described in III-19-5 (a), (b) or (c), including an annual increase described in III-19-5 (d), for each calendar year or portion thereof at the time the statement for such calendar year is filed pursuant to this Section 6.”

III-19-9.00 is amended in its entirety to read as follows:

“III-19-9.00 - Verified Statement by City:

City may audit the fiscal records of Grantee. Grantee shall permit such examination of its records by City as is necessary and material to the determination of the performance of Grantee’s franchise license obligation. Grantee shall permit such examination of its records by City as is necessary and material to the determination of the performance of Grantee’s franchise license obligation.”

III-19-10.00 is amended in its entirety to read as follows:

“III-19-10.00 - Grantee Faithful Performance Bond:

Within five days of the grant of a franchise, Grantee shall submit a corporate surety bond in favor of City and approved by City Council in a penal sum of One Hundred Thousand Dollars (\$100,000), conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition of the franchise, and that in case of any breach of condition of the bond, the amount of the penal sum shall be recoverable.”

III-19-12.00 is amended in its entirety to read as follows:

“III-19-12.00 - Insurance Protection Required:

Grantee shall, upon the execution of a written agreement for its franchise license, furnish to City, and at all times during the existence of any license hereunder, maintain in full force and effect, at its own cost and expense, a comprehensive general liability insurance policy, or at Grantee’s option, an Owner’s Protective Liability Policy, in protection of City of Milpitas, its officers, its agents, employees and volunteers, with a company approved by the City Council and in a form satisfactory to the City Attorney, protecting City and all persons against liability for loss or damage for personal injury, death and property damage, occasioned by the operations of Grantee under such license with a combined single limit for bodily injury and property damage of two million dollars (\$2,000,000) per occurrence.

The policy mentioned in the foregoing paragraph shall name City of Milpitas, its officers, its agents, employees and volunteers, as additional insured and shall contain a provision that a written notice of cancellation or reduction in coverage of said policy shall be delivered to City thirty (30) days in advance of the effective date thereof. If such insurance is provided by a policy which also covers Grantee or any other entity or person other than those above-named, then such policy shall contain a standard cross-liability endorsement.”

III-19-13.00 is amended in its entirety to read as follows:

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“III-19-13.00 - Installation Procedure:

- (a) Grantee shall not install, maintain, use or cause, allow or permit to be installed, maintained, or used within the streets, or other public property of City, any pipes or appurtenances unless and until Grantee shall have filed with the City Engineer a map showing the area or portion of the City within which service shall be made available to customers by Grantee, together with plans and specifications for installation of such pipes and appurtenances and received approval for the installation.
- (b) The City shall have the right to disapprove of vertical and horizontal locations of the pipes to be installed under, along, across the streets of City. All plans and specifications shall be approved by the Fire Department of the City, as to compliance with Health and Safety standards. The City Engineer shall be responsible for review of plans and specifications, permit issuance, and inspection of the installation of all pipes and appurtenances in the streets of City.
- (c) Grantee shall pay to City a fee for review of Grantee’s plans and specifications, for inspecting the installation of all pipes and appurtenances, and other required services. The fee for review and inspection shall be in accordance with City requirements at the time the project is instituted.
- (d) Before any work is commenced on or in any street of City, Grantee shall comply with the provisions of the Milpitas Municipal Code as presently provided or as hereafter amended, and the imposition of any reasonable requirements and any permits issued pursuant thereto. Without limitation to the provisions hereof, and except as to the location of pipes and appurtenances in the streets, nothing contained in any license agreement exempts Grantee from obtaining environmental clearance, use or zoning permits and/or encroachment permits prior to the installation, maintenance or use of any pipes or appurtenances. Grantee shall be required to obtain and pay for the annual Milpitas Business License.
- (e) All crossings of a street by a pipeline shall be bored and jacked, open cut, directional drill or any other method as approved by the City. All installations must meet City of Milpitas standard specifications and requirements. Restoration shall be performed to the satisfaction of the City.
- (f) Grantee shall file with the City Engineer on the completion of a new project a current as-built map or set of maps of the project, drawn to scale or a summary written listing of locations (street name, cross streets, length, diameter of pipe, approximate location to curb and depth of cover, customer name and site address, lateral diameter, dates of operation) showing all pipes or appurtenances installed and in place in the streets of City. Upon request from the City, Grantee shall provide maps of any pipelines in the City and upon request mark said facilities.
- (g) Grantee must become a member, if not already a member, of underground service alert (USA) and remain an active member for perpetuity of the license agreement. As a participant, Grantee is responsible for field marking its subsurface facilities as part of USA notification in accordance with the requirements of Section 4216 of the State of California Government Code, as it now reads or may hereinafter be amended.”

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.

