PUBLIC VERSION

FEDERAL TRADE COMMISSION RECEIVED DOCUMENTS MAY 13 2005 SECRETARY

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **The Dow Chemical Company,** a corporation, and **Union Carbide Corporation,** a corporation.	Docket No. C-3999

PETITION OF THE DOW CHEMICAL COMPANY FOR APPROVAL OF CERTAIN AMENDMENTS TO THE INEOS AGREEMENT

Pursuant to Section 2.41 of the Federal Trade Commission ("Commission") Rules of Practice and Procedure, 16 C.F.R. §2.41 (2005), The Dow Chemical Company ("Dow") hereby petitions the Commission to approve certain amendments to the Ineos Agreement, which is incorporated into the Decision and Order (the "Order") in the above-captioned matter.[1]

The proposed amendments have been agreed to by Ineos. This petition describes the terms of the proposed amendments and explains how the proposed amendments further the purposes of the Commission's Order.

For the convenience of maintaining the public record, Dow is submitting this petition in two versions—one that includes confidential and proprietary information (the "Confidential Version") and another that is the same as the Confidential Version, but with

[1] All capitalized terms used but not otherwise defined in this petition have the meanings ascribed to them in the Commission's Order.

certain confidential and proprietary information redacted and Confidential Appendices A through G redacted (the "Public Version"). Pursuant to Section 21 of the Federal Trade Commission Act, 15 U.S.C. §57b-2, and the Commission's Rules of Practice 4.10-4.11, 16 C.F.R. §§4.10-4.11, Dow hereby requests that certain information provided in this petition and all of the information and documents provided in Confidential Appendices A through G be treated by the Commission as strictly confidential and not be made available to the public. Portions of this petition and Confidential Appendices A through G contain commercially and competitively sensitive information relating to the Dow Global Ethanolamines Business and the Dow Gas Spec MDEA Business, which were divested to Ineos. Disclosure of the information contained herein to the public will prejudice Dow and Ineos.

I. Proposed Amendments to Ineos Agreement

Pursuant to paragraphs III.A and IV.A of the Order, on February 12, 2001, Dow divested, absolutely and in good faith, as an ongoing business, the Dow Global Ethanolamines Business and the Dow Gas Spec MDEA Business to Ineos in accordance with the Ineos Agreement. Since the divestiture, Dow believes it has complied with its obligations under the Ineos Agreement, including the supply agreement by which Dow supplies GAS/SPEC solvent, solvent additive, and solvent and MDEA to Ineos for use in the production of MDEA-based specialty amines for gas processing industries (the "GAS/SPEC Supply Agreement"); and the supply agreement by which Dow supplies ethylene oxide ("EO") to Ineos for use in the production of ethanolamines at Ineos' plant in Plaquemine, Louisiana (the "EO Supply Agreement").

As stated in paragraphs III.C and IV.C of the Order, the purpose of the divestitures of the Dow Global Ethanolamines Business and the Dow Gas Spec MDEA Business is to ensure the continued operation of these businesses in the same businesses in which they were engaged at the time of the acquisition by Dow of Union Carbide Corporation, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

At the outset, it is important to note that these divestitures have achieved the purpose of the Order. Indeed, Ineos has recently announced a large-scale expansion of its global ethanolamines business, which is a tribute to the success of the divestitures. In particular, in December 2004, Ineos Oxide announced its intention to expand its EO and EO-derivative capabilities in Antwerp, with production commencing in early 2007.[2] The Antwerp expansion will include a new 160 ktpa ethanolamines plant, equivalent to Ineos' entire U.S. capacity.[3] Moreover, Ineos is a vibrant and growing chemical company that now has over €5 billion in sales and over 10 million tons of volume;[4] and the Ineos Oxide division (located in Antwerp, Belgium; Plaquemine, Louisiana; and Freeport, Texas) is a €535 million business with 269 ktpa

