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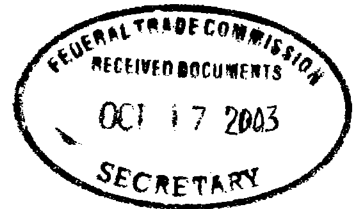
FEDERAL TRADE COMMISSION



Docket No. 9300

IN THE MATTER OF
CHICAGO BRIDGE & IRON COMPANY, N.V.,
A FOREIGN CORPORATION,

CHICAGO BRIDGE & IRON COMPANY,
A CORPORATION,

AND

PITT - DES MOINES, INC.,
A CORPORATION

RESPONDENTS' REPLY AND CROSS-APPEAL RESPONSE BRIEF

PUBLIC RECORD VERSION

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TABLE OF CONTENTS

Page

OVERVIEW 1

I. REPLY TO COMPLAINT COUNSEL'S RESPONSE BRIEF

INTRODUCTION TO RESPONDENTS' REPLY BRIEF 2

A. COMPLAINT COUNSEL'S PRIMA FACIE CASE IS WEAK AT BEST. 4

B. UNDER *BAKER HUGHES*, RESPONDENTS HAVE FORCEFULLY REBUTTED ANY PRIMA FACIE CASE. 6

1. EVIDENCE OF ACTUAL ENTRY SINCE THE ACQUISITION REBUTS THE PRIMA FACIE CASE. 7

2. EVIDENCE OF LOW ENTRY BARRIERS INTO THESE MARKETS REBUTS THE PRIMA FACIE CASE. 8

(a) Barriers To The LNG Market Are Low. 9

(b) Barriers To The LPG Market Are Low. 12

(c) Barriers To The LIN/LOX Market Are Low 13

3. EVIDENCE OF CUSTOMER SOPHISTICATION REBUTS COMPLAINT COUNSEL'S PRIMA FACIE CASE 13

4. RESPONDENTS' SHOWING OF SUFFICIENCY REBUTTED ANY PRIMA FACIE CASE. COMPLAINT COUNSEL'S ATTEMPT TO SHIFT THE BURDEN ON THIS ISSUE IS IMPROPER. 15

(a) Respondents Do Not Bear The Burden Of Proving That Entry Will Be Sufficient To Constrain CB&I's Pricing At Levels That Would Have Prevailed Absent The Acquisition. 15

(b) Empirical Evidence Demonstrates That Entry Is Sufficient. 17

(c) Economic Evidence Supports Respondents' Showing Of Sufficiency And Precludes Complaint Counsel From Carrying Its Burden Of Proof. 23

(1) There is no reliable evidence that new entrants have prohibitively higher overall costs. 23

(2) Critical loss analysis shows that CB&I cannot implement price increases in the face of new entry. 25

Page

(3) Complaint Counsel's use of Respondents' statements sheds no light on the sufficiency of entry. 26

C. COMPLAINT COUNSEL FAILED TO ADDRESS RESPONDENTS' ARGUMENTS REGARDING REMEDY. 29

D. COMPLAINT COUNSEL IGNORES KEY EVIDENCE REGARDING THE EXITING ASSETS DEFENSE. 30

II. RESPONSE TO COMPLAINT COUNSEL'S CROSS-APPEAL

INTRODUCTION TO RESPONDENTS' RESPONSE TO COMPLAINT COUNSEL'S CROSS-APPEAL 32

A. COMPLAINT COUNSEL HAS FAILED TO PRESENT ANY CREDIBLE EVIDENCE OF ANTICOMPETITIVE EFFECTS. 33

1. COMPLAINT COUNSEL HAS NOT PRESENTED CREDIBLE EVIDENCE OF ANTI-COMPETITIVE CONDUCT 33

(a) Complaint Counsel Has Not Presented Any Credible Evidence Of Collusion. 33

(b) Complaint Counsel Has Not Presented Any Credible Evidence Of Price Increases. 34

(1) The Memphis LNG projects provide no evidence of anticompetitive effects. 35

(2) Projects for Linde and Praxair provide no evidence of anticompetitive effects. 36

(3) The Spectrum Astro project provides no evidence of price increases. 37

(4) The Cove Point project provides no evidence of anticompetitive effects. 38

(5) The CMS and Southern LNG projects provide no evidence of anticompetitive effects. 38

(6) The **[xx]** projects provide no evidence of anticompetitive effects. 40

(7) Projects for **[xxxxxx]** provide no evidence of anticompetitive effects. 41

Page

2. CONTRARY TO COMPLAINT COUNSEL'S CLAIMS, THE ALJ PROPERLY EXCLUDED EVIDENCE REGARDING ALLEGED ANTICOMPETITIVE CONDUCT. 42

3. COMPLAINT COUNSEL IMPROPERLY ATTEMPTS TO SHIFT THE BURDEN OF PROOF REGARDING ITS ALLEGATIONS OF ANTICOMPETITIVE EFFECTS. 43

B. COMPLAINT COUNSEL'S PROPOSED REMEDY IS OVERBROAD, WHOLLY UNSUPPORTED BY RECORD EVIDENCE, AND ITS POTENTIAL EFFECTS ARE UNKNOWN. 45

1. THE PROPOSED ORDER IS OVERBROAD. 45

2. THE PROPOSED ORDER IS THE LATEST VERSION OF A CONSTANTLY-CHANGING COLLECTION OF PROPOSED REMEDIAL MEASURES. 47

3. THE EVIDENCE INDICATES THAT THE PROPOSED ORDER WILL NOT ONLY BE INEFFECTIVE, BUT THAT IT WILL HARM THE VERY CUSTOMERS IT IS INTENDED TO PROTECT. 49

(a) The Portion Of The Proposed Order That Mandates Divestiture Of Employees Is Unsupported By The Evidence. 50

(b) The Portion Of The Proposed Order That Mandates The Assignment Of Contracts Is Unsupported By The Evidence. 52

(c) The Portion Of The Proposed Order That Mandates Divestiture Of Confidential Information Is Unsupported By The Evidence. 56

(d) The Portion Of The Proposed Order That Requires CB&I To Provide Transitional Assistance Is Unsupported By The Evidence. 57

4. THE PROPOSED ORDER PRESENTS SEVERE OBSTACLES TO CB&I'S ABILITY TO BE A LOW-COST COMPETITOR. 57

CONCLUSION 59

TABLE OF AUTHORITIES

CASES

Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,
386 U.S. 129 (1967)....52

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985)....48

In re Ekco Products Co.,
65 F.T.C. 1163 (1964)....55

F.T.C v. Heinz,
246 F.3d 708 (D.C. Cir. 2001)....6, 7, 8, 16

F.T.C. v. Libbey, Inc.,
211 F. Supp. 2d 34 (D.D.C. 2002)....7

F.T.C. v. PPG Indus., Inc.,
798 F.2d 1500 (D.C. Cir. 1986)....17

F.T.C. v. Tenet Health Care Corp.,
186 F.3d 1045 (8th Cir. 1999)....25

Ford Motor Co. v. United States,
405 U.S. 562 (1972)....49

Fruehauf Corp. v. F.T.C.,
603 F.2d 345 (2d Cir. 1979)....17

Lenox, Inc.,
73 F.T.C. 578 (1968)....43, 44

New York v Kraft Gen. Foods, Inc.,
926 F. Supp. 321 (S.D.N.Y. 1995)....17

Olin Corp. v. F.T.C.,
986 F.2d 1295 (9th Cir. 1993)....17

In re Olin Corporation,
113 F.T.C. 400 (1990)....29

Reynolds Metals Co. v. F.T.C.,
309 F.2d 223 (D.C. Cir. 1962)....52

United States v. Archer-Daniels-Midland,
781 F. Supp. 1400 (S.D. Iowa 1991) 5

United States v. Baker Hughes Inc.
908 F.2d 981 (D.C. Cir. 1990) ....*passim*

United States v. Baker Hughes Inc.
731 F. Supp. 3 (D.D.C. 1990) ....*passim*

United States v. E.I. DuPont de Nemours,
353 U.S. 586 (1957) 49

United States v. E.I. DuPont de Nemours,
366 U.S. 316 (1961) 45, 51, 54

United States v. Green,
399 U.S. 149 (1970) 47

United States v. Mercy Health Servs.,
902 F. Supp. 968 (E.D. Iowa 1995) 25

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 49

United States v. Phillipsburg National Bank & Trust Co.,
399 U.S. 350 (1970) 5

United States v. Syufy Enters.,
903 F.2d 659 (9th Cir. 1990) 5

United States v. United Tote, Inc.,
768 F. Supp. 1064 (D. Del. 1991) 20

United States v. Ward Baking Co.,
376 U.S. 327 (1964) 49

Utah Public Serv. Comm'n v. El Paso Natural Gas Co.,
395 U.S. 464 (1970) 52

STATUTES AND RULES

15 U.S.C. § 18 46

F.T.C. Rule 3.41 (c) 49

F.T.C. Rule 3.52 (d) 1

F.T.C. Rule 3.54 (c) 50, 52

MISCELLANEOUS

In re Automatic Data Processing, Inc.,
No. 9282 (Oct. 29, 1997) 51, 56

In re MSC Software Corp.,
No. 9299 (Oct. 28, 2002) 51, 56

Baker, Jonathan B., *Respondents to Developments in Economics and the Courts: Entry in the Merger Guidelines,* Antitrust L.J. 189 (Autumn 2003) 17

Posner, Richard, Antitrust Law: An Economic Perspective 9

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Merger Guidelines, § 2.1 33

TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used:

CCOB	Complaint Counsel's Opening Post-Trial Brief
CCFOF	Complaint Counsel's Proposed Findings of Fact
CCPO	Complaint Counsel's Proposed Order
CCRAB	Complaint Counsel's Response and Appeal Brief
CCRB	Complaint Counsel's Post-Trial Reply Brief
CX	Complaint Counsel's Exhibit
ID	Initial Decision
RAB	Respondents' Appeal Brief
RFOF	Respondents' Proposed Findings of Fact
ROB	Respondents' Opening Brief
RRB	Respondents' Reply Brief
RRFOF	Respondents' Reply Findings of Fact
RX	Respondents' Exhibit

OVERVIEW

Complaint Counsel and Respondents substantially disagree on two legal issues which are dispositive of this case.[1] *First*, if a prima facie case exists, whether Respondents have presented enough evidence to rebut it. *Second*, which party bears the burden of proving that entry will be sufficient to restore any loss of competition. Respondents contend that they have presented more than enough evidence to rebut Complaint Counsel's weak prima facie case. They further contend that Complaint Counsel bears the burden of proving that entry will not be sufficient to restore competition, and that it has failed to do so.