REGULAR

***8**

NUMBER: 222.1

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS AMENDING CHAPTER 17 OF TITLE III OF THE MILPITAS MUNICIPAL CODE REGARDING NITROGEN GAS FRANCHISE (AIR PRODUCTS)

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of June 4, 2013, upon motion by Vice Mayor Polanski and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

***8**

WHEREAS, revisions and updates to the City’s ordinance for the Nitrogen Gas Franchise (Air Products) are needed; and

WHEREAS, the agreement with the franchise company, Air Products and Chemicals, Inc., has expired; and

WHEREAS, the franchise company has desired to enter into a new agreement; and

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to it. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF CHAPTER 17 OF TITLE III OF THE MILPITAS MUNICIPAL CODE

Chapter 17 of Title III of the Milpitas Municipal Code is hereby amended to read as follows:

Section III-17-1.00 is amended to read as follows:

III-17-1.00 - Authority

Under and pursuant to the provisions of Chapter 19, Title III of the Milpitas Municipal Code, the City Council of the City of Milpitas is empowered to grant a non-exclusive franchise for the transmission and distribution of nitrogen gas. Application for a 15 year franchise in accordance with the provisions of Chapter 19, Title III has been made by Air Products and Chemicals Inc., a Delaware Corporation. The City Council has heretofore adopted a Resolution of Intention to grant a franchise and has published notice thereto and of the holding of a public hearing thereon on the 4th day of June, 2013, at 7:00 p.m. before the City Council of the City of Milpitas for the purpose of hearing any objections thereon. No written protest stating objections against the granting of the franchise were delivered to the Clerk of the City Council prior to the hour set for the hearing of said objections. At the time set for hearing objections, the City Council determined that no protests were made, and that the granting of a 15 year non-exclusive franchise to the applicant was in the interest of the City of Milpitas and that an ordinance granting said franchise should be adopted. Said hearing was thereupon closed.

Section III-17-2.00 is amended to read as follows:

III-17-2.00 - Granting of Franchise

The City Council of the City of Milpitas does hereby grant as of July 18, 2013, the effective date of this amendment, a non-exclusive franchise for a term of 15 years to Air Products and Chemicals Inc., a Delaware Corporation, which franchise shall commence upon the acceptance of said franchise by said Air Products and Chemicals Inc. to install, construct, maintain and use under, along, across or upon the public streets, easements, ways, and places within the City all pipes and appurtenances for transmitting and distributing nitrogen gas for any and all purposes, provided, however, that such rights shall not include the right to occupy any park, playground or other municipal property (exclusive of public thoroughfares) unless a special permit therefor shall be granted by the City Council, and provided further that such rights shall apply to federal, State,

county and City streets now or hereafter established within the City and freeways hereafter established within the City, only to the extent that City is empowered to grant such rights with respect thereto, subject to laws relating to the location and maintenance of such pipes and appurtenances thereto. Said franchise is granted under and pursuant to the provisions of Chapter 19, Title III of the Milpitas Municipal Code and pursuant to the authority granted in Section 6201 et seq. of the Public Utilities Code of the State of California, being the Franchise Act of 1937. Said franchise is granted upon the express condition precedent (and applicant shall expressly agree in writing in its acceptance of said franchise), that applicant shall comply with each and every term, condition and provision of Chapter 19, Title III of the Milpitas Municipal Code and of the provisions of this Chapter. Said franchise is further granted pursuant to the terms and provisions of the franchise License Agreement approved concurrently herewith and the franchise shall be renewable in the future for 15 year terms as agreed in writing by officials of both parties.

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.

REGULAR

***8**

NUMBER: 223.2

TITLE: AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS AMENDING CHAPTER 18 OF TITLE III OF THE MILPITAS MUNICIPAL CODE REGARDING NITROGEN GAS FRANCHISE (PRAXAIR, INC.)

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of June 4, 2013, 2013, upon motion by Vice Mayor Polanski, and was adopted (second reading) by the City Council at its meeting of _____, upon motion by _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

RECITALS AND FINDINGS:

***8**

WHEREAS, revisions and updates to the City’s ordinance for the Nitrogen Gas Franchise (Praxair, Inc.) are needed; and

WHEREAS, the agreement with the franchise company, Praxair, Inc., has expired; and

WHEREAS, the franchise company has desired to enter into a new agreement; and

NOW, THEREFORE, the City Council of the City of Milpitas does ordain as follows:

SECTION 1. RECORD AND BASIS FOR ACTION

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

SECTION 2. AMENDMENT OF CHAPTER 18 OF TITLE III OF THE MILPITAS MUNICIPAL CODE

Chapter 18 of Title III of the Milpitas Municipal Code is hereby amended as follows:

Section III-18-1.00 is amended to read as follows:

III-18-1.00 – Authority

Under and pursuant to the provisions of Chapter 19, Title III of the Milpitas Municipal Code, the City Council of the City of Milpitas is empowered to grant a non-exclusive franchise for the transmission and distribution of nitrogen gas. Application for a 15 year franchise in accordance with the provisions of Chapter 19, Title III has been made by Praxair, Inc. The City Council has heretofore adopted a Resolution of Intention to grant a franchise and has published notice thereto and of the holding of a public hearing thereon on the 4th day of June, 2013, at 7:00 p.m. before the City Council of the City of Milpitas for the purpose of hearing any objections thereon. No written protest stating objections against the granting of the franchise were delivered to the Clerk of the City Council prior to the hour set for the hearing of said objections. At the time set for hearing objections, the City Council determined that no protests were made, and that the granting of a 15 year non-exclusive franchise to the applicant was in the interest of the City of Milpitas and that an ordinance granting said franchise should be adopted. Said hearing was thereupon closed.

