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Hon. Jason Steele  
Brevard County, Florida  
Board of County Commissioners  
2725 Judge Fran Jamieson Way  
Viera, FL 32940

**VIA E-MAIL ([morris.richardson@brevardfl.gov](mailto:morris.richardson@brevardfl.gov))**

**Re: Air Liquide Vested Rights Petition Hearing**

Dear Chairman and Commissioners:

We represent Air Liquide Industries, Inc. (“Air Liquide”), in its Vested Rights Petition (the “Petition”) relating to its nitrogen and oxygen production plant (the “Facility”) located at 7007 N Courtenay Pkwy, Merritt Island, Florida 32953 (the “Property”). We write to provide support for granting the Petition, and to also formally request that the Board of County Commissioners (“BCC”) consider tabling this matter under Rule III.A.(6) pending an agreement between all interested parties to allow Air Liquide to construct a proposed 400-foot long, by 14-foot tall, noise barrier (the “Barrier”)<sup>1</sup> along the north side of Courtenay Parkway to resolve this issue to the benefit of all interested parties.

**1. The Air Liquide Facility is Essential to the Safety, Welfare and Prosperity of the Local Community, Brevard County Economy and the Space Coast.**

First, it is important to understand that the Facility has been in operation for almost 60 years, working in the same fashion and producing the same products since 1968. It uses compressors and cryogenic processes (essentially, very cold pipes) to produce both nitrogen and oxygen out of the ambient air. That’s it – there are no hazardous chemical processes, no reactor or explosive oriented elements, nothing that could harm the environment. The feedstock at the Facility is just air, and the end product is just liquified nitrogen and oxygen that is pulled out of that air.

Air Liquide is the sole source for high pressure nitrogen to NASA at the Kennedy Space Center via a direct pipeline system pumped from the Facility. Nitrogen is one of the few totally inert gases known to man (which means that it prevents and inhibits explosions). Thus, NASA uses Air Liquide’s nitrogen to blanket both launch pads and rocket vessels prior to launch to prevent them from inadvertently exploding. To put it bluntly, Air Liquide’s nitrogen keeps the launch pads and rockets from going “boom,” exploding prematurely and potentially causing catastrophic damage and loss of life. Air Liquide’s nitrogen is therefore a critical and essential safety tool at the Kennedy Space Center.

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<sup>1</sup> A copy of the Preliminary Noise Barrier Proposal is attached as **Exhibit 1**.

Again, Air Liquide is the sole source for that nitrogen— without Air Liquide’s Facility, the rockets simply cannot launch; and, if they did, then they could accidentally explode causing massive damage and injury.<sup>2</sup> In fact, NASA has awarded Air Liquide numerous laurels memorializing just how essential the Facility is to their launch program over the last 50 years.<sup>3</sup>

Air Liquide is also the main source for purified oxygen to the Brevard County hospitals and health systems.<sup>4</sup> During the COVID pandemic, Air Liquide provided almost 90% of the oxygen that kept patients in Brevard County alive – Air Liquide even curtailed its other customers so that it could supply the local hospitals as a top priority. Without a steady, local supply of purified liquid oxygen, the Brevard County Health System could not operate and, if it did, it would be unreasonably dependent on the shipment of medical grade oxygen from air separation facilities hundreds of miles away.

To summarize, without the Facility NASA cannot launch at the Kennedy Space Center, and Brevard County hospitals cannot function. People could die, the economy would be damaged and rockets could explode without the nitrogen and oxygen that Air Liquide produces at the Facility.

Finally, in providing those products, Air Liquide also supports four out of the five largest listed employers in Brevard County: Health First, Space Launch Delta 45, L3 Harris Technologies and Northrop Grumman Corp.<sup>5</sup>:

**The five largest employers in Brevard County are:**

- **Health First**
- **Brevard Public Schools**
- **Space Launch Delta 45**
- **L3Harris Technologies Inc. (NYSE: LHX)**
- **Northrop Grumman Corp. (NYSE: NOC)**

The Special Magistrate noted how essential and critical Air Liquide’s Facility is to Brevard

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<sup>2</sup> Hearing Transcript (vol. 1 & 2) Excerpts, attached as Exhibit 2, vol. 2 at p. 171.

<sup>3</sup> Pictures of NASA awards, attached as Exhibit 3.