Pursuant to Rule 3.52(d), this brief is both a reply in support of Respondents' appeal and a response to Complaint Counsel's cross-appeal. It is divided into two parts. Part I contains Respondents' reply. It discusses Complaint Counsel's failure to meet the standards of proof set forth in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), including the nonexistent or weak prima facie case, as well as Respondents' rebuttal evidence, which includes an analysis of evidence regarding sufficiency of entry. In addition, it discusses deficiencies in Complaint Counsel's arguments regarding the issues of remedy and the exiting assets defense. Part II contains Respondents' response to Complaint Counsel's cross-appeal. It focuses on Complaint Counsel's specious attempts to prove alleged post-Acquisition collusion and price increases, as well as deficiencies in its proposed remedy.

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1 Respondents and Complaint Counsel disagree on numerous other issues. Indeed, Complaint Counsel has made many misstatements of fact and law. Respondents cannot treat each such instance. Only the most egregious are discussed herein.

I. REPLY TO COMPLAINT COUNSEL'S RESPONSE BRIEF

INTRODUCTION TO RESPONDENTS' REPLY BRIEF

Complaint Counsel's Response (the "Response") exaggerates its proof of any prima facie case by relying on market concentration evidence rejected by the ALJ and attempts to aggregate all four product markets in order to meet Section 7's substantiality requirement. Thus, if a prima facie case exists, it is weak. Under such circumstances, *Baker Hughes* requires only that Respondents present some evidence tending to show that the prima facie case is not indicative of future anticompetitive effects. Respondents presented extensive evidence regarding actual entry, potential entry, customer sophistication and unique circumstances surrounding the sale of PDM. Actual post-Acquisition pricing and careful economic analysis from Dr. Barry Harris also support Respondents' rebuttal of the prima facie case. This evidence shows that new entry has constrained (and will continue to constrain) CB&I's pricing.

Complaint Counsel dismissed this extensive record with the unsupported assertion that "[t]here simply is no evidence of any entry . . . ." (CCRAB 15). Similarly, it ignores Respondents' empirical and economic testimony regarding sufficiency of entry, relying on unsupported and unquantified assertions of cost disadvantages, flawed economic analysis, and documents taken out of context. As argued herein, regardless of the strength of Complaint Counsel's prima facie case, Respondents successfully rebutted it with evidence more compelling than that presented by the successful *Baker Hughes* respondents.

Faced with that reality, Complaint Counsel argues that any entry is insufficient to restore competition. In doing so, it attempts to place the burden on Respondents to demonstrate sufficiency of entry. This tactic squarely contradicts the D.C. Circuit's decision in *Baker Hughes*, which held that Complaint Counsel bears the burden of proof "at all times." Further, the D.C. Circuit rejected the notion that a respondent must bear the burden of proving that entry

would be quick and effective because doing so would improperly shift the ultimate burden of proof. The Commission should reject Complaint Counsel's attempt to vitiate *Baker Hughes*.

Because Respondents have forcefully rebutted Complaint Counsel's prima facie case, Complaint Counsel must present additional evidence demonstrating anticompetitive effects. As discussed in Part II, *infra*, it failed to do so. Accordingly, the Complaint as to all product markets should be dismissed with prejudice.

A. COMPLAINT COUNSEL'S PRIMA FACIE CASE IS WEAK AT BEST.

Complaint Counsel must prove that the Acquisition is likely to have a "substantial" effect on competition. *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 11 (D.D.C. 1990). (*See* RAB 10). Here, Complaint Counsel relied on market concentration statistics to do so. (CCRAB 20-21). However, the ALJ agreed with Respondents that "Complaint Counsel failed to demonstrate that a valid and credible HHI had been calculated in any of the relevant markets" because neither the Merger Guidelines nor any cited case law supported an attempt to calculate HHI statistics based on market data spanning more than a decade. (ID 91). He also recognized the arbitrary nature of HHI evidence in this case, observing that the HHI numbers changed dramatically depending on the start date used. This is true in large part because there were so few sales in the relevant markets and because CB&I had not had recent success in winning work in these markets. (*see* ID 90-92).

Complaint Counsel asserts that it can overcome this deficit simply by showing that "CB&I acquired its closest competitor" and that Respondents' documents "confirm that CB&I and PDM were each other's closest competitor." (CCRAB 21-22). The ALJ erred in accepting this argument (*see* ID 95-97) because it relies on the same analytically flawed HHI calculations. To argue that CB&I and PDM were close competitors pre-Acquisition does not cure the flaws in the underlying conclusion that pre-Acquisition market data here is unreliable. (Harris, Tr. 7219-22, 7311-12).

Even if market concentration evidence were relevant here, it would not prove a prima facie case. A "substantial" effect on competition is unlikely because the markets at issue are miniscule in size. (*See* RAB 10-12). In attempting to address this critical flaw, the Response asserts that "the four markets had combined sales of about $250 million over the eleven years

prior to the Acquisition." (CCRAB 26). This approach misleadingly aggregates data from four different markets. Each market must be *individually* analyzed to evaluate the strength of a prima facie case. Moreover, Complaint Counsel improperly aggregates market share data spanning from 1990 to the date of the Acquisition. As the ALJ noted, neither the Merger Guidelines nor any reported case support the use of such aged market share data. (ID 89-90). In short, because of the lack of activity in these markets, pre-Acquisition data is unreliable and cannot serve as the basis for making a prima facie case. *See Baker Hughes*, 731 F. Supp. at 11; *see also Baker Hughes*, 908 F.2d at 991.[2]

Because market share information here is unreliable, the ALJ should have examined post-Acquisition entry evidence in evaluating the prima face case. (*See* RAB 12-13). Complaint Counsel's proffered contrary authority is off-point because it addresses post-acquisition evidence *subject to manipulation by the party seeking to use it.* (*Id.*) As the ALJ correctly noted, there is no evidence to suggest that Respondents have manipulated evidence. (ID at 80). To the contrary, Respondents could not have manipulated the post-Acquisition entry evidence, such as the entry of Skanska/Whessoe into the U.S. market for LNG tanks, Dynegy's refusal to allow CB&I to bid on its LNG project, and AT&V's ability to bid on projects at lower costs relative to CB&I. Complaint Counsel argues that post-Acquisition evidence is irrelevant because it does not like what it shows -- that the relevant markets have continued to behave competitively.[3]

2 Complaint Counsel's citations to *Phillipsburg National Bank*, *Food Town Stores*, and *Bethlehem Steel Corp.* are inapposite. (CCRAB 25). Those cases addressed markets of substantial size. For example, in *Phillipsburg National Bank*, the lines of commerce were larger and far more consistent. The two merging banks at issue had combined assets of over $41 million -- in pre-1970 dollars. *See United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970).

3 *Syufy* and *ADM* (CCRAB 23) featured reliable market share data. Here, there is no such reliable evidence. *United States v. Syufy Enters.*, 903 F.2d 659, 665, n.6 (9th Cir. 1990); *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1413-16 (S.D. Iowa 1991).

B. UNDER *BAKER HUGHES*, RESPONDENTS HAVE FORCEFULLY REBUTTED ANY PRIMA FACIE CASE.

Contrary to assertions made in the Initial Decision and the Response (ID 101; CCRAB 28), *Baker Hughes* provides the governing standard for a Section 7 case. It has not been overruled by the Courts of Appeal or the Merger Guidelines. Indeed, the D.C. Circuit recently reaffirmed that *Baker Hughes* "explained the analytical approach by which the government established a section 7 violation." *F.T.C. v. Heinz*, 246 F.3d 708, 715 (D.C. Cir. 2001). This standard is clear: Assuming *arguendo* a prima facie case, Respondents must present some probative evidence indicating that the prima facie case does not accurately predict anticompetitive conduct.

Citing its own Merger Guidelines, Complaint Counsel incorrectly argues that *Respondents have the burden* of proving that entry will be sufficient to constrain CB&I's pricing. (*See* CCRAB 27). This is not the law. The D.C. Circuit *specifically rejected* the notion that a respondent must show that entry would actually occur or that it would be "quick and effective" because requiring such a showing would improperly shift the ultimate burden of proof. *Baker Hughes*, 908 F.2d at 987, 992. Evidence must be commensurate with the strength of the prima facie case, but in no event does the burden shift. Nor is, as Complaint Counsel suggests, a "clear showing" required to successfully rebut such a case. *Id.* at 989, 991.