Section III-18-2.00 is amended to read as follows:

III-18-2.00 - Granting of Franchise

The City Council of the City of Milpitas does hereby grant as of July 18, 2013, the effective date of this amendment, a non-exclusive franchise for a term of 15 years to Praxair, Inc., which franchise shall commence upon the acceptance of said franchise by said Praxair Inc., to install, construct, maintain and use under, along, across or upon the public streets, easements, ways, and places within the City all pipes and appurtenances for transmitting and distributing nitrogen gas for any and all purposes, provided, however, that such rights shall not include the right to occupy any park, playground or other municipal property (exclusive of public thoroughfares) unless a special permit therefor shall be granted by the City Council, and provided further that such rights shall apply to federal, state, county and City streets now or hereafter established within the City and freeways hereafter established within the City, only to the extent that City is empowered to grant such rights with respect thereto, subject to laws relating to the location and maintenance of such pipes and appurtenances thereto. Said franchise is granted under and pursuant to the provisions of Chapter 19, Title III of the Milpitas Municipal Code and pursuant to the authority granted in Section 6201 et seq. of the Public Utilities Code of the State of California, being the Franchise Act of 1937.

Said franchise is granted upon the express condition precedent (and applicant shall expressly agree in writing in its acceptance of said franchise), that applicant shall comply with each and every term, condition and provision of Chapter 19, Title III of the Milpitas Municipal Code and of the provisions of this Chapter. Said franchise is further granted pursuant to the terms and provisions of the franchise License Agreement approved concurrently herewith and the franchise shall be renewable in the future for 15 year terms as agreed in writing by officials of both parties.

Section III-18-3.00 is deleted in its entirety.

Section III-18-4.00 is deleted in its entirety.

SECTION 3. SEVERABILITY

The provisions of this Ordinance are separable, and the invalidity of any phrase, clause, provision or part shall not affect the validity of the remainder.

SECTION 4. EFFECTIVE DATE AND POSTING

In accordance with Section 36937 of the Government Code of the State of California, this Ordinance shall take effect thirty (30) days from and after the date of its passage. The City Clerk of the City of Milpitas shall cause this Ordinance or a summary thereof to be published in accordance with Section 36933 of the Government Code of the State of California.

MASTER LICENSE AGREEMENT BETWEEN CITY OF MILPITAS AND ***8**
PRAXAIR, INC.

This License Agreement is made by and between the City of Milpitas, a general law city of the State of California (hereafter referred to as "City") and Praxair, Inc., a Delaware Corporation (hereafter referred to as "Praxair") at Milpitas, California on _____, 2013.

In consideration of the mutual covenants herein contained, the parties do hereby agree as follows:

Section 1. Definitions. Whenever in this agreement, the words or phrases hereinafter in this section defined are used, they shall have the respective meanings assigned to them in the following definitions:

- (a) The word "Praxair" shall mean Praxair, Inc., and its lawful subsidiaries, a Delaware corporation, successors or assigns.
- (b) The word "Praxair" shall mean Praxair, Inc., a Delaware corporation qualified and engaged in the business of producing and distributing industrial gases in the State of California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form
- (c) The word "City" shall mean the City of Milpitas, a municipal corporation of the State of California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form.
- (d) The word "streets" shall mean the public streets, alleys, public service easements and other public property, subject to the other provisions of this License Agreement, as the same now or may hereafter exist within City, excluding State highways and freeways, now or hereafter established within City. Also, see Section 2.
- (e) The word "gas" shall mean nitrogen gas.
- (f) The phrase "pipes and appurtenances" shall mean pipes, pipelines, mains, services, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, appliances, attachments, appurtenances and, without limitation to the foregoing, any other property located or to be located in, along, across or under the streets of City, and used or useful in transmitting and/or distributing gas.
- (g) The phrase "install, maintain and use" shall mean to lay, construct, erect, install, operate, maintain, use, repair or replace.

- (h) The phrase "annual fee" shall mean a fee for each calendar year, or fractional calendar year, for the term of the License. *8

Section 2. License. A nonexclusive License to install, maintain and use in the streets of City all pipes and appurtenances for transmitting and distributing gas only, for any and all purposes is hereby granted to Praxair., provided, however, that such License shall not include the right to occupy any park, playground, or other municipal property (not used as a street), unless a special permit therefor shall be granted by the City, and provided further that such rights shall apply to city streets now or hereafter established within City, only to the extent that City is empowered to grant such rights with respect thereto, subject to laws relating to the location and maintenance of such pipes and appurtenances therein.

Section 3. Term. Said License shall be for the renewable terms of fifteen years as agreed in writing by officials of both parties, or until the License is voluntarily surrendered or abandoned by Praxair, or until the State or some municipal or public corporation, including City, duly authorized by law shall purchase by voluntary agreement or shall condemn and take under the power of eminent domain, all property actually used and useful in the exercise of said License and situated in the territorial limits of the municipal or public corporation purchasing or condemning such property, or until said License shall be forfeited for noncompliance with its terms by Praxair. Also, see Section 17.