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2 INEOS Oxide CEO Bill Reid stated that "[t]his is an important step forward in establishing INEOS Oxide as one of the largest EO and derivative producers in the world. These investments have been under consideration for some time as we have approached maximum plant occupacities [sic] both at Antwerp and our EOA facility at Plaquemine Louisiana. Timing is now right to implement these initiatives, permitting us to support the growth plans of our customers." Press Release, *INEOS Oxide: EO and Derivatives Expansion at Antwerp* (Dec. 10, 2004), *at* http://www.ineos.com/news/newsframeset.htm. At the same time, Ineos Oxide announced it was adding a fourth reactor to its alkoxylation capabilities in Antwerp, and expanding the production capability for ethylidene norbornene (ENB) at Antwerp. Press Release, *INEOS Oxide Adds 4th Alkox Reactor* (Dec. 10, 2004), *at* http://www. ineos.com/news/newsframeset.htm; Press Release, *INEOS Oxide Expands ENB Capacity* (Dec. 10, 2004), *at* http://www.ineos.com/news/newsframeset.htm.

3 INEOS Oxide, Snapshot, *at* http://www.ineos.com/businesses/buss1frame.htm; Press Release, *INEOS Oxide: EO and Derivatives Expansion at Antwerp* (Dec. 10, 2004), *at* http://www.ineos.com/news/newsframeset.htm.

4 Ineos Parent Company, Snapshot, *at* http://www.ineos.com/aboutus/aboutusframe.htm.

total volume from these sites.[5] Indeed, as early as July 2001, Ineos joined the ranks of the Global Top 50 chemical producers (ranked by Chemical & Engineering News).[6]

A. Amendment of GAS/SPEC Supply Agreement

As part of the divestiture of the Dow Gas Spec MDEA Business, Dow and Ineos entered into the GAS/SPEC Supply Agreement under which Dow supplies Ineos with GAS/SPEC solvent, solvent additive, and solvent and MDEA. Dow believes that the GAS/SPEC Supply Agreement, which was reviewed and incorporated into the Order by the Commission, is consistent with the language and purposes of the Order. In response to issues raised by Ineos, Dow and Ineos have agreed to amend the GAS/SPEC Supply Agreement, dated as of July 31, 2000 (and amended as of January 11, 2001).[7] The "February 2005 Amendment No. 1 to the GAS/SPEC Supply Agreement" has been executed by Dow and Ineos, but will not become effective until the Commission approves the proposed amendments (a copy is provided at Confidential Appendix A). The purpose of the proposed amendments is to secure maximum availability of GAS/SPEC solvent and MDEA products to Ineos at fair prices and reduce any unnecessary financial burden on Ineos. These amendments will enable Ineos to become a more reliable supplier of MDEA and a more effective competitor in that business. A summary of the amendments is provided at Confidential Appendix B.

B. Amendment of EO Supply Agreement

As part of the divestiture of the Dow Global Ethanolamines Business, Dow and Ineos also entered into the EO Supply Agreement, by which Dow supplies Ineos with EO for use

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5 INEOS Oxide, Snapshot, *at* http://www.ineos.com/businesses/buss1frame.htm.

6 Patricia L. Short, *Ineos Springs into the Top 50: British Chemical Producer Makes Money Out of Unfashionable Commodities*, Chemical & Engineering News, Aug. 27, 2001, at 23-25.

7 A copy of the existing GAS/SPEC Supply Agreement is provided at Confidential Appendix E.

in the production of ethanolamines at Ineos' ethanolamines plant in Plaquemine, Louisiana. Dow believes that the EO Supply Agreement, which was reviewed and incorporated into the Order by the Commission, is consistent with the language and purposes of the Order. At the request of Ineos in October 2001, Dow agreed to amend various terms of the EO Supply Agreement (dated as of July 31, 2000), resulting in the "October 2001 Amended EO Supply Agreement."[8] In accordance with Commission procedure, Dow petitioned the Commission for approval of the October 2001 Amended EO Supply Agreement and a consequent amendment to the Order. After a thirty-day public comment period, the Commission approved the amended Order on January 28, 2002.