Respondents rebutted any prima facie case by presenting strong evidence regarding actual entry, potential entry, customer sophistication, and unique economic circumstances, as well as evidence regarding actual post-Acquisition competition. They were required to do nothing more. Complaint Counsel's argument that the Merger Guidelines shift the burden and alter the strength of a rebuttal showing is inconsistent with established circuit court law and, if adopted by the Commission, Respondents respectfully submit will result in reversible

error. *See Baker Hughes*, 908 F.2d at 991-92; *see also F.T.C. v. Heinz*, 246 F.3d 708, 715 (D.C. Cir. 2001) (recognizing that *Baker Hughes* provides the "analytical approach" for examining a Section 7 case); *F.T.C. v. Libbey, Inc.*, 211 F. Supp. 2d 34, 51 (D.D.C. 2002) (citing *Baker Hughes* as the governing standard for rebuttal evidence in a Section 7 case).

1. EVIDENCE OF ACTUAL POST-ACQUISITION ENTRY REBUTS THE PRIMA FACIE CASE.

Neither Complaint Counsel's assertion that "[t]here simply is no evidence of any entry" (*e.g.*, CCRAB 15) nor the ALJ's conclusions with respect to entry are consistent with the evidence. Three foreign consortia -- Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V -- have entered the U.S. market for LNG tanks, and are continuing to enhance their standing in this market. (*See* RAB 14-17).[4] Current LNG customers consider all three new entrants to be powerful global competitors that can effectively compete in the U.S. In fact, many U.S. customers are already working with these entrants on projects around the world. (*See generally* RAB 21, 39-40) (Izzo Tr. 6483, 6498-6500; Carling Tr. 4455; Sawchuck Tr. 6053). All three have bid on the $500 million Dynegy Project -- the largest LNG project in North America. (RAB 14-15). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

Similarly, Respondents have demonstrated substantial entry in the LPG and LIN/LOX markets. Three large U.S. tank manufacturers -- AT&V, Matrix, and Chattanooga Boiler & Tank ("Chattanooga") -- have entered the LIN/LOX market near the time of the Acquisition and have successfully won a majority of post-Acquisition projects. (*See* RAB 18-

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4 For example, Skanska/Whessoe has allied itself with Black & Veatch, a leading engineer of process equipment necessary for construction of LNG facilities. (*See* Puckett, Tr. 4579; Eyermann, Tr. 6992) (RFOF 3.65, 3.273). Despite Complaint Counsel's contrary assertion (CCRAB 34), AT&V and TKK are in the process of locating similar expertise. (*See, e.g.*, Kistenmacher, Tr. 902-03; 915).

19). Similarly, in the LPG market, Matrix and AT&V have already entered and won half of the projects awarded in the past three years. (*See* RAB 17). This evidence is indicative of actual current competition and is outcome-determinative.

Moreover, as discussed in Part I-A, *supra*, these markets are smaller than the *Baker Hughes* market, where in the three years prior to the Acquisition, competitors had built over 100 units. 731 F. Supp. at 6. In the five years prior to the Acquisition here, only four LNG tanks were built. Especially in light of the small size of these markets, it is simply wrong to say that there is "simply no evidence of any entry."

2. EVIDENCE OF LOW ENTRY BARRIERS INTO THESE MARKETS REBUTS THE PRIMA FACIE CASE.

"If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." *Baker Hughes*, 908 F.2d at 988 (emphasis in original); *see also Heinz*, 246 F.3d at 717. Indeed, the fact that Respondents can rebut a prima facie case without demonstrating actual entry undercuts the argument that they bear the burden of showing that entry will be sufficient. (*See, e.g.*, CCRAB 29). Here, *entry has already occurred*. This demonstrates that entry barriers are low. Consistent with *Baker Hughes*, this showing rebuts a prima facie case. (*See* RAB 19-25).

The Response argues that "high entry barriers" exist in the relevant markets, which raises the question of why entry has occurred in the face of such high barriers. The answer is that Complaint Counsel has made the same fundamental error that the ALJ made -- treating any cost or challenge as automatically constituting an "entry barrier." (*See, e.g.*, CCRAB 12, 16; *see also* ID 106-08). As Dr. Harris noted, all firms seeking to enter a market must incur certain costs, yet these do not necessarily constitute entry barriers. (Harris, Tr. 7247-48). Antitrust commentators agree. For example, Judge Posner has observed that "it is obvious

that a new entrant must incur costs to enter the market, just as his predecessors, the firms now occupying the market, did previously." *See, e.g.*, Richard Posner, Antitrust Law: An Economic Perspective 59 (1976).[5] Instead, the proper test of which costs constitute entry barriers is whether they are costs that the incumbent firms did not previously have to bear. G.J. Stigler, The Organization of Industry, 67 (1968). Case law is in agreement. For example, *Baker Hughes* did not consider reputational concerns or the importance customers place on assurances of product quality and reliable future service to constitute entry barriers because incumbent firms also needed to clear these hurdles in order to effectively compete. 908 F.2d at 989, n. 10.[6]

The fact that entry has already occurred conclusively demonstrates that entry barriers are not high. Even if this entry had not occurred, neither Complaint Counsel nor the ALJ has identified costs or requirements borne by new entrants that were not also borne by CB&I and PDM. Accordingly, low entry barriers rebut the prima facie case.

(a) Barriers To The LNG Market Are Low.

Respondents have argued that entry barriers to the LNG market are low. (RAB 20-24). Complaint Counsel primarily disputes Respondents on three purported entry barriers -- reputation, locational advantage, and access to workforce and specialized equipment:

Reputation and experience -- The Response argues that reputation and experience pose an entry barrier because "customers of the relevant products strongly prefer to contract with companies that have a long track record in constructing these facilities." (CCRAB 31). Respondents do not dispute that customers prefer companies with deep experience and good

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5 Capital requirements are not entry barriers because the incumbent firm also needed to expend those resources in order to compete in the market. *See, e.g.*, C.C. von Weizsacker, Barriers to Entry 1 (1980).

6 Further, as discussed in detail herein, new entrants have already overcome this alleged entry barrier. Current LNG customers have recognized that new entrants are qualified, experienced, and capable of building LNG tanks in the U.S. (*See* ROB 20-46).

reputations. However, new entrants *already have this type of experience and reputation.* They are large, multinational corporations with significant resources, good reputations, and deep experience in the LNG industry. (*See* RAB 20-21). The assertion that a majority of customers have a "strong preference for buying from firms that have previously built these structures in the United States" (CCRAB 32) is simply wrong.[7] The vast majority of *current* LNG customers have unambiguously testified that new entrants meet their reputational requirements and are willing to work with them. (*See* ROB 20-46).

Locational advantages -- The Response argues that CB&I's "local presence" in the U.S. constitutes an entry barrier. (CCRAB 32). This argument is flawed because the new entrants in this case also have a U.S. presence. Technigaz has partnered with domestic construction giant H.B. Zachry and TKK has partnered with AT&V. Skanska/Whessoe is the world's largest construction company with a large U.S. presence. (*See* ROB 21-40). CB&I simply does not have a "local" advantage over new entrants.

The Response asserts that "[c]ompanies that have not built LNG tanks in the United States are at a cost disadvantage relative to those that have . . . ." (CCRAB 32). The evidence does not support this claim. Competition is strong in this market because CB&I's competitors also have cost advantages. For example, while **[xxxxxxxxxx]** may have minor cost disadvantages relative to CB&I, it enjoys advantages in other areas. The resulting parity has moved **[xxxxxxxxxx]** to enter the U.S. market. (*See* **[xxxxxx]** Tr. 4725) (RFOF 3.152, 3.173-3.178). It is this balance of advantages that has led current customers to conclude that new

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7 The characterization of Brian Price (of Black & Veatch) and Patricia Outtrim (of PTLA) as customers (CCRAB 32) is inaccurate. Black & Veatch is a competitor to CB&I. Ms. Outtrim owns an interest in another of CB&I's competitors in the LNG industry. (Price, Tr. 641; Outtrim, Tr. 684-86) (RFOF 3.659, 3.684).

entrants can generate sufficient competition. (*See, e.g.*, Izzo, Tr. 6505-06, 6511-12; Bryngelson, Tr. 6146, 6160; Carling, Tr. 4487-96; *see also* RFOF 3.73-3.86, 3.247-3.255).

Lest there be any doubt as to whether CB&I's "local advantages" permit it to charge supracompetitive prices, one need only review the post-Acquisition Trinidad bidding contest. The Response discounts this evidence, claiming that entry barriers to the U.S. LNG market are higher than anywhere else. (CCRAB 32). The ALJ simply ignored the project because it is outside the U.S. (ID 16). Both are wrong. Trinidad provides a natural market experiment to test whether new entrants face entry barriers in the U.S. CB&I's position in Trinidad is similar to its position in the U.S.[8] It had strong locational advantages of the type Complaint Counsel classifies as entry barriers, including 20 years of prior experience working in Trinidad and knowledge of the Trinidadian labor force and local regulations. Further, CB&I had a real cost advantage it will not likely have on any future U.S. project -- it was *already on the Trinidad job site* building another LNG tank. (*See* RAB 24). In an effort to capitalize on these advantages, CB&I submitted a bid that was 5% more than its previous bid to Atlantic LNG. (*See* JX 11). Despite these supposed advantages, CB&I lost the Trinidad project to TKK/AT&V, who had never built a tank in Trinidad, by 5%. (RX 838). The post-Acquisition price did not increase over the pre-Acquisition price. This natural market experiment persuasively demonstrates that theoretical advantages of "local presence" do not necessarily translate into an ability to charge higher prices.[9]

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8 Natural market experiments such as Trinidad provide valuable information on a variety of economic issues, including the existence of entry barriers. (*See* Harris, Tr. 7219, 7267-71, 7351; Simpson, Tr. 3760-61). *See also* David T. Scheffman and Mary T. Coleman, Current Economic Issues at the FTC (undated), *available at* http://www.ftc.gov/be/hiltes/riotinal.pdf.