Section 4. Fees. Praxair shall, during the term of said License, pay to City as follows:

Fees consisting of items (a), (b) and (c)

(a) An annual fee equal to four thousand thirty nine dollars (\$4039) per mile for the calendar year 2013 (rounded up to the nearest mile) of the total gas-carrying pipe installed within the streets of City.

(b) An additional annual fee per customer location within City having a connection to this License system equal to the product of Seven hundred seventy seven dollars (\$777.00) for the calendar year 2013 and nominal inside diameter of the pipe, expressed in inches and fraction thereof at the property line of each customer location connected to each gas-carrying pipe. In calculating the annual fee per customer location connection, Praxair shall include in calculating the fee, any customer who has a connection for service during any part of the calendar year or portion thereof for which the fee is payable. Each separate location receiving nitrogen gas shall occasion payment of the above annual fee.

(c) In no event shall Praxair pay City pursuant to this Section 4, an amount less than two thousand dollars (\$2,000) per calendar year, or portion thereof, for the term of the License.

(d) The fees stated in (a) and (b) above in this section shall be increased annually at a rate of the larger of seven percent (7%) per annum over the fee for the preceding calendar year throughout the term of the license or any extension thereto.

Section 5. Filing. For each calendar year or portion thereof during the term of this License, Praxair shall file with the City Clerk of City a verified statement showing in detail the lineal feet of gas pipes installed within the streets of City and the customer locations within City having a connection to this License system. Said statement shall be filed for each calendar year on or before January 30th of the calendar year following the calendar year to which the statement applies or within 30 days after the termination of this License, whichever is sooner. The initial filing shall be the first January 30 after the execution of the agreement for the License. Praxair shall pay City the license fees described in Subsections 4(a), (b) and (c) ("Annual License Fees") including an annual increase in Subsection 4 (d) for each calendar year or portion thereof at the time the statement for such calendar year is filed pursuant to this Section 5. *8

Section 6. Set-Off. Praxair shall be allowed to offset all costs incurred by Praxair in relocating pipes at the request, demand, or other requirement of City against the Annual License Fees; provided, however, that in any calendar year period in which the costs were incurred, Praxair may not offset costs greater than ten percent (10%) of the Annual License Fees payable for such calendar year or portion thereof, and no offset shall be made against any Section 4 (c) or (d) payment. Any costs not so offset in one calendar year period shall be accumulated and carried over to the next calendar year to be offset on the same basis until fully exhausted or until the expiration of the License including any extension or renewal thereof, whichever occurs sooner. The offset provided by this Section 7 shall not apply to any pipe removal or relocation installed, used, or maintained under the License when required by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction for or by City of any subway, viaduct, street, structure, pipeline or any other lawful public work of governmental character.

Section 7. Installation Procedure.

- (a) Praxair shall not install, maintain, use or cause, allow or permit to be installed, maintained, or used within the streets, or other public property of City, any pipes or appurtenances unless and until Praxair shall have filed with the City Engineer a map showing the area or portion of the City within which service shall be made available to customers by Praxair, together with plans and specifications for installation of such pipes and appurtenances and received approval for the installation.
- (b) The City shall have the right to disapprove of vertical and horizontal locations of the pipes to be installed under, along, across the streets of City. All plans and specifications shall be approved by the Fire Department of the City, as to compliance with Health and Safety standards. The City Engineer shall be responsible for review of plans and specifications, permit issuance, and inspection of the installation of all pipes and appurtenances in the streets of City.
- (c) Praxair shall pay to City a fee for review of Praxair's plans and specifications, for inspecting the installation of all pipes and appurtenances, and other required services. The fee for review and

inspection shall be in accordance with City requirements at the time the project is instituted. ***8**

- (d) Before any work is commenced on or in any street of City, Praxair shall comply with the provisions of the Milpitas Municipal Code as presently provided or as hereafter amended, and the imposition of any reasonable requirements and any permits issued pursuant thereto. Without limitation to the provisions hereof, and except as to the location of pipes and appurtenances in the streets, nothing contained in this License Agreement exempts Praxair from obtaining environmental clearance, use or zoning permits and/or encroachment permits prior to the installation, maintenance or use of any pipes or appurtenances. Praxair shall be required to obtain and pay for the annual Milpitas Business License.
- (e) All crossings of a street by a pipeline shall be bored and jacked, open cut, directional drill or any other method as approved by the City. All installations must meet City of Milpitas standard specifications and requirements. Restoration shall be performed to the satisfaction of the City.
- (f) Praxair shall file with the City Engineer on the completion of new project a current as-built map or set of maps of the project, drawn to scale or a summary written listing of locations (street name, cross streets, length, diameter of pipe, approximate location to curb and depth of cover, customer name and site address, lateral diameter, dates of operation) showing all pipes or appurtenances installed and in place in the streets of City. Upon request from the City, Praxair shall provide maps of any pipelines in the City and upon request mark said facilities.
- (g) Praxair must become a member (if you are not already) of underground service alert (USA) and remain an active member for perpetuity of the license agreement. As a participant, you are responsible for field marking your subsurface facilities as part of USA notification in accordance with the requirements of Section 4216 of the State of California Government Code, as it now reads or may hereinafter be amended.