Following further developments, and again at the request of Ineos, Dow has agreed to amend the October 2001 Amended EO Supply Agreement. The "February 2005 Amendment No. 1 to the EO Supply Agreement" has been executed by Dow and Ineos, but will not become effective until the Commission approves the proposed amendments (a copy is provided at Confidential Appendix C). The purpose of the proposed amendments is to secure continuing maximum availability of EO to Ineos and to limit the impact of future EO supply interruptions (if any) at Dow's Plaquemine EO plant. The proposed amendments should permit Ineos to become an even more reliable supplier of ethanolamines and an even more effective competitor to other ethanolamines producers. A summary of the amendments is provided at Confidential Appendix D.

[8] A copy of the existing EO Supply Agreement is provided at Confidential Appendix F.

II. Proposed Amendments Strengthen Ineos as a Reliable Ethanolamines and MDEA Competitor

The amendments proposed herein are the result of extensive good faith negotiations between Dow and Ineos, communications with the Monitor Trustee, and early discussions with the FTC Bureau of Competition's Compliance Division.[9] The amendments reflect the knowledge that Dow and Ineos have gained since the divestiture about the integration of their businesses, the operation of the Agreements, and the requirements of their customers. Dow is now better able to understand Ineos' concerns and has been responsive by taking on substantial additional obligations to Ineos. Ineos sought increased reliability of supply, and both Dow and Ineos (collectively "the Parties") are endeavoring to minimize the likelihood and significance of future disputes. Both goals have been accomplished.

Through the proposed amendments that clarify, simplify, and make transparent certain matters related to the Parties' ongoing rights and obligations under each Agreement, Dow and Ineos have laid the groundwork for a more stable relationship that will enable more productive operations, result in fewer disputes, and require less time to resolve any disputes that do arise. Dow's ultimate goal in amending the Agreements was to not only resolve current issues identified by Ineos, but also to do so in a way that would avoid future issues during the course of the Dow-Ineos relationship.

As described more fully below, highlights of the amendments to the *GAS/SPEC Supply Agreement* are:

- clarifying cost calculations;

[9] A copy of the proposed Settlement Agreement reached by Dow and Ineos with regard to the amendments to the GAS/SPEC Supply Agreement and EO Supply Agreement is provided at Confidential Appendix G.

- revising the capital contribution mechanism;
- improving the dispute resolution system;
- adjusting certain contract terms annually, which provides a substantial economic benefit to Ineos;
- responding to Ineos' desire to reduce its purchases of MMEA (a by-product of MDEA production);
- increasing Ineos' flexibility to access other supply options;
- narrowing the conditions under which force majeure may be declared; and
- improving communication and creating transparency through annual budgeting and reporting, periodic meetings, and full reconciliation on accounts and calculations.

As described more fully below, highlights of the amendments to the *EO Supply Agreement* are:

- narrowing the conditions under which force majeure may be declared;
- planning ahead to avoid disputes and maintain reliable supply to Ineos, as with the "Unplanned Outages" section;
- improving the dispute resolution system; and
- shifting to pricing formulas that are more objective and transparent, and thus less likely to create suspicion or disputes.

A. Improved Transparency and Communication

One goal of many of the amendments to both Agreements is to increase transparency for Dow and Ineos and improve communication between them in order to reduce the likelihood of disputes.

In both Agreements, transparency is enhanced through changes to how prices are determined. In particular, several of these pricing formulas are now more objective and readily verifiable, and thus less likely to lead to suspicion and disputes.

Communication should also be improved by the introduction of Article 31 in the *GAS/SPEC Supply Agreement*, which provides for representatives of Dow and Ineos to meet on a regular basis to discuss issues regarding the facility, product, and operations under the Agreement. The importance placed on regular communication should reduce the likelihood of disputes and the possibility of interruption of Ineos' supply to its customers. In fact, Dow and Ineos representatives have already begun meeting quarterly while approval of the amendments is pending.