9 The Response incorrectly argues that CB&I raised its price dramatically. A 5% price increase can hardly be called dramatic. The fact that CB&I could not win with such a price is a testament to the vibrant nature of competition in the North American LNG market as well as the presence of low entry barriers.

Access to workforce and equipment -- The Response argues without support that access to a "sizeable workforce and specialized equipment" is an entry barrier. (CCRAB 32-33). This is wrong. New entrants have met these needs by partnering with U.S. tank construction companies that have the required workforce and equipment. (*See, e.g.*, Cutts, Tr. 2328; Jolly, Tr. 4684-85; Fahel, Tr. 1684) (RFOF 3.105, 3.166-3.172). Further, the capital expenditures involved in acquiring these capabilities are not entry barriers because incumbent firms also needed and continue to need to incur them. The evidence demonstrates not only that CB&I must acquire the necessary labor force and equipment to build LNG tanks, but also that it has no competitive advantage in doing so. (*See* ROB 53-55).[10]

(b) Barriers To The LPG Market Are Low.

Respondents have argued that entry to the LPG market is easy, pointing to the fact that AT&V and Morse successfully won and executed LPG projects without prior experience in this market. (*See* RAB 25). The ALJ failed to address this evidence. The Response alleges that Morse's experience is irrelevant because it had a "substantial competitive advantage" due to its close proximity to the jobsite. (CCRAB 33). This argument is facile and misleading. While the Response highlights this locational advantage, it fails to quantify it. Although Morse enjoyed a transportation cost advantage of approximately $70,000 on the Ferndale project (1% of the total cost of the project), this advantage was outweighed by Morse's $180,000 disadvantage stemming from having to use union labor. Further, Morse faced all of the purported entry barriers, such as reputation and access to equipment, yet still successfully entered the LPG market with minimum sunk costs. (*See* Maw, Tr. 6553-56, 6563-66, 6680) (RFOF 4.99-4.111). This evidence demonstrates that entry barriers are low, a conclusion that flows from the fact that Morse

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10 Contrary to Complaint Counsel's suggestion (CCRAB 35), potential entrants need not actually enter a market in order to exert competitive discipline. *Baker Hughes*, 908 F.2d at 988.

overcame allegedly substantial "entry barriers" with a mere 1% cost advantage in one small area of contract performance.

(c) Barriers To The LIN/LOX Market Are Low.

Respondents have argued that entry barriers to the LIN/LOX market are low. (RAB 25-26). The best evidence of this fact is that new entrants have already succeeded in entering the market, winning a majority of new bids. (RAB 25-26). The Response claims, and the ALJ agreed, that new entrants face entry barriers due to a lack of equipment and reputation. (*See* CCRAB 33; ID 108). These positions cannot be squared with the fact that Matrix and AT&V *have already entered the market* and now enjoy a 60% post-Acquisition market share compared to approximately 6% pre-Acquisition. (*See, e.g.*, Harris, Tr. 7307-08). Further, as discussed above, access to equipment is not an entry barrier because CB&I also needed to purchase that equipment.

3. EVIDENCE OF CUSTOMER SOPHISTICATION REBUTS COMPLAINT COUNSEL'S PRIMA FACIE CASE.

Customer sophistication rebuts a prima facie case. *See Baker Hughes*, 908 F.2d at 986-87. The Response concedes sophistication of customers -- some of the largest energy and chemical companies in the world -- but dismisses it because "pricing is not transparent to customers . . . ." (CCRAB 41). While the ALJ accepted this argument (ID 109), it misses the mark for two reasons. First, such an argument would vitiate *Baker Hughes*. Pricing was not transparent in *Baker Hughes*, either. Yet, the court found the fact that customers were large consumers who "closely examine[d] available options and typically insist on receiving multiple,

confidential bids for each order" rebutted a prima facie case. 908 F.2d at 986. Complaint Counsel does not dispute that customers here precisely fit this description.[11]

Second, to the extent access to pricing information is relevant, *customers have access to and use such information*. Customers such as El Paso, CMS, and BP have access to sophisticated pricing models and experienced consultants. Using these sources, customers can and do make judgments regarding LNG tank pricing. (RAB 31).[12] Contrary to the ALJ's reasoning (ID 109) and the Response (CCRAB 41-42), consultants have access to accurate and detailed LNG pricing information. Further, customers actually use that information to evaluate pricing. (*See* RAB 30-31). *Complaint Counsel's own witnesses* confirm this fact. **[xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (**[xxxxxxxx]** Tr. 722-23). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxy.]** (*Id.*) Similarly, Brian Price of Black & Veatch (one of CB&I's competitors), testified that he has personal knowledge of CB&I's costs on LNG tanks, and that Black & Veatch has access to pricing curves that it uses to assess pricing. (Price, Tr. 606, 637-38, 661-62).

Recognizing that many customers believe that sufficient competition exists in this market, the Response claims that they are ignorant of tank pricing. (CCRAB 42-43). This argument is misplaced. These current customers have extensive experience in the LNG industry

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11 Customers use well-established procurement procedures, including subterfuge, to achieve better prices. (*See, e.g.*, Patterson, Tr. 350). This is strong evidence of customer sophistication.

12 Complaint Counsel's arguments regarding Whessoe's pricing (CCRAB 43) are based on mere speculation. (*See* RRFOF 883-905). [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

and have seen firsthand the competition that existed between CB&I and PDM *as well as* the current competition that exists. The fact that they are entrusted to oversee several billion dollars worth of LNG projects should be accorded substantial weight. (*See* RFOF 3.574-3.592).[13]

4. RESPONDENTS' SHOWING OF SUFFICIENCY REBUTTED ANY PRIMA FACIE CASE. COMPLAINT COUNSEL'S ATTEMPT TO SHIFT THE BURDEN ON THIS ISSUE IS IMPROPER.

Respondents made a substantial showing of sufficiency of entry. Consistent with the *Baker Hughes* sliding scale approach, 908 F.2d at 982-83, this showing rebutted the purported prima facie case. Contrary to the position of Complaint Counsel and the ALJ, the Merger Guidelines do not and cannot alter established circuit court law with respect to the strength of showing or the burden of proof regarding sufficiency of entry. Complaint Counsel's approach would set a standard from which only the F.T.C. can prevail in merger litigation. While the Guidelines provide a useful analytical framework to view mergers, they do not apportion burdens of proof in litigation and they do not trump existing circuit court precedent. Respondents respectfully urge that to hold otherwise would be reversible error.

(a) Respondents Do Not Bear The Burden Of Proving That Entry Will Be Sufficient To Constrain CB&I's Pricing At Levels That Would Have Prevailed Absent The Acquisition.

Throughout this litigation, Complaint Counsel has attempted to shift the burden of proving that entry will be sufficient to "deter or counteract" the possible anticompetitive effects of the Acquisition to Respondents, claiming that "the law requires Respondents to prove that new entry will be profitable at pre-merger prices . . . " (*See, e.g.*, CCRAB 27; Robertson, Tr. 8151,

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13 Some of Complaint Counsel's own witnesses agree that the Acquisition has not substantially harmed competition. Bechtel testified that it can get a "reasonable price" for an LNG tank post-Acquisition. (Rapp, Tr. 1325, 1333-34) (RFOF 3.184). MLGW testified that it has seen no evidence that CB&I can control the LNG market post-Acquisition and that "it's possible that there may be more competition in the United States today for [LNG] tanks . . . than there was in 1994 . . . ." (Hall Tr. 1861).

8350-51).[14] The ALJ implicitly agreed with Complaint Counsel on this point. (*See* ID 101-02). Although Respondents have demonstrated that post-Acquisition entry has maintained pricing at competitive levels, the position taken by Complaint Counsel and the ALJ on the burden of proof is inconsistent with the law. In *Baker Hughes*, the D.C. Circuit *specifically rejected* the notion that a respondent must show that entry would actually occur or that such entry would be "quick and effective," reasoning that a respondent could not reasonably be expected to prove that new competitors will "quickly" or "effectively" enter unless it could produce evidence regarding specific competitors or their plans. *Baker Hughes*, 908 F.2d at 987. The court noted that imposing such a standard would shift the ultimate burden of proof in a Section 7 case and force the defendant to "prove the core of the dispute." The D.C. Circuit found this to be a breach of fundamental fairness because it would create a situation in which respondents could never successfully defend a Section 7 case. *Id.* at 992.

In an effort to skirt the dispositive holding of *Baker Hughes* (a decision authored by a panel including two sitting Supreme Court Justices), the Response -- citing the ALJ -- implies that *Baker Hughes* has been overruled by subsequent cases from the D.C. Circuit (such as *Heinz*) and the Commission, as well as the 1992 Merger Guidelines ("Guidelines"). (CCRAB 28). That assertion is wrong. *Heinz* reaffirmed that *Baker Hughes* sets forth the "analytical approach by which the government established a section 7 violation." *F.T.C. v. Heinz*, 246 F.3d 708, 715 (D.C. Cir. 2001). It does not purport to impose on a respondent the onerous burden of

[14] Further, Complaint Counsel and the ALJ incorrectly assume that in order to assess sufficiency of entry, one must compare post-merger pricing to pre-merger pricing. The relevant question is whether entry will create competitive circumstances equivalent to pricing *that would have prevailed absent the Acquisition.* (Harris, Tr. 7173-74, 7186-87; Simpson, Tr. 5677, 5701). This distinction is important here because the evidence demonstrates that PDM would have been a substantially less effective competitor in at least the LNG market absent the Acquisition. (*See* RAB at 49-51). This fact, disregarded by the ALJ, requires that post-merger competition be measured by the less competitive pricing that would have occurred absent the Acquisition.

proving that entry is sufficient. Similarly, the Guidelines do not modify *Baker Hughes*. In fact, the Guidelines "disclaim allocation of burdens" of proof in a judicial or administrative proceeding. *See* Jonathan B. Baker, *Respondents to Developments in Economics and the Courts: Entry in the Merger Guidelines*, Antitrust L. J. 189, 205-06 (Autumn 2003).[15]

(b) Empirical Evidence Demonstrates That Entry Is Sufficient.