Section 8. Construction Guarantee. Praxair shall provide a faithful performance bond and labor and materials bond satisfactory to City each in the amount equal to the full cost of all construction undertaken pursuant to this License conditioned upon the faithful performance of such construction and the payment for all labor and materials in connection therewith. Also, see Section 11 for additional bonding requirement of the license.

Section 9. Praxair Abandonment of Pipelines. If Praxair abandons use of the pipelines installed under or pursuant to the License, the title to said pipelines shall vest in the City upon notification of abandonment and City's consent to and acceptance of title.

Section 10. Praxair's Duties Upon Customer Service Discontinuance. The line of any customer whose service is disconnected shall be suitably capped-off by Praxair to City's satisfaction.

Section 11. License Faithful Performance Bond. Praxair shall submit to City, upon acceptance of License, an appropriate corporate surety or other bond, approved by City as to form, in the amount of one hundred thousand dollars (\$100,000) guaranteeing the performance by Praxair of its obligations under this License. Such bond shall be maintained in full force and effect for the License term.

Section 12. Indemnity. As a material portion of the consideration for granting of said License and by accepting said License, Praxair agrees to hold the City of Milpitas, its officers, its agents, employees and volunteers free and harmless for and on account of any and all claims, demands, liability, obligation, account, action, cause of action, whether the same be known or unknown, expected or unexpected, already appeared or developed or now latent, or may in the future appear or develop, arising out of or in any way connected with the exercise of said License by Praxair, including but not limited to damages or injuries or death to persons or damage or injuries to property.

Section 13. Insurance Protection Required. Praxair shall, upon the execution of this License, furnish to City, and at all times during the existence of any license hereunder, maintain in full force and effect, at its own cost and expense, a comprehensive general liability insurance policy, or at Praxair's option, an Owner's Protective Liability Policy, in protection of City of Milpitas, its officers, its agents, employees and volunteers, in a company approved by the City Council and in a form satisfactory to the City Attorney, protecting City and all persons against liability for loss or damage for personal injury, death and property damage, occasioned by the operations of Praxair under such License with a combined single limit for bodily injury and property damage of two million dollars (\$2,000,000) per occurrence.

The policy mentioned in the foregoing paragraph shall name City of Milpitas, its officers, its agents, employees and volunteers, as additional insured as respects Praxair's obligations under this Agreement and shall contain a provision that a written notice of cancellation or reduction in coverage of said policy shall be delivered to City thirty (30) days in advance of the effective date thereof. If such insurance is provided by a policy which also covers Praxair or any other entity or person other than those above-named, then such policy shall contain a standard cross-liability endorsement.

Section 14. City Audit of Fiscal Records. Praxair shall permit such examination of its records by City as are necessary and material to the determination of the performance of Praxair's License obligation.

Section 15. Condemnation by City. There is hereby reserved to the City of Milpitas the right to acquire the property of Praxair utilized in the performance of this License through the exercise of the right of eminent domain.

Section 16. Acceptance of License Terms and Conditions. By accepting this License, Praxair covenants and agrees to perform and be bound by each and all of the terms and conditions imposed by Federal or state statutes and local ordinances and standard specifications of City (whichever are more stringent).

Said License is granted and is hereby accepted by Praxair upon the express condition that the streets of City shall be used and that gas is furnished by Praxair in strict

compliance with the terms of this License and applicable provisions of the Milpitas Municipal Code, as presently written or as amended during the term of this License. *8

Section 17. Termination of License. This License may be terminated by any of the following methods:

- (a) by either party at any time upon five (5) years prior written notice to the other, said termination to be effective upon the first December 31st to follow the expiration of the five (5) year notice period;
- (b) by City upon written notice to Praxair (“Termination Notice”) in the event that Praxair has violated any other provisions of this License and has failed to correct the same within sixty (60) days after written notice from City to Praxair of said violation (“Violation Notice”); said termination shall be effective upon dispatch of the Termination Notice by City; the City Manager may in its discretion extend for good cause the period of time for correction of said violation;
- (c) as to any provision hereof, by final determination of a court of competent jurisdiction that said provision hereof is ultra vires.

Section 18. Suspension. In the event of any condition involving the subject matter of this License which endangers the health or safety of any person or property within City, City may immediately suspend this License and said suspension shall remain in full force during said condition. The City Manager shall make a written report of said suspension and the reasons therefor to the City Council at the first meeting following said suspension. It shall not be a condition of the invoking of said suspension that Praxair has violated any of the provisions of this License nor shall said suspension extend the term of this License (unless the City Council otherwise determines). Notice of said suspension may be oral or in writing to Praxair and shall be effective immediately.

Section 19. Notice. All notices hereunder to City shall be addressed to the City Manager, City Hall, 455 East Calaveras Boulevard, Milpitas, California 95035. All notices to Praxair shall be given to Praxair, Inc., Real Estate Dept, 39 Old Ridgebury Rd, Danbury, CT 06810-5113

Provided, however, that either party may change the place of notice by giving the other party a written statement thereof sent registered mail, return receipt requested, at the above address to be effective upon receipt.

Section 20. Agent for Service of Process. The name and address of Praxair’s agent for service of process in California are as follows: Corporate Services Company, 2711 Centerville Road, Suite #400, Wilmington, DE 19808 Praxair shall notify City of any changes in the name or address of Praxair’s agent for service of process in California.