<sup>4</sup> The oxygen is produced as a by-product of the nitrogen production process, not as part of an independent manufacturing process resulting in any additional noise.

<sup>5</sup> List of top Employers in Brevard County, attached as Exhibit 4. Health First relies on the Facility for all of its oxygen needs. The following businesses purchase nitrogen from the Facility to operate spaceship launch operations: Space Launch Delta, L3Harris Technologies, Inc., Northrup Gruman, NASA Kennedy Space Center, and Lockheed Martin. *See also*, Hearing Transcript, vol.2, p. 121.

County and the community as a whole. And to be certain, Air Liquide's Facility operated almost 30 years before anyone ever moved to the area and built a house (right next to the Kennedy Space Center, mind you, where no one should reasonably expect peace and quiet while rockets are exploding into space).

There is, also, no dispute here that each of those houses moved to the Facility – neither Air Liquide nor the Facility moved to them. Those residents, in fact, testified that the noise level from the Facility **is quieter** than normal traffic coming down Courtenay Parkway.<sup>6</sup> The Facility, therefore, is less disruptive than a semi-truck coming down the road.

In sum, to be absolutely certain, the Facility has not gotten any louder since 1968.<sup>7</sup> The issue here is the frequency of Kennedy Space Center launches in the last several years. For fifteen years (around when residents started purchasing their property and building houses), there were almost no launches from the Kennedy Space Center – then, in the last decade, all that reversed course and the Space Coast is literally and figuratively booming.<sup>8</sup> That is important because the Facility maintains a strict NASA “on demand” protocol called the Launch Safety System (the “LSS”). Essentially, if NASA schedules a launch, the Facility must run at full capacity in LSS mode for several days in a row (with backup pumper trucks in case of an emergency explosion requiring extra nitrogen to put the fire out) to keep constant high pressure on the pipeline to meet all NASA needs. That is when the Facility is allegedly “loud.” Air Liquide lacks any control whatsoever over that operation: when NASA calls, Air Liquide must run the LSS – there is no choice.<sup>9</sup>

Thus, nothing has changed at the Facility except that NASA is requiring Air Liquide to run the LSS more often. That is it. Air Liquide cannot control NASA's requirements, and if it could, there are serious health safety and welfare risks (setting aside the fact that federal preemption would likely tie Air Liquide's hands) in doing so. Rockets would not launch, or even worse they could explode. The Space Coast economy could not operate. Local hospitals could not keep patients alive without purified oxygen. In short, the Facility is essential to Brevard County, and it has been since 1968.

## **2. Air Liquide Satisfied the Vested Rights Elements.**

Legally speaking, the elements for a vested right are: (1) an act or omission by the County; (2) Air Liquide relied upon that act or omission to change positions or expend money; and, (3) the vesting will not create imminent peril to public health, safety or general welfare of the residents of the county.<sup>10</sup> Each of those elements were satisfied in this situation. Here, the County took at least three actions and

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<sup>6</sup> See Exhibit 2, Hearing Transcript, vol.2, p.99, 1.16-1.21; vol.2, p.101, 1.25-p.102, 1.2.

<sup>7</sup> See Exhibit 2, Hearing Transcript, vol.2, p. 124-5 (Q. ·Okay· Do any of those improvements emit any sound that is appreciable in relation to the normal operations? A. ·No· No· If anything, we have made it quieter because of the upgrades and how we have modified the pumps and those things).

<sup>8</sup> Hearing Transcript vol. 2, p. 183 -- Ms. Elliot, attached as Exhibit 2.

<sup>9</sup> Hearing Transcript vol. 2, p. 123 – Mr. Maupin, attached as Exhibit 2.