As part of its rebuttal, Respondents presented evidence on sufficiency of entry. In the LNG market, Respondents showed that sufficient new entry has occurred and has kept that market competitive. Recent LNG projects such as Dynegy, CMS Energy, and Southern LNG demonstrate that CB&I cannot exercise market power, either in the form of increased margins or dictation of contract terms. (*See* RAB 34-37). LNG projects in Trinidad and the Bahamas, which are quite similar to U.S. projects, further support this conclusion. (*See, e.g.*, Harris, Tr. 7218-19). Virtually all current LNG customers confirm that new entry has generated and will continue to generate competition sufficient to keep prices low. (*See* RAB 39-41).[16]

Complaint Counsel's analysis of this evidence is flawed. It argues that the Dynegy project is irrelevant because CB&I initially declined to bid on the tank portion of this project. (CCRAB 34; *see also* CCRAB 15). This conclusion misstates the facts, and is in any case irrelevant. Prior to seeking a tank supplier, Dynegy accepted bids for the EPC portion of the project; it selected Skanska as its EPC contractor over many other foreign and domestic firms, *including CB&I*. (*See* Puckett, Tr. 4545-47). Thereafter, CB&I initially declined to

15 The Guidelines cannot place on Respondents the burden to show that entry would be timely, likely, and sufficient. They are not law, are not binding on courts or the Commission, and cannot provide the basis to contradict well-settled principles of law. *See, e.g.*, *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 n.9 (S.D.N.Y. 1995); *see also*, *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1300 (9th Cir. 1993); *F.T.C. v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 353-54 (2d Cir. 1979).

16 Without explanation, the Response argues that "specific evidence" regarding each new entrant demonstrates that they cannot be effective competitors in the United States. (CCRAB 11). This argument is meritless because new entry has *already been successful*. (*See* RFOF 3.57-3.227; RRFOF 448-570).

submit a bid for the tank portion of the project because it feared that its competitively-sensitive bid information would be transmitted to Skanska/Whessoe. (Puckett, Tr. 4574-75, 4577-78; Glenn, Tr. 4411). After Dynegy assuaged CB&I's confidentiality concerns, *CB&I attempted to submit a bid for the LNG tanks*. Dynegy rejected this attempt because *it was satisfied with bids received from new entrants*. (Puckett, Tr. 4559-60). Even an appeal by CEO Gerald Glenn to Dynegy's CEO could not change Dynegy's mind. (*See, e.g.*, Glenn, Tr. 4137). Dynegy's outright rejection of CB&I for the largest LNG project in North America conclusively demonstrates that new entry is sufficient to constrain CB&I's pricing and alleged market power.[17]

With respect to other LNG projects, the Response (citing the ALJ) argues that foreign entrants "rise only to the level of expressing an interest or participating in preliminary meetings." (CCRAB 34). This argument substantially understates the status of entry in the LNG market. New entrants have done much more than "express an interest" and participate in "preliminary meetings." As discussed above, Skanska/Whessoe has submitted a final bid on the Dynegy project and has already allied itself with process engineer Black & Veatch. (*See* Puckett, Tr. 4579; Eyermann, Tr. 6992). It has also provided pricing to Yankee Gas for its peakshaving facility and to **[xxxxxxxxxxx]** for its import terminal in **[xxxxxxxxxxxxxxxx xxxxxxxxx]**. (*See* Andrukiewicz, Tr. 6445-46; **[xxxxxxxxxxxxxxxxxxx]**).[18] Similarly, Technigaz/Zachry has bid on the Dynegy project and has submitted pricing to Yankee Gas. (*See* Puckett, Tr. 4556; Andrukiewicz, Tr. 6445). TKK/AT&V has also done far more than

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17 Complaint Counsel argues that a competitor of CB&I's, Black & Veatch's Brian Price, has expressed "concerns" that Dynegy will pay a higher price "without CB&I's participation in the bidding." (CCRAB 11). This "concern" is groundless. Dynegy itself testified that it was satisfied with the bids received, and that it felt CB&I's participating in the bidding contest was unnecessary. (*See* Puckett, Tr. 4557-60). Tellingly, although Mr. Price testified to this alleged "concern," he never bothered to share it with his client -- Dynegy. (Price, Tr. 609-10, 625). Mr. Price's testimony relating to this project is uninformed, self-serving, and biased. (*See* ROB at 85-86).

18 The Yankee Gas project has not been awarded yet. (*See* Andrukiewicz, Tr. 6445-46).

"participat[e] in preliminary meetings," having already bid on the Dynegy project and having implemented training programs designed to train U.S. workers on LNG projects. (*See, e.g.*, Puckett, Tr. 4556; Cutts, Tr. 2326, 2442, 2565-66).

The Response sidesteps evidence of LNG bids in the Bahamas and Trinidad because of purported "[b]arriers to entering the United States market." (CCRAB 35).[19] Yet, Complaint Counsel neither showed that entry barriers into the Bahamas or Trinidad are lower than in the U.S. nor that entry barriers in the U.S. are high.[20] *See* Part I-B, *supra*. Indeed, evidence regarding the Trinidad project -- a project on which CB&I admittedly had some cost advantages due to its incumbency from a previous project on the same site -- demonstrates that these advantages do not translate into an ability to charge supracompetitive prices.[21]

Respondents have also shown that entry is sufficient to keep the LPG market competitive. Matrix and AT&V have constrained CB&I's pricing in this market. ITC testified that "AT&V beat the socks off of CB&I" on its Deer Park LPG project and that the Acquisition has not hindered competition for LPG tanks. (*See* RAB 41; *see also* N. Kelley, Tr. 7091-92,

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19 The ALJ disregarded this evidence because the projects were not in the relevant product market. (ID 16, 87). This approach erroneously assumes that no information about new entrants originating outside the U.S. is relevant. As Dr. Harris observed, such evidence is important to assessing the strength of new entrants here. (*See* Harris, Tr. 7219, 7267-71, 7351). Courts have also recognized that information regarding foreign projects is useful in examining entry issues. *See Baker Hughes*, 908 F.2d at 989; *see also Baker Hughes,* 731 F.Supp. at 10-11.

20 In fact, the evidence is to the contrary. For example, with respect to the alleged reputation and experience entry barrier, customers for the Bahamas project (Enron) and the Trinidad project (Atlantic LNG) have testified regarding the good reputation that new entrants enjoy. (*See, e.g.*, Carling, Tr. 4494; Rapp, Tr. 1333-34).

21 As discussed *supra,* CB&I attempted to implement a 5% price increase on the most recent phase of the Trinidad project, believing that its current presence on the job site would give it a competitive advantage. (ROB 59-60). CB&I was wrong; it lost this project to TKK/AT&V. This demonstrates that CB&I cannot raise its prices to the SSNIP level without losing business to new entrants.

7134-37; RFOF 4.56-4.61).[22] With respect to the ABB Lummus project, it is uncontroverted that the presence of Matrix and Wyatt forced CB&I to lower its pricing to a tiny margin in order to win. (*See* Scorsone, Tr. 5039-43) (RFOF 4.66-4.70).

By contrast, the Response has not cited *any* affirmative evidence demonstrating that entry is insufficient to constrain pricing. Instead, it attacks the validity of Respondents' sufficiency evidence, arguing that Matrix's competitiveness in the LPG market is "questionable" because it has never constructed an LPG tank. This standard would remove entry from merger analysis. More fundamentally, Complaint Counsel ignores the fact that the presence of Matrix has constrained CB&I's pricing, forcing it to "adjust its prices in response" to its bidding -- one of the hallmarks of sufficiency. *See United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1082 (D. Del. 1991).

Similarly, the Response argues that AT&V is "capacity constrained" and has limited bonding capacity. (CCRB at 37). This argument is off-base because it assumes without any supporting evidence that AT&V cannot build the types of LPG projects that customers currently require. There is no evidence that the ITC project is any smaller than the tanks future LPG customers will require. Further, even if future customers will require larger LPG tanks, Complaint Counsel assumes -- without any evidentiary support -- that any "limits" on AT&V's bonding capability would prevent it from building these larger LPG tanks. Finally, Complaint Counsel incorrectly assumes that AT&V is somehow unable to expand or adapt to meet the changing needs of its customers. As discussed below, AT&V has already demonstrated this type of adaptability, having gone from new entrant to LIN/LOX market leader in just three years.

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22 Complaint Counsel presented no evidence to suggest that the ITC project is not typical of LPG projects in the future. In fact, its only witness regarding the LPG market has not been involved in that market for six years. (*See* Warren, Tr. 2284, 2318).

Finally, with respect to the LIN/LOX market, Respondents presented substantial evidence showing that new entry has and will continue to keep this market competitive. Most compellingly, new entry has constrained CB&I to the point where LIN/LOX customers are receiving post-Acquisition pricing *equal to or better than* pricing received post-Acquisition. (*See* RAB 43-47; RX 208). CB&I's own contemporaneous documents show that it was forced to lower pricing in response to the competitive threat posed by new entry. (*See* RX 627; RAB 44-45; RFOF 5.128-5.130).