Section 21. City of Milpitas Business License. Praxair shall pay the annual City of Milpitas business license similar to any company doing business in the City of Milpitas.

Section 22. Sale, Transfer, Assignment or Sublease of License. No *8
franchise granted hereunder shall be sold, assigned, transferred, leased or sublet, in whole or in part, voluntarily or by operation of law, without written consent of the City of Milpitas. The consent would be based on the new licensee having an acceptable industry standard safety record. In addition, consent is granted based on Praxair filing and paying the necessary processing costs, including but not limited to, the business license, bonding, insurance certificates, contact information, etc.

IN WITNESS WHEREOF, the parties have executed this License the day and year first above written.

PRAXAIR, INC., a Delaware corporation

By 
Edward R. Durkin
Director, Corporate Real Estate

CITY OF MILPITAS

By _____
Thomas C. Williams, City Manager

NOTE: The execution of this Agreement by Praxair, Inc. must be acknowledged before a notary public.

*8

MASTER LICENSE AGREEMENT BETWEEN CITY OF MILPITAS AND AIR
PRODUCTS AND CHEMICALS, INC.

This License Agreement is made by and between the City of Milpitas, a general law city of the State of California (hereafter referred to as "City") and Air Products and Chemicals, Inc., a Delaware Corporation (hereafter referred to as "Air Products") at Milpitas, California on 17 APRIL, 2013.

In consideration of the mutual covenants herein contained, the parties do hereby agree as follows:

Section 1. Definitions. Whenever in this agreement, the words or phrases hereinafter in this section defined are used, they shall have the respective meanings assigned to them in the following definitions:

- (a) The word "Air Products" shall mean Air Products and Chemicals, Inc., and its lawful subsidiaries including Air Products Manufacturing Corporation, a Delaware corporation, successors or assigns.
- (b) The word "Air Products ." shall mean Air Products and Chemicals, Inc., a Delaware corporation and Air Products Manufacturing Corporation, a Delaware corporation qualified and engaged in the business of producing and distributing nitrogen gas in the State of California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form
- (c) The word "City" shall mean the City of Milpitas, a municipal corporation of the State of California, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form.
- (d) The word "streets" shall mean the public streets, alleys, public service easements and other public property, subject to the other provisions of this License Agreement, as the same now or may hereafter exist within City, excluding State highways and freeways, now or hereafter established within City. Also, see Section 2.
- (e) The word "gas" shall mean nitrogen gas.
- (f) The phrase "pipes and appurtenances" shall mean pipes, pipelines, mains, services, traps, vents, vaults, manholes, meters, gauges, regulators, valves, conduits, appliances, attachments, appurtenances and, without limitation to the foregoing, any other property located or to be located in, along, across or under the streets of City, and used or useful in transmitting and/or distributing gas.
- (g) The phrase "install, maintain and use" shall mean to lay, construct, erect, install, operate, maintain, use, repair or replace.

- (h) The phrase “annual fee” shall mean a fee for each calendar year, or fractional calendar year, for the term of the License.

Section 2. License. A nonexclusive License to install, maintain and use in the streets of City all pipes and appurtenances for transmitting and distributing gas only, for any and all purposes is hereby granted to Air Products., provided, however, that such License shall not include the right to occupy any park, playground, or other municipal property (not used as a street), unless a special permit therefor shall be granted by the City, and provided further that such rights shall apply to city streets now or hereafter established within City, only to the extent that City is empowered to grant such rights with respect thereto, subject to laws relating to the location and maintenance of such pipes and appurtenances therein.

Section 3. Term. Said License shall be for fifteen years and for future renewable terms of fifteen years as agreed in writing by officials of both parties, or until the License is voluntarily surrendered or abandoned by Air Products, or until the State or some municipal or public corporation, including City, duly authorized by law shall purchase by voluntary agreement or shall condemn and take under the power of eminent domain, all property actually used and useful in the exercise of said License and situated in the territorial limits of the municipal or public corporation purchasing or condemning such property, or until said License shall be forfeited for noncompliance with its terms by Air Products. Also, see Section 17.

Section 4. Fees. Air Products shall, during the term of said License, pay to City as follows:

Fees consisting of items (a), (b) and (c)

(a) An annual fee equal to four thousand thirty nine dollars (\$4,039) per mile for the calendar year 2013 (rounded up to the nearest mile) of the total gas-carrying pipe installed within the streets of City.

(b) An additional annual fee per customer location within City having a connection to this License system equal to the product of Seven hundred seventy seven dollars (\$777.00) for the calendar year 2013 and nominal inside diameter of the pipe, expressed in inches and fraction thereof at the property line of each customer location connected to each gas-carrying pipe. In calculating the annual fee per customer location connection, Air Products shall include in calculating the fee, any customer who has a connection for service during any part of the calendar year or portion thereof for which the fee is payable. Each separate location receiving nitrogen gas shall occasion payment of the above annual fee.

(c) In no event shall Air Products pay City pursuant to this Section 4, an amount less than two thousand dollars (\$2,000) per calendar year, or portion thereof, for the term of the License.