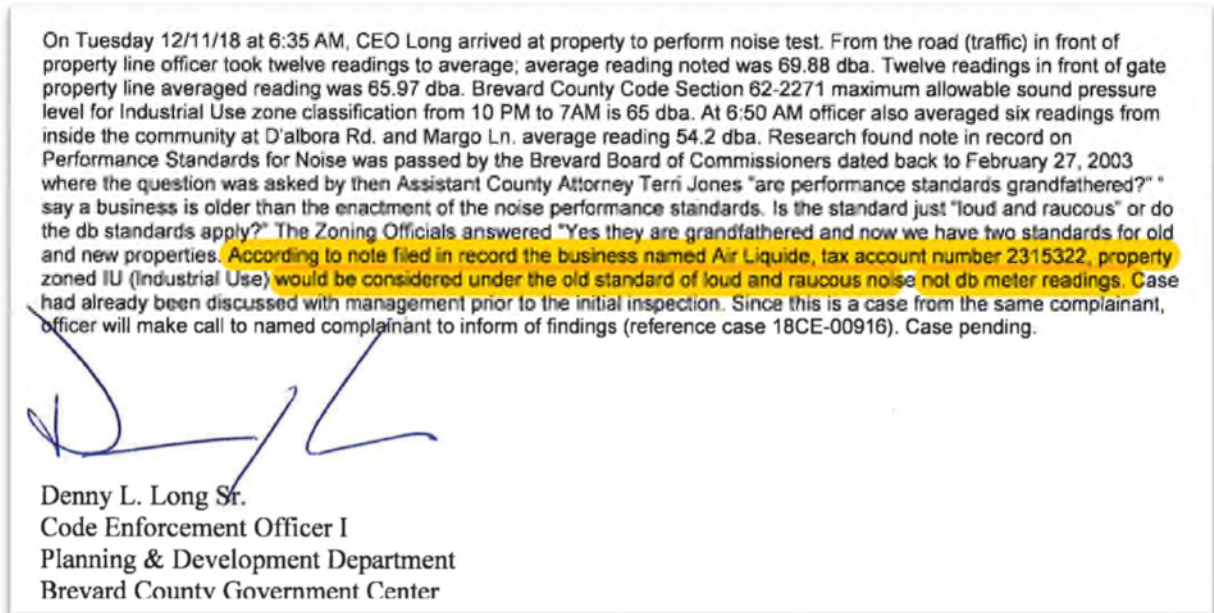
<sup>10</sup> Section 62-507(d), Brevard County Land Development Code.

omissions, which Air Liquide relied on to change its position such that it would be highly unjust or inequitable to now destroy Air Liquide's rights.

**a. First Act or Omission/Reliance: The County's official position was that Air Liquide was vested or grandfathered under the loud and raucous standard:**

In late 2002, Air Liquide's neighbors at the Facility pursued a future land use map amendment and rezoning of their properties to change from industrial land use and zoning designations to residential. According to the State, that was a bad idea.<sup>11</sup> Air Liquide submitted formal objections to the neighbors' request to the State, including a letter dated November 22, 2002.<sup>12</sup> In short, both the State and Air Liquide stated that residential next to the Facility would be incompatible.

It is no coincidence then that just three months later, on February 27, 2003, the Zoning Official for the County, Scott Knox, advised Terri Jones, Assistant County Attorney, that businesses that are older than the enactment of the noise performance standards are grandfathered. "In other words, loud and raucous applies to properties prior to the enactment of the noise performance standards. Properties that came into existence after that date fall under the db meter readings."<sup>13</sup> That Zoning Official Action was "filed in the record [for] the business named Air Liquide, tax account number 2315322" and that property was therefore "considered under the old standard of loud and raucous noise **not** db meter readings."



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<sup>11</sup> See Exhibit 5, Letter dated January 17, 2003, from the Florida Department of Community Affairs to County; and, Memorandum from the East Central Florida Regional Planning Council, dated February 10, 2003.

<sup>12</sup> See Exhibit 5.

<sup>13</sup> See Exhibit 5.

Shortly after that note went into Air Liquide's file, the BCC approved the future land use map amendment for Air Liquide's neighboring properties from industrial to residential (based on assurances by the neighbors that they were aware of the Facility). Each of those neighboring residential properties stated that they had no problems with the noise at that time.<sup>14</sup>

That "note filed in the record" above – as put into action by the County's dismissal of noise complaint,<sup>15</sup> after noise complaint,<sup>16</sup> after noise complaint<sup>17</sup> – are the first "acts and omissions" at issue here. Based on the County's official position, the County systematically represented to the State, to Air Liquide and to the neighbors that Air Liquide is vested from the noise performance standard and the noise emanating from the Facility is not an issue. Code enforcement actions were terminated at the direction of the Chief Zoning Official, Robin Sobrino, based on the County's official position. For decades, the County took no action to put Air Liquide on notice that the performance standards applied to it or that the constant noise emanating from the Facility is "loud and raucous." The County's action - official position - was affirmatively communicated to Air Liquide by numerous County Officials over twenty (20) plus years.<sup>18</sup> And, Air Liquide reasonably relied upon that action in spending "hundreds of millions of dollars" at the facility "upgrading the LSS, [adding] new vaporizers [and] a new roof... pushing two and a half million into a C50 nitrogen compressor" and numerous other upgrades.<sup>19</sup> Air Liquide should be allowed to reasonably rely upon the County's action in placing that "grandfathered" note in its tax file stating that the "loud and raucous" noise standard applied.