Amendments to both Agreements increase the confidentiality protections of Dow's and Ineos' proprietary business information exchanged in order to make certain calculations under the Agreements (amended GAS/SPEC Section 18.6; amended EO Section 20.6). Such heightened protection allows Dow and Ineos to exchange information more freely and comfortably.

B. Greater Supply Reliability and Protection for Ineos

Several of the amendments to both Agreements are intended to provide greater protection to Ineos during times of interrupted supply from Dow.

The amendment to *GAS/SPEC Supply Agreement* Section 2.3 gives Ineos additional flexibility to secure EO supply at times when Dow cannot assure supply.

Several of the proposed amendments to the *EO Supply Agreement* deal with the effect of "Force Majeure Events," unscheduled outages, or other similar events on Ineos. Dow's intention with these amendments is to grant additional protections to Ineos during such unscheduled outages by taking on additional obligations. For example, the amendments allow Ineos to more easily secure EO supply during such an event (amended EO Sections 3.1, 3.3). The amendments also allow Ineos to secure supplemental EO at prices acceptable to Ineos.

Dow and Ineos have created a new defined term in the *EO Supply Agreement*, "Unplanned Outages," and a provision regarding such circumstances in order to deal preemptively with the Parties' rights and obligations during unexpected, limited-duration plant outages that could arise over the course of the Agreement (amended EO Article 30). The addition of an Unplanned Outages provision is an example of the Parties' efforts to plan in advance for future contingencies while they are calm and not embroiled in crisis, in order to avoid disputes escalating unnecessarily.[10]

Dow's obligations to supply Ineos during Unplanned Outages are described in detail, and the pricing and other terms during Unplanned Outages are favorable to Ineos. During the first five days of an Unplanned Outage, Dow must supply Ineos with EO as usual. After the first five days, there are additional mechanisms to shift the risk of loss from Ineos to Dow. Ineos also has increased flexibility to seek other supply options and honor its time-swap commitments during an Unplanned Outage (amended EO Article 30 and Section 3.1). If an Unplanned Outage (or Outages) lasts longer than prescribed time periods in a calendar year, Ineos may elect to deem the excessive portion of the breakdown or outage *not* an Unplanned Outage, and thus Dow would not be relieved of its ordinary obligations under the Agreement (amended EO Section 30.1). If Dow is unable to supply the required amount of EO to Ineos during an Unplanned Outage, Ineos has additional rights that are very favorable to Ineos (amended EO Section 30.3).

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[10] While Dow sought the Unplanned Outages provision to deal specifically with a set of circumstances that could arise involving very short-term interruptions of supply, Ineos was able to secure significant supply and compensation guarantees in the provision, resulting in an amendment that benefits both Parties.

The protections for Ineos built into the Unplanned Outage provision are intended to make Ineos whole if such circumstances occur. And Dow certainly has its own strong incentives for keeping the Plaquemine EO plant operational and avoiding Unplanned Outages or any other decrease or interruption in supply. Specifically, Dow relies on the Plaquemine plant for a key input into Dow's EO derivatives businesses.

C. Negotiated Dispute Resolution

Amendments to both Agreements establish a negotiated dispute resolution system that will quickly put high-level Dow executives into close communication with high-level Ineos executives in order to efficiently diffuse and resolve any future disputes.

The systems established in amended GAS/SPEC Article 24 and amended EO Article 26 require Dow and Ineos to communicate and cooperate earlier and more often through specified tiers of negotiation in order to resolve disputes and, ultimately, to avoid litigation. More cooperative and effective dispute resolution will prevent unnecessary distractions that could affect Ineos' ability to compete in the production of MDEA and ethanolamines.