(d) The fees stated in (a) and (b) above in this section will be increased annual at a rate of seven percent (7%) per annum over the fee for the preceding calendar year throughout the term of the license or any extension thereto.

Section 5. Filing. For each calendar year or portion thereof during the term of this License, Air Products shall file with the City Clerk of City a verified statement showing in detail the lineal feet of gas pipes installed within the streets of City and the customer locations within City having a connection to this License system. Said statement shall be filed for each calendar year on or before January 30th of the calendar year following the calendar year to which the statement applies or within 30 days after the termination of this License, whichever is sooner. The initial filing shall be the first January 30 after the execution of the agreement for the License. Air Products shall pay City the amount of the license fees described in Subsections 4(a) and 4 (b) or 4 (c) (“Annual License Fees”) including an annual increase in Subsection 4 (d) for each calendar year or portion thereof at the time the statement for such calendar year is filed pursuant to this Section 5.

Section 6. Set-Off. Air Products shall be allowed to offset all costs incurred by Air Products in relocating pipes at the request, demand, or other requirement of City against the Annual License Fees; provided, however, that in any calendar year period in which the costs were incurred, Air Products may not offset costs greater than ten percent (10%) of the Annual License Fees payable for such calendar year or portion thereof, and no offset shall be made against any Section 4 (c) or (d) payment. Any costs not so offset in one calendar year period shall be accumulated and carried over to the next calendar year to be offset on the same basis until fully exhausted or until the expiration of the License including any extension or renewal thereof, whichever occurs sooner. The offset provided by this Section 7 shall not apply to any pipe removal or relocation installed, used, or maintained under the License when required by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction for or by City of any subway, viaduct, street, structure, pipeline or any other lawful public work of governmental character.

Section 7. Installation Procedure.

- (a) Air Products shall not install, maintain, use or cause, allow or permit to be installed, maintained, or used within the streets, or other public property of City, any pipes or appurtenances unless and until Air Products shall have filed with the City Engineer a map showing the area or portion of the City within which service shall be made available to customers by Air Products, together with plans and specifications for installation of such pipes and appurtenances and received approval for the installation.
- (b) The City shall have the right to disapprove of vertical and horizontal locations of the pipes to be installed under, along, across the streets of City. All plans and specifications shall be approved by the Fire Department of the City, as to compliance with Health and Safety standards. The City Engineer shall be responsible for review of plans and specifications, permit issuance, and inspection of the installation of all pipes and appurtenances in the streets of City.

- (c) Air Products shall pay to City a fee for review of Air Product's plans and specifications, for inspecting the installation of all pipes and appurtenances, and other required services. The fee for review and inspection shall be in accordance with City requirements at the time the project is instituted.
- (d) Before any work is commenced on or in any street of City, Air Products shall comply with the provisions of the Milpitas Municipal Code as presently provided or as hereafter amended, and the imposition of any reasonable requirements and any permits issued pursuant thereto. Without limitation to the provisions hereof, and except as to the location of pipes and appurtenances in the streets, nothing contained in this License Agreement exempts Air Products from obtaining environmental clearance, use or zoning permits and/or encroachment permits prior to the installation, maintenance or use of any pipes or appurtenances. Air Products shall be required to obtain and pay for the annual Milpitas Business License.
- (e) All crossings of a street by a pipeline shall be bored and jacked, open cut, directional drill or any other method as approved by the City. All installations must meet City of Milpitas standard specifications and requirements. Restoration shall be performed to the satisfaction of the City.
- (f) Air Products shall file with the City Engineer on the completion of new project a current as-built map or set of maps of the project, drawn to scale or a summary written listing of locations (street name, cross streets, length, diameter of pipe, approximate location to curb and depth of cover, customer name and site address, lateral diameter, dates of operation) showing all pipes or appurtenances installed and in place in the streets of City. Upon request from the City, Air Products shall provide maps of any pipelines in the City and upon request mark said facilities.
- (g) Air Products must become a member (if you are not already) of underground service alert (USA) and remain an active member for perpetuity of the license agreement. As a participant, you are responsible for field marking your subsurface facilities as part of USA notification in accordance with the requirements of Section 4216 of the State of California Government Code, as it now reads or may hereinafter be amended.

Section 8. Construction Guarantee. Air Products shall provide a faithful performance bond and labor and materials bond satisfactory to City each in the amount equal to the full cost of all construction undertaken pursuant to this License conditioned upon the faithful performance of such construction and the payment for all labor and materials in connection therewith. Also, see Section 11 for additional bonding requirement of the license.

Section 9. Air Products Abandonment of Pipelines. If Air Products abandons use of the pipelines installed under or pursuant to the License, the title to said pipelines shall vest in the City upon notification of abandonment and City's consent to and acceptance of title.

Section 10. Air Product's Duties Upon Customer Service Discontinuance. The line of any customer whose service is disconnected shall be suitably capped-off by Air Products to City's satisfaction.

Section 11. License Faithful Performance Bond. Air Products shall submit to City, upon acceptance of License, an appropriate corporate surety or other bond, approved by City as to form, in the amount of one hundred thousand dollars (\$100,000) guaranteeing the performance by Air Products of its obligations under this License. Such bond shall be maintained in full force and effect for the License term.