Although the reality is that new entrants are now the leaders in the LIN/LOX market, the Response asserts that they have not made "any headway" against CB&I. (*See* CCRAB 2). In support of that claim, it attacks the competence of new entrants. (CCRAB 37-38; *see also* ID 47-50). This is most evident in its discussion of AT&V. On a project for BOC in Midland, North Carolina, the Response asserts that "although the price was low in the beginning, because of the many change orders [AT&V's] price ended up higher than CB&I's." (CCRAB 37). This misleading claim is based on an unsupported hearsay statement from a witness who was not even involved in the project. (*See, e.g.*, Kistenmacher, Tr. 922; RRFOF 467). The truth regarding the BOC Midland project, straight from BOC's designated representative, is that BOC was "quite satisfied [with AT&V] in all aspects" and that AT&V had "distinguished themselves as being capable LIN/LOX tank providers." (V. Kelley, Tr. 5281-87) (RFOF 5.108-5.113). Lest there be any doubt as to BOC's view of AT&V, BOC plans to use AT&V again in the future. Another division of BOC -- based on a positive recommendation from BOC's Midland project manager -- has already selected AT&V as a LIN/LOX tank contractor. (*See* ID 45; *see also* V. Kelley, Tr. 4601, 5289-92; Cutts, Tr. 2504-06) (RFOF 5.113-5.121).

Similarly, Complaint Counsel attempts to belittle Matrix by arguing that it is a "higher-cost" competitor because it must "subcontract for LIN/LOX fabrication work." (CCRAB 38). This statement is false. There is no evidence to support the claim that Matrix must subcontract fabrication work. In fact, Matrix's testimony is to the contrary:

> Q. Have there ever been any proposals that you received, requests for quotes that you have received from potential customers that have spec'd out a LIN/LOX tank that you would not have the pressing capability to supply?
>
> A. *I don't think so.*

(Newmeister, Tr. 2197) (RFOF 7.128) (RRFOF 523) (emphasis added). Further, Complaint Counsel's claim that Matrix is a "higher cost," "non-competitive" competitor (CCRAB 37-38) has been squarely undercut by recent bidding contests, which show that Matrix can compete head-to-head with CB&I on price. (*See* RAB 44-45).[23]

Finally, the Response wrongly argues that Chattanooga Boiler & Tank ("Chattanooga") is not a sufficient competitive constraint because it has not yet built a LIN/LOX tank and because its "price" was "substantially higher than any other competitor." (CCRAB 38). Complaint Counsel misleadingly confuses bids and budget prices. Chattanooga did not "bid" on the project to which Complaint Counsel refers -- it provided a preliminary budget price. (Stetzler, Tr. 6351).[24] Moreover, Chattanooga can compete in this market effectively because it has significant advantages over CB&I in terms of overhead costs and experienced field personnel. (Stetzler, Tr. 6369-73) (RFOF 5.66-5.67).

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23 [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

24 As discussed *infra*, budget pricing should not be confused with firm, fixed price bids. A budget price is a preliminary estimate provided to a customer, incorporating little in terms of detail and analysis; such prices are usually higher than firm, fixed price bids.

(c) Economic Evidence Supports Respondents' Showing Of Sufficiency And Precludes Complaint Counsel From Carrying Its Burden Of Proof.

In attempting to carry its burden of proof, the Response argues that new entry will be insufficient to constrain CB&I's prices. This argument assumes that new entrants will have higher costs than CB&I. Yet, Complaint Counsel presented no reliable evidence showing that new entrants' cost structures will prevent them from competing effectively. In fact, apart from questionable attempts to draw conclusions from anecdotal evidence of higher costs, Complaint Counsel has not even *attempted* to present or quantify evidence regarding competitors' costs. By contrast, in the course of rebutting the prima facie case, Respondents presented extensive economic evidence regarding critical loss analysis and bid theory. This evidence demonstrates that new entrants can, regardless of whether they may have higher costs on a particular project, constrain CB&I's pricing. In the face of this evidence, Complaint Counsel cannot carry its burden of proof on sufficiency of entry.

(1) There is no reliable evidence that new entrants have prohibitively higher overall costs.

In finding that new entrants cannot sufficiently constrain CB&I's pricing, the ALJ incorrectly assumed that an entrant will not provide a sufficient constraining effect unless it is "equally cost-effective," to CB&I. (CCRAB 27; ID 95). This approach is incorrect for two reasons:

First, Complaint Counsel's theory regarding insufficiency assumes that new entrants will have higher costs than CB&I and PDM. Yet, it failed to present probative evidence, such as a cost study, to support this assumption. Its attempt to use anecdotal evidence to carry its burden of proof failed. For example, the ALJ (and the Response) highlighted testimony indicating that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx][25] Further, the Response and the ALJ's factual conclusions rely significantly on evidence recited by Dr. Simpson, who concluded erroneously and without basis that the costs of foreign competitors will put them at a substantial disadvantage to CB&I in the U.S. (Simpson, Tr. at 3919-20). Yet, the record is clear that Dr. Simpson *knows nothing about new entrants' actual costs*. (Simpson, Tr. 3919-22). He had not studied CB&I's costs or the costs of the foreign entrants, and did not know whether new entrants charged more or less for fabrication, materials, engineering, field work, or overhead. (*See, e.g.*, Simpson, Tr. 3921-27). In short, Complaint Counsel has not shown that new entrants have higher costs (let alone that such higher costs would allow CB&I to raise its prices) and thus cannot meet its burden of establishing insufficiency of entry.

Second, to the extent new entrants do have some specific cost disadvantages, they have offsetting advantages that allow them to compete effectively. For example, as discussed above, [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] ([xxxxxx] Tr. 4687-89, 4715-21). Similarly, TKK/AT&V undercut CB&I's price in Trinidad despite two allegedly significant cost disadvantages -- its complete lack of prior experience in Trinidad and the fact that CB&I had huge cost advantages by already being mobilized on the project site. In the LIN/LOX market, AT&V has overcome alleged cost disadvantages, winning the majority of post-Acquisition jobs at prices lower than CB&I's or PDM's pre-Acquisition prices. (Harris, Tr. 7307-09).

25 [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (*See* Simpson, Tr. 3926; Jolly, Tr. 4687-89).

(2) Critical loss analysis shows that CB&I cannot implement price increases in the face of new entry.

Whether or not new entrants have higher costs, critical loss analysis indicates that CB&I cannot reliably attempt to increase price by a substantial margin. Respondents have outlined the importance of critical loss theory in this case, and criticized the ALJ for refusing to mention it in his Initial Decision. (*See* RAB 47). The Response argues that Dr. Harris' critical loss analysis was "badly flawed" (CCRAB 38), yet fails to acknowledge that Dr. Harris is one of the two *creators* of critical loss theory and that his critical loss analyses have been accepted and cited by several courts. (*See* Harris, Tr. 7258).[26] [27]

Complaint Counsel argues that critical loss is but "one of several methods" to analyze whether a firm can increase price. (CCRAB 38).[28] However, the ALJ failed to use any proper alternative methodology; he simply concluded that higher competitor costs prevent new entrants from constraining prices. Critical loss analysis, however, provides a method for measuring the risks and rewards of attempting a price increase and how CB&I would likely perceive those risks.

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26 *See, e.g., F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (S.D. Iowa 1995), *vacated as moot,* 107 F.3d 632 (8th Cir. 1997).

27 Complaint Counsel's criticism that Dr. Harris "ignored several caveats about using critical loss that have been articulated in recent antitrust articles" (CCRAB 40) is misplaced. Dr. Harris explicitly addressed one of these two articles (by Langenfeld and Li) during his cross-examination. (Harris, Tr. 7892-98). As Dr. Harris explained, many of the "caveats" identified by Complaint Counsel during its cross-examination are irrelevant to economic analysis in this case. (*See id.*) The other article (by Katz & Shapiro) was published six months *after* Dr. Harris testified in this case.

28 In fact, Respondents presented evidence on another of these methods -- bid model theory. Bid model theory, which the ALJ ignored in his Initial Decision, predicts that in markets with blind bids, an acquirer is unlikely to attempt to raise prices above the SSNIP level in the Merger Guidelines. (*See* Simpson, Tr. 3767-68). The evidence demonstrates that CB&I does not have good information regarding its competitors' costs. Given CB&I's critical loss, bid model theory suggests there is too much uncertainty and risk for an economic actor such as CB&I to attempt a price increase. (*See* RFOF 7.59-7.88; *see also* ROB 131-37).

Complaint Counsel accuses Dr. Harris of "major mistakes" in calculating CB&I's variable profit margin. Dr. Harris made a small adjustment to initial calculations of the actual critical loss because of differences in the LNG variable profit margin stemming from testimony given after he made his initial calculations. These differences were small and did not, in any way, affect the outcome of his critical loss analysis. (Harris. Tr. 7344).[29] In any event, Dr. Harris' analysis was far superior to that of Dr. Simpson (CCRAB 39), who principally based his analysis on a single document and then assumed that virtually all of CB&I's costs were variable without inquiring as to whether CB&I viewed them to be fixed costs. (*E.g.*, Simpson, Tr. 3885-3909; Harris, Tr. 7341-42).

Even using Dr. Simpson's erroneous approach in the calculation of the variable profit margin, critical loss analysis still shows that CB&I would be unlikely to attempt a supracompetitive price increase because the risk of lost profit outweighed the potential gain. (Harris, Tr. 7265-66). Because the projects in the relevant markets are so infrequent and (in some cases) expensive, CB&I cannot attempt a 5% price increase because the risk of loss would be too great. (*See id.*)[30]

(3) Complaint Counsel's use of Respondents' statements sheds no light on the sufficiency of entry.