D. Minimization of Force Majeure Events and Effects

Amendments to both Agreements "raise the bar" on what constitutes a Force Majeure Event. The amended definition of Force Majeure Event in both Agreements is narrowed to include only "significant and material" breakages or accidents to machinery (thereby limiting the possibility of invocation of a Force Majeure Event by either Party) and to include only "similar" causes that were not specifically listed in the provision rather than simply "other" causes. The amendments also limit the period of performance excused to a Force Majeure Event in that it now commences upon notification by the Party experiencing the event, as requested by

Ineos as a change from the prior language, "for the duration," of the event (amended GAS/SPEC Section 14.1; amended EO Section 16.1).

The amendments to the *EO Supply Agreement* go even further with additional protections for Ineos during Force Majeure Events. The proposed amendment to Section 16.9 strengthens the protections granted to Ineos in the October 2001 amendment to that Section. Dow will now be obligated to indemnify Ineos against the costs, expenses, and losses incurred by Ineos during *any* five days of the Force Majeure Event, rather than during the *first* five days. Ineos pursued, and achieved, this greater right of indemnification because in the past Dow has generally been able to meet a large portion of Ineos' EO needs during the first five days of a Force Majeure Event. Ineos will now be able to receive indemnification for any five days it chooses, *i.e.*, those days on which its needs are *not* being met by Dow.

E. GAS/SPEC Supply Agreement—Clear, Certain and Transparent Pricing

Motivating the changes to the pricing and cost terms in the GAS/SPEC Supply Agreement is the desire for simplicity and transparency. The amendments related to pricing allow Ineos control and choice in price determinations, clarify an important cost determination, and result in better pricing for Ineos.

For instance, certain cost definitions are amended in order to clarify that calculations should be made by quarter in response to Ineos' concerns that monthly cost calculations cause pricing spikes.

The definition for certain contract terms is also amended to reflect yearly adjustments for cost determinations (amended GAS/SPEC Supply Agreement Section 3.2), resulting in product price adjustments for Ineos. Yearly adjustments will avoid the situation experienced by Ineos when it missed an important adjustment deadline, an oversight for which Dow has agreed to make a retroactive adjustment not required by the existing Agreements.

A sample calculation of certain costs is included as a schedule to the GAS/SPEC Supply Agreement for added clarity, eliminating the opportunity for ambiguity and suspicion between the Parties.

In a significant economic concession by Dow, the Parties have agreed to a new mechanism to determine Ineos' capital contribution. In addition to the prospective application of this mechanism, Dow has agreed to cover a prior **Redacted** capital improvement at the plant that, through the negotiation of the amendments, Dow has now agreed to fund completely notwithstanding the fact that Ineos derives a substantial economic benefit estimated by Dow to be around **Redacted** per year from this capital project.

F. GAS/SPEC Supply Agreement—Increased Flexibility and Control for Ineos

Through several amendments to the GAS/SPEC Supply Agreement, Ineos gains a greater voice and control in the operation of the Agreement.

For instance, a certain price definition is amended to give Ineos control over the determination of this component of the product price formula. Ineos also has the flexibility to reduce its purchase of MMEA (a by-product of MDEA production), as Ineos sought through the amendment process to reduce its MMEA offtake, and negotiate with Dow to find a beneficial way to deal with excess MMEA that may be created due to fluctuations in Ineos' customers' requirements (amended GAS/SPEC Sections 2.2(d) and 2.4). And the amendment to GAS/SPEC Section 3.1 allows Ineos additional supply options.

Through other amendments, Ineos will gain the ability (1) to verify Dow's pricing calculations for certain costs and benefit from periodic and ongoing adjustments and recalculations to the prices Ineos pays for product (amended GAS/SPEC Section 29.1); (2) to participate in an annual review and reconciliation process where payments are reconciled with certain costs for the previous year, which could result in a credit back to Ineos if the amount it was charged exceeds the recalculated amount (or a credit to Dow if the opposite is true) (amended Section 29.2); and (3) to review Dow's annual operating plan for the Freeport MDEA plant and provide input on the future direction of that plant (amended Article 30). The last provision is designed to alleviate Ineos' concerns about the planning process and future capital spending process for the Freeport MDEA plant because regular meetings mandated by the Agreement will keep Ineos involved and knowledgeable about potential significant changes to the plan and allow Ineos to voice input on the plan.