Section 12. Indemnity. As a material portion of the consideration for granting of said License and by accepting said License, Air Products agrees to hold the City of Milpitas, its officers, its agents, employees and volunteers free and harmless for and on account of any and all claims, demands, liability, obligation, account, action, cause of action, whether the same be known or unknown, expected or unexpected, already appeared or developed or now latent, or may in the future appear or develop, arising out of or in any way connected with the exercise of said License by Air Products, including but not limited to damages or injuries or death to persons or damage or injuries to property.

Section 13. Insurance Protection Required. Air Products shall, upon the execution of this License, furnish to City, and at all times during the existence of any license hereunder, maintain in full force and effect, at its own cost and expense, a comprehensive general liability insurance policy, or at Air Product's option, an Owner's Protective Liability Policy, in protection of City of Milpitas, its officers, its agents, employees and volunteers, in a company approved by the City Council and in a form satisfactory to the City Attorney, protecting City and all persons against liability for loss or damage for personal injury, death and property damage, occasioned by the operations of Air Products under such License with a combined single limit for bodily injury and property damage of two million dollars (\$2,000,000) per occurrence.

The policy mentioned in the foregoing paragraph shall name City of Milpitas, its officers, its agents, employees and volunteers, as additional insured and shall contain a provision that a written notice of cancellation or reduction in coverage of said policy shall be delivered to City thirty (30) days in advance of the effective date thereof. If such insurance is provided by a policy which also covers Air Products or any other entity or person other than those above-named, then such policy shall contain a standard cross-liability endorsement.

Section 14. City Audit of Fiscal Records. Air Products shall permit such examination of its records by City as are necessary and material to the determination of the performance of Air Product's License obligation.

Section 15. Condemnation by City. There is hereby reserved to the City of Milpitas the right to acquire the property of Air Products utilized in the performance of this License through the exercise of the right of eminent domain.

Section 16. Acceptance of License Terms and Conditions. By accepting this License, Air Products covenants and agrees to perform and be bound by each and all of the terms and conditions imposed by Federal or state statutes and local ordinances and standard specifications of City (whichever are more stringent).

Said License is granted and is hereby accepted by Air Products upon the express condition that the streets of City shall be used and that gas is furnished by Air Products in strict compliance with the terms of this License and applicable provisions of the Milpitas Municipal Code, as presently written or as amended during the term of this License.

Section 17. Termination of License. This License may be terminated by any of the following methods:

- (a) by either party at any time upon five (5) years prior written notice to the other, said termination to be effective upon the first December 31st to follow the expiration of the five (5) year notice period;
- (b) by City upon written notice to Air Products ("Termination Notice") in the event that Air Products has violated any other provisions of this License and has failed to correct the same within sixty (60) days after written notice from City to Air Products of said violation ("Violation Notice"); said termination shall be effective upon dispatch of the Termination Notice by City; the City Manager may in its discretion extend for good cause the period of time for correction of said violation;
- (c) as to any provision hereof, by final determination of a court of competent jurisdiction that said provision hereof is ultra vires.

Section 18. Suspension. In the event of any condition involving the subject matter of this License which endangers the health or safety of any person or property within City, City may immediately suspend this License and said suspension shall remain in full force during said condition. The City Manager shall make a written report of said suspension and the reasons therefor to the City Council at the first meeting following said suspension. It shall not be a condition of the invoking of said suspension that Air Products has violated any of the provisions of this License nor shall said suspension extend the term of this License (unless the City Council otherwise determines). Notice of said suspension may be oral or in writing to Air Products and shall be effective immediately.

Section 19. Notice. All notices hereunder to City shall be addressed to the City Manager, City Hall, 455 East Calaveras Boulevard, Milpitas, California 95035. All notices to Air Products shall be given to Air Products and Chemicals, Inc., Attention: Thomas S. Houser, 12600 Northborough Drive, Suite 196 Houston TX. 77067

Provided, however, that either party may change the place of notice by giving the other party a written statement thereof sent registered mail, return receipt requested, at the above address to be effective upon receipt.

Section 20. Agent for Service of Process. The name and address of Air Product's agent for service of process in California are as follows: CT Corporation System, 700

South Flower Street, Los Angeles, California 90017. Air Products shall notify City of any changes in the name or address of Air Product's agent for service of process in California.

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Section 21. City of Milpitas Business License. Air Products shall pay the annual City of Milpitas business license similar to any company doing business in the City of Milpitas.

Section 22. Sale, Transfer, Assignment or Sublease of License. No franchise granted hereunder shall be sold, assigned, transferred, leased or sublet, in whole or in part, voluntarily or by operation of law, without written consent of the City of Milpitas. The consent would be based on the new licensee having an acceptable industry standard safety record. In addition, consent is granted based on Air Products filing and paying the necessary processing costs, including but not limited to, the business license, bonding, insurance certificates, contact information, etc.

IN WITNESS WHEREOF, the parties have executed this License the day and year first above written.

AIR PRODUCTS AND CHEMICALS, INC., a Delaware Corporation

By: *Gary D. Kinsey*

Name Printed: GARY D. KINSEY

Title: GLOBAL RIGHT-OF-WAY MANAGER

CITY OF MILPITAS

By _____
Thomas C. Williams, City Manager