For decades, the County continued to process permit applications, knowing Air Liquide was pouring hundreds of millions of dollars into the Facility to install improvements and to maintain the Facility. Based on this, Air Liquide has, since 2003, spent hundreds of millions of dollars to maintain and make improvements to the Facility; paid tens of thousands of dollars to the County for taxes and fees; spent tens of thousands of dollars on consultants to pursue permits to make improvements to the Facility; and entered into binding contracts with third parties such as NASA.<sup>20</sup>

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<sup>14</sup> See Exhibits 6.

<sup>15</sup> See Exhibit 7.

<sup>16</sup> See Exhibit 8.

<sup>17</sup> See Exhibit 9 & 10.

<sup>18</sup> See Exhibit 2, Hearing Transcript, vol.2, p. 127 – 129 (Q. What else did they tell you? A. That we had nothing to worry about and just can we do it because we was under the grandfather of the loud and noxious noise. Q. Let's be very clear here. Code officials came out to the plant and talked to you, right? A. Right. Q. And what did they tell you with respect to not worrying about it? A. We was under the grandfather noise, that we did not have to worry about the complaint.).

<sup>19</sup> Exhibit 2, Hearing Transcript, vol.2, p. 132-33.

<sup>20</sup> It is important to note that decisions made by Air Liquide upper management was based on the understanding the Facility was operating in compliance with the law, *i.e.*, vested based on the "loud and raucous" standard. Had operational level staff been put on notice, that notice would have made it to upper management.

**b. Second Act or Omission/Reliance: The County issued the CUP and site plan which Air Liquide's predecessor relied on to spend millions of dollars to construct permanent improvements on the Property:**

Next, as noted above, the Facility has been in operation since 1968, doing the same thing it has been doing for almost 60 years: producing nitrogen and oxygen for 4 of the top 5 employers in the County.<sup>21</sup> The Facility received a Conditional Use Permit (the "CUP") in 2002 to allow for the expansion of certain building improvements (none of which make noise) in order to replace older equipment with more modern, updated equipment (which all testimony noted is, in fact, quieter).<sup>22</sup>

Based upon that CUP – and the County's position regarding the Noise Standards – Air Liquide spent millions to replace older equipment that was permanently affixed to the real property consistent with the approved site plan. In approving the CUP, the County represented (consistent with clear language in the County's Code): (i) the Noise Standards will not apply to pre-existing improvements; and (ii) the Noise Standards will apply to the expanded portion of the improvements, which in Air Liquide's case, did not consist of any new noise producing improvements. Air Liquide relied upon those acts and omissions in spending those funds to improve the Facility.

**c. Third Act or Omission/Reliance: The County issued the Certificate of Occupancy as a confirmation that the permanent improvements were approved:**

Third, all of the additions to the Facility were constructed consistent with the County approved site plan (which was approved by the County as consistent or in compliance with the CUP), as confirmed by the County through the issuance of a Certificate of Occupancy. Air Liquide relied on the CUP, approved site plan, and Certificate of Occupancy to value the Facility at \$17M, the majority of which was based on the business operation resulting from the new or replaced improvements and which were well in excess of the true value for the Property.

**d. There is no Imminent Peril to Public Health, Safety, or Welfare from the Facility:**

Finally, the Facility does not cause any peril to the public health, safety or welfare – it has been in operation in the same manner for almost 60 years. The noise emanating from the Facility has existed in the same capacity since at least 2003, and that same noise cannot, overnight, cause imminent peril to the public health, safety or welfare. Further, per testimony during the hearing by County staff, Air Liquide's expert, and members of the community, the noise from cars coming down Courtenay Parkway

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<sup>21</sup> See Exhibit 4. Health First relies on the Facility for all of its oxygen needs. The following businesses purchase nitrogen from the Facility to operate spaceship launch operations: Space Launch Delta, L3 Harris Technologies, Inc., Northrup Gruman, NASA Kennedy Space Center and Lockheed Martin. See also, Hearing Transcript, vol.2, p.121.