In an effort to carry its burden on sufficiency, Complaint Counsel resorts to a small collection of documents and statements taken out of context. First, the Response cites to a public investor conference call led by Gerald Glenn, where he discussed CB&I's margin levels

29 Complaint Counsel also accuses Dr. Harris of basing his critical loss conclusions on an "inaccurate sample" of projects when he, in fact, considered all the LNG projects in existence and explained why the Trinidad LNG project was highly relevant to a critical loss analysis of CB&I's U.S. behavior. (Harris, Tr. 7270-73).

30 Dr. Simpson assumed a variable profit margin of 15% -- which means that a 5% price increase will not be profitable if it leads to a loss of sales of 25% or more. (Harris, Tr. 7342).

and capabilities. (*See, e.g.*, CCRAB 2, 8, 10, 11). Reliance on these statements is flawed. As Mr. Glenn explained, higher "margin levels" have been generated by CB&I's recent acquisition of its Howe Baker subsidiary, not by the Acquisition of PDM. (*See* CX 1527; Glenn, Tr. 4392-93).[31] Indeed, as discussed *supra*, CB&I has been forced to cut its margins (to zero percent in some cases) to remain competitive in the relevant markets. Further, Mr. Glenn's comments regarding CB&I's future prospects related to the overall prospects of the company, not its competitiveness with respect to any particular product line. (*See* CX 1731 at 4, 27, 28). Indeed, revenue from sale of relevant products in the U.S. is a tiny percentage of CB&I's total revenue. (Glenn, Tr. 4088, 4158). Finally, to the extent Mr. Glenn made predictions during the call about competitors' costs, the economic evidence demonstrated that CB&I does not, in fact, have good information regarding those costs. As Dr. Harris noted, CB&I could win every project if it actually had that information. Prices in the relevant markets are established individually. (*See* Harris, Tr. 7261). Consequently, if Complaint Counsel's theory were correct, CB&I could set the price for each job just below the level of its competitors' costs, thus assuring itself of a winning bid. (Harris, Tr. 7358-59). However, CB&I has lost more than half of the available projects post-Acquisition. (*See* Harris, Tr. 7223). This result demonstrates either that CB&I does not have lower costs or that it lacks the ability to take advantage of any lower costs due to its lack of accurate information regarding competitors' costs.[32]

Further, the Response argues, falsely, that CB&I failed to discuss post-Acquisition competition in its post-Acquisition SEC filings. (CCRAB 7, 10). CB&I's post-

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[31] Howe Baker was acquired a few months prior to the Acquisition. Its business has nothing to do with the relevant markets.

[32] CB&I's inability to know its competitors' costs is most apparent in connection with the Trinidad project, where CB&I overestimated the costs of the eventual winner of this project -- TKK/AT&V. (*See* Harris, Tr. 7272-73).

Acquisition filings *clearly state* that "[t]here are numerous regional, national and international competitors that offer products and services similar to ours." (CX 1021 at 36; *see also* RRFOF 757).

Finally, in an effort to show that CB&I and PDM intended to create anticompetitive effects with the Acquisition, the Response cites to a collection of pre-Acquisition documents predicting that, for example, CB&I would be a "dominant force." (*See, e.g.*, CCRAB 1, 7). Such predictions are irrelevant. As discussed *supra*, new entry has created a highly competitive environment that effectively prevents CB&I from raising prices. The existence of this entry was not discussed in these documents because it occurred *after these documents were created.* (Scorsone, Tr. 5225-34).

C. COMPLAINT COUNSEL FAILED TO ADDRESS RESPONDENTS' ARGUMENTS REGARDING REMEDY.

The Response fails to squarely address Respondents' arguments regarding remedy. (*See* RAB 52-57). Respondents argued that ordering divestiture of the Water Division was inappropriate because there was no evidence to support the conclusion that its inclusion would assist competition in any relevant market. (RAB 56-57). The Response cites -- out of context -- the closing argument of Respondents' counsel (Mr. Leon), who argued that any divestiture order would need to include some assets that are not directly related to the relevant products. (*See* CCRAB 78) (citing Court, Tr. 8311-12). While it is true that a divestiture order would necessarily include some assets not directly related to the relevant products, there is no evidence in the record as to what those assets would be. Complaint Counsel *failed to present any evidence* regarding what assets would be necessary to assist competition or whether including those assets in a divestiture order would harm customers unrelated to the relevant product markets. (Leon, Tr. 8311-12).[33]

The Response wholly misses the point and misstates Respondents' point at trial, which remains the same now: Because Respondents have presented evidence showing that a divestiture would harm competition in the relevant markets, Complaint Counsel was obliged to present evidence regarding the efficacy of its proposed remedy. Because Complaint Counsel presented no evidence that Water Division assets would assist any acquirer in being "competitively viable," its inclusion in the ALJ's divestiture order was inappropriate.

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33 Complaint Counsel's citation to *Olin* supports Respondents' position. There, the ALJ took *substantive evidence* regarding the proposed remedy and found, *based on that evidence,* that inclusion of assets unrelated to the relevant products was necessary in order to ensure the viability of the new competitor. *In re Olin Corporation*, 113 F.T.C. 400 (1990).

D. COMPLAINT COUNSEL IGNORES KEY EVIDENCE REGARDING THE EXITING ASSETS DEFENSE.

In attempting to avoid the application of the exiting assets defense, Complaint Counsel makes two key factual errors.[34] *First*, Complaint Counsel wrongly suggests that there were potential purchasers other than CB&I for PDM's EC division. (CCRAB 61-62). This argument lacks sufficient evidentiary support. To the contrary, in light of the market conditions at the time and the various competing constraints, the preponderance of the evidence demonstrates that PDM did everything possible to sell its EC Division. CB&I was the only potential purchaser with sufficient financial strength to give PDM what it needed: a quick, all-cash transaction. (Byers, Tr. 6759-62) (RFOF 8.5, 8.23-8.25, 8.30-8.39). In the course of conducting a diligent search for potential buyers, PDM and its investment banker conducted an additional search as late as December 19, 2000 -- less than 2 months before closing. After this search, the Board concluded that "there is a thin market and *no other potential purchaser was identified.*" (RX 28 at 2) (emphasis added). (*See also* RAB 60-61).[35] [36]

Second, citing the ALJ, the Response argues that PDM would not have exited the market absent the Acquisition. (*See* CCRAB 63). This claim is contradicted by the greater weight of the evidence, which -- despite the Response's contrary claims (CCRAB 60) -- demonstrates that PDM's Board voted to sell PDM and close the business. (Byers, Tr. 6732-33,

34 The Response failed to even address Respondents' argument that the exiting assets evidence also constitutes rebuttal evidence under *Baker Hughes*. (*See* RAB 49-51).

35 In finding that other potential purchasers existed, the ALJ relies on Tanner's fairness opinion dated February 7, 2001. (ID 118). However, this opinion was prepared in December 2000 as work product for the liquidation scenarios performed by Tanner. (Byers, Tr. 6877-78) (RFOF 8.123). In fact, no such potential buyers were located during the subsequent December 19, 2000 Board meeting. (Byers, Tr. 6872-73; RX 28 at 2) (RFOF 8.122).

36 Complaint Counsel's argument that PDM turned away prospective purchasers is inaccurate. PDM and its investment banker continued to receive inquiries of interest from prospective buyers. (Scheman, Tr. 2941, 6911) (CCRAB 13, 62; ID 73-75). These inquiries were analyzed, assessed and eventually determined not to be viable alternative purchasers. (Scheman, Tr. 2941).

6741-42, 6755-58, 6769-78; Scorsone, Tr. 4790-93; Scheman, Tr. 2911-19, 6907-10, 6952) (RFOF 8.3, 8.11, 8.16, 8.20, 8.21, 8.38, 8.55, 8.115, 8.118) (CCRAB 12; ID 74). Complaint Counsel's attempt to claim otherwise is misleading and should be rejected by the Commission.[37]

[37] For example, in arguing that PDM would not have exited, Complaint Counsel argues that "some company other than CB&I" would be "building the Cove Point project" (CCRAB 63). The referenced testimony says nothing regarding whether an attempt to assign the Cove Point contract to another company would have been feasible or whether the customer would have permitted such an assignment.

II. RESPONSE TO COMPLIANT COUNSEL'S CROSS-APPEAL

INTRODUCTION TO RESPONDENTS' RESPONSE TO COMPLAINT COUNSEL'S CROSS-APPEAL

Complaint Counsel's cross-appeal attempts to hide the deficiencies in the Initial Decision and to call attention away from its inability to carry its burden of proof under Section 7. Its allegations regarding collusion are demonstrably false and its allegations of price increases are based on speculation and conjecture, all of which is unsupported by reliable evidence. The ALJ properly rejected these unfounded allegations.

Complaint Counsel's appeal of the ALJ's remedy is similarly overreaching and unsupported by record evidence. The scope and scale of its request to divest a significant portion of its contracts and employees would be a remedy that has never been imposed in any prior adjudicative proceeding. Further, such a remedy in this case is wholly unsupported by record evidence. Imposing such a remedy would also be grossly unfair. The provisions in the Proposed Order on appeal are not the same as those presented to the ALJ. Further, Respondents were never given the chance to present evidence on the specifics of *any* proposed remedy, as the proposed order presented to the ALJ was not disclosed until four weeks after the trial concluded. To the extent the Commission finds that a violation of Section 7 occurred, Respondents respectfully submit that the ALJ's Order implemented a complete divestiture and that no further remedy is warranted under these facts or permitted by law.