With regard to one particular product quality issue, Dow and Ineos have agreed to work together to resolve possible product discoloration problems.

G. EO Supply Agreement—Fixed Formula Pricing

Several amendments to the EO Supply Agreement will result in relevant prices being determined by objective fixed formulas, rather than by definitions of certain costs (which had caused confusion and pricing discrepancies in the past). Certain cost definitions have been amended and are now based on objective and verifiable inputs. With these changes, it is no longer necessary for the Parties to obtain potentially sensitive competitive information from each other in order to make certain cost-based calculations.

New EO Supply Agreement Section 5.7 describes "Principles of Calculation" by excluding EO purchase and ethanolamines production figures that occur outside the normal course of business from calculations of average course of business figures. This exclusion will impact relevant forecasts and should reduce the prices paid by Ineos.

H. EO Supply Agreement—Increased Flexibility and Control for Ineos

Several amendments provide Ineos with increased flexibility and control over its purchases and payments under the EO Supply Agreement.

Ineos' right to access other supply options during times of diminished EO supply from Dow has been expanded in order to respond to Ineos' goal of increasing the practicality of the swap option under the Agreement. An expanded set of circumstances under which Ineos can seek other EO supply options, a significantly reduced (from seven days to two days) notice period for Ineos to alert Dow that it is pursuing such an option, and a timeframe for the other supply option that runs through the *expected* (if later than actual) duration of reduced supply will minimize the effects on Ineos of any problem with Dow's supply (amended EO Section 3.1).

I. Summary

The proposed amendments to both Agreements further enhance Ineos' already strong position as an ethanolamines and branded MDEA competitor. The acquisition of Dow's Global Ethanolamines Business and Dow's Gas Spec MDEA Business was strategic and beneficial for Ineos, complementing Ineos' existing EO and EO derivatives businesses, and was beneficial to competition. The construction of a world-scale ethanolamines plant by Ineos in Antwerp confirms that the divestiture created a vigorous and growing competitor. The proposed amendments further bolster Ineos' ability to compete. The purpose behind and pro-competitive result of the amendments is discussed in greater detail in Confidential Appendix B (for the GAS/SPEC Supply Agreement amendments) and Confidential Appendix D (for the EO Supply Agreement amendments), which also show in "redline" format each of the actual changes to the Agreements.

III. Conclusion

The terms of the February 2005 Amendment No. 1 to the GAS/SPEC Supply Agreement with Ineos and February 2005 Amendment No. 1 to the EO Supply Agreement with Ineos further the purposes of the Commission's Order. Accordingly, Dow respectfully requests that the Commission approve the proposed amendments as expeditiously as possible.

Respectfully submitted,

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CONFIDENTIAL APPENDIX A

February 2005 Amendment No. 1 to the GAS/SPEC Supply Agreement

[REDACTED]

CONFIDENTIAL APPENDIX B

Proposed Amendments to GAS/SPEC Supply Agreement

[REDACTED]

CONFIDENTIAL APPENDIX C

February 2005 Amendment No. 1 to the EO Supply Agreement

[REDACTED]

CONFIDENTIAL APPENDIX D

Proposed Amendments to EO Supply Agreement

[REDACTED]

PUBLIC VERSION

CONFIDENTIAL APPENDIX E

Existing GAS/SPEC Supply Agreement

[REDACTED]

CONFIDENTIAL APPENDIX F

Existing EO Supply Agreement as Amended October 2001

[REDACTED]

PUBLIC VERSION

CONFIDENTIAL APPENDIX G

Proposed Settlement Agreement (February 24, 2005)

[REDACTED]