<sup>22</sup> See Exhibit 2, Hearing Transcript, vol.2, p. 124-5 (Q. ·Okay· Do any of those improvements emit any sound that is appreciable in relation to the normal operations? A. ·No· No· If anything, we have made it quieter because of the upgrades and how we have modified the pumps and those things.

is louder than the noise emanating from the Facility. Therefore, the Facility cannot possibly cause any imminent peril.

The Facility's operation is consistent with operations expected for an industrial area. As noted above, in 2002 Air Liquide's neighbors pursued a future land use map amendment and rezoning of their properties to change from industrial land use and zoning designations to residential. According to the State, that was a bad idea as the proposed residential use was "incompatible" with the Facility's industrial use.<sup>23</sup> Air Liquide submitted formal objections to the neighbors' request to the State, including a letter dated November 22, 2002.<sup>24</sup> At the time the BCC approved the future land use designation amendment and rezoning to residential, Commissioner Pritchard analogized future purchasers of the adjacent residential property to purchasers "buying next to an airport and complaining about airplanes." Everyone knew what they were getting and cannot now be heard to complain too loudly.

In any event, it is the possibility of shutting the Facility down that will cause imminent public health, safety, or welfare. The Facility produces nitrogen for the space industry to ensure safe launches – as the witnesses testified, without Air Liquide, the rockets will go "boom" and kill people<sup>25</sup> – and the facility produces purified oxygen for hospitals to treat the most vulnerable members of the community. It is an integral business for 4 of the top 5 employers for the County. Shutting the Facility down will not only create safety issues for space launches and leave vulnerable members of the community without proper oxygen but would result in tremendous negative economic impact for the County.

### **3. Air Liquide's Request to Table the Issue and Install a Noise Barrier.**

All of that said, Air Liquide has always desired to be a good neighbor and citizen of Brevard County. It values this community and wants to continue providing essential nitrogen to the Space Coast and purified oxygen to the local hospitals. Air Liquide is eager to find a solution that makes all interested parties happy.

Thus, even though Air Liquide believes that it has more than satisfied the elements for a Vested Right as to the Noise Standards, it would prefer to avoid continued litigation, formal takings claims, more code enforcement actions and the various other proceedings that will drive up costs and fees for both Air Liquide and the County. Truth be told, none of that will ever make all the parties happy at the end of the day – and that is the goal of compromise.

Air Liquide, therefore, commissioned and is proposing the attached rendering for the construction of an additional barrier wall at Air Liquide's expense. Air Liquide requests the BCC temporarily table this matter under Rule III.A.(6) to allow Air Liquide and any interested parties to negotiate an agreement for the construction of the wall, and to construct that wall, in order to avoid continued and protracted

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<sup>23</sup> See Exhibit 11, p. 44, Letter dated January 17, 2003, from the Florida Department of Community Affairs to County; and Exhibit 58-048, Memorandum from the East Central Florida Regional Planning Council, dated February 10, 2003

<sup>24</sup> See Exhibit 11.

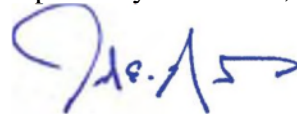
<sup>25</sup> Exhibit 2, vol. 2, at 171.

litigation on these issues. The Facility is integral to the community and discontinuing its operation would not be in the best interest of Air Liquide, the County, or the community. Neither, for that matter, will continued litigation.

Thus, it would be better for all stakeholders to sit down and work out a compromise to build a noise barrier that will satisfy the County and the residents in the area. Air Liquide requests that this issue be tabled for a brief period to work out that agreement, construct the noise barrier and attempt to resolve this issue to everyone's benefit without the need for further litigation.

Finally, just as a house keeping matter, Air Liquide is requesting the entire record submitted for the Special Magistrate proceeding be included in the record for the BCC May 21, 2024, proceeding.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "J.E. Rogers", with a stylized arrow pointing to the right.

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cc: Air Liquide

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