A. COMPLAINT COUNSEL HAS FAILED TO PRESENT ANY CREDIBLE EVIDENCE OF ANTICOMPETITIVE EFFECTS.

Because Respondents have successfully rebutted the weak prima facie case, Complaint Counsel -- to prevail -- must present additional evidence of anticompetitive effects. *See Baker Hughes*, 908 F.2d at 983. To do so, Complaint Counsel argues without credible evidentiary support that Respondents have engaged in collusion and post-Acquisition price increases. Complaint Counsel also argues that the ALJ improperly applied the rules of evidence. These claims are wholly without merit.[38]

1. COMPLAINT COUNSEL HAS NOT PRESENTED CREDIBLE EVIDENCE OF ANTI-COMPETITIVE CONDUCT.

(a) Complaint Counsel Has Not Presented Any Credible Evidence Of Collusion.[39]

Complaint Counsel accuses CB&I of colluding with PDM on the Spectrum Astro TVC opportunity. (CCRAB 48-49, 52-53; *see also* CCRAB 16-17). The ALJ rejected this argument, because "[t]he evidence does not establish that issues of pricing, profit margins, costs, or anything else related to this project were discussed between PDM and CB&I . . . " (ID 114). Indeed, the evidence affirmatively establishes that such issues were never discussed between PDM and CB&I and that no plan to coordinate bidding was ever created or executed. (Scorsone,

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38 Complaint Counsel resorts to violating the Commission's own rules by citing to evidence outside the record. (*See* CCRAB 49 n. 18). Further, in an apparent attempt to prejudice the Commission, Complaint Counsel falsely accuses Respondents of obtaining an "extension of time" to "consummate the Acquisition." (CCRAB 1). Respondents fully complied with all applicable provisions of the HSR Act. It was Complaint Counsel who, having failed to meet the Act's timing requirements, asked Respondents for additional time to investigate the Acquisition. Respondents made every effort to accommodate this request, and closed the Acquisition only after it became apparent that: 1) Complaint Counsel had no intention of concluding its investigation in a timely manner; and 2) the Acquisition would fall apart if it were not consummated immediately.

39 As an initial matter, Complaint Counsel has not shown that the Acquisition resulted in a structural change making collusion more likely in the industrial tank industry. This industry is not susceptible to collusive behavior because of product heterogeneity, inability to access complete information about rivals' businesses, and differences in vertical integration. (*See* ROB 144; RRB 43 n.42). *See also* Merger Guidelines § 2.1

Tr. 4796-97, 5045-46; Scully, Tr. 1217-22; *see also* ID 114) (RFOF 6.138-6.153). Further, all of the participants in the Spectrum Astro project -- including those who testified on behalf of Complaint Counsel -- testified that CB&I and PDM fought hard for this job. (Scorsone, Tr. 5046; Thompson, Tr. 2114-15; Scully, Tr. 1218-22; *see also* ID 114) (RFOF 6.141-6.152). None of them saw any evidence of collusion.[40]

Complaint Counsel also accuses Respondents of colluding with Howard Fabrication ("Howard") on a TVC opportunity for TRW. (CCRAB 9, 16-17, 48-49). This claim is also groundless. (*See, e.g.*, RRB 1165-1180, RFOF 6.127-6.137; RRFOF 1165-80). As the ALJ correctly noted, the evidence does not demonstrate that any CB&I decision maker was ever aware of or approved such a proposal or that any collusion occurred. (ID 114). Further, although an entry-level CB&I salesperson approached Howard to discuss the possibility of working together on the TRW project, he made that contact in order to determine if Howard would be willing to serve as a subcontractor to CB&I -- a perfectly legitimate business arrangement. He made that contact without knowing Howard had already provided pricing to TRW. (Scorsone, Tr. 5060-61; Gill, Tr. 274; *see also* ID 66).[41]

(b) Complaint Counsel Has Not Presented Any Credible Evidence Of Price Increases.

Complaint Counsel misleadingly asserts that CB&I has significantly increased prices and "dramatically" increased margins since the Acquisition. (*See, e.g.*, CCRAB 2-3, 8). Its claims rest primarily on comparisons of pre-Acquisition firm, fixed bid prices to post-Acquisition quotes in a preliminary form known as "budget pricing." As the ALJ correctly

40 Respondents addressed these arguments in further detail in their post-trial briefing (*See* RRB 43-44; RFOF 6.138-6.153, 6.169-6.202; RRFOF 1108-1164).

41 Complaint Counsel cites a response to a hypothetical question on direct examination by Mr. Neary of TRW as evidence. (CCRAB 3, 9, 53). The witness did not testify about established facts in this case and his hypothetical opinion should be given no weight. (*See* Neary, Tr. 1451).

noted, budget prices are less precise than firm, fixed bid prices. (*See* ID 69-70). Budget prices are provided for the purpose of helping a customer set its budgets. Unlike firm, fixed bid prices, budget prices are given without full knowledge of actual tank design, desired construction schedule, or project location. (*See* ID 69-70; Scorsone, Tr. 4999-5002; Hall, Tr. 1868; RFOF 7.1-7.38). For that reason, they are often higher than firm, fixed bid prices. (*See* RFOF 7.4-7.10). Customers do not purchase products based on budget prices, nor do they expect that budget prices will accurately depict what they would actually pay for a given project. (*See, e.g.*, Stetzler, Tr. 6379-80; Patterson, Tr. 373-374; Kistenmacher, Tr. 925; Hall, Tr. 1863-65; Price, Tr. 608-09; Simpson, Tr. 5366-68; Carling, Tr. 4472). Because of these differences, it is inappropriate to compare firm, fixed bid prices to budget pricing in attempting to determine whether prices have increased. (*See*, *e.g.*, ID 69-70, 110; Patterson, Tr. 373-74; Hall, Tr. 1869-70; Scorsone, Tr. 5003, 5250-54).

(1) The Memphis LNG projects provide no evidence of anticompetitive effects.

Complaint Counsel accuses Respondents of raising prices on LNG projects for Memphis, Light, Gas, and Water ("MLGW").[42] The ALJ correctly held that this allegation was unsupported by the evidence. Indeed, he found it to be misleading because it attempted to compare a competitively bid and negotiated actual price (given in 1994) to a budget price provided for a 50-year capital expenditure planning exercise (given in 2002). (ID 110). Such a comparison is inappropriate because budget prices are, as discussed above, preliminary in nature. (*See* ID 29-30, 110). Testimony from Complaint Counsel's own witness confirms this conclusion. MLGW's representative called the 2002 budget price a "scientific wild assed guess" because he requested it in connection with a planning exercise. (Hall, Tr. 1865-66; *see also*

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42 (*See also* RRB 49-51; RFOF 3.608-3.613; RRFOF 929-954).

Scorsone, Tr. 5251) (RFOF 3.609, 3.611). He also testified that there was "no work at stake" and that CB&I provided this estimate out of courtesy in an effort to assist MLGW. (Hall, Tr. 1864-65; *see also* ID 30) (RFOF 3.608). He also confirmed that MLGW provided CB&I minimal information regarding the proposed project and that it would have needed to provide "volumes more" information for CB&I to derive an accurate price. (Hall, Tr. 1866-67) (RFOF 3.609, 3.610).

Undaunted, Complaint Counsel incorrectly argues that "the customer believes that it is stuck and cannot get a better deal from any of the alleged foreign competitors" and that it believes CB&I to be the "only qualified supplier." (CCRAB 9, 55). This argument ignores the evidence. MLGW *has made no effort* to search for an LNG tank builder since 1994 and is not familiar with the current capabilities of new entrants. (Hall, Tr. 1843-57) (RFOF 3.653-3.657). Accordingly, MLGW has *no idea* whether it could get a better deal from a foreign tank supplier than it could from CB&I. (*See* Hall, Tr. 1843-57) (RFOF 3.653-3.657).

(2) Projects for Linde and Praxair provide no evidence of anticompetitive effects.

Complaint Counsel accuses Respondents of raising prices on projects for Linde and Praxair. (CCRAB 7, 9, 56-57). This claim lacks any merit. (*See* RRB 51-52; RFOF 5.165-5.166, 5.178-5.179, 5.185-5.211; RRFOF 1053-1086). As the ALJ correctly noted, "[n]one of [these] allegations are supported by sufficient, reliable evidence." (ID 112-13). Complaint Counsel's allegations were based primarily on a comparison of a CB&I budget price and a three-year-old PDM firm, fixed bid price to an outdated pricing model. The creator of that model

acknowledged that it was deficient in many respects. (ID 53, 113; *see also* Fan, Tr. 1049-50).[43] The ALJ properly rejected the conclusions that Complaint Counsel draws from it.

Further, Complaint Counsel's arguments are based on comparisons of budget prices provided by CB&I to Praxair and Linde for a New Mexico project to a three-year-old budget price provided by PDM to Praxair for a Colorado project. (RRFOF 1071-1086). As the ALJ correctly noted, such a comparison is baseless because there is no evidence that these projects are comparable. (ID 113). Indeed, there were substantial differences in the tank specifications, construction schedule, location, and condition of the project sites. (ID 113). The ALJ properly rejected Complaint Counsel's arguments on this score. (ID 53-54, 113).

(3) The Spectrum Astro project provides no evidence of price increases.

Complaint Counsel accuses Respondents of raising prices and margins to Spectrum Astro as a result of the Acquisition. (*See* CCRAB 9, 52-53). This argument is meritless. (*See* RRB 46-47; RFOF 6.169-6.202; RRFOF 1108-1164). As the ALJ correctly held, the evidence does not establish these allegations. (ID 114). Changes in the price of the Spectrum Astro project came after the project was already awarded and were based on scope changes in the project that were unrelated to the Acquisition.[44] Further, the customer did not believe CB&I raised its price because of the Acquisition, instead testifying that the revised pricing was a "pretty common business dispute." (Thompson, Tr. 2117) (RFOF 6.193).

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43 Mr. Fan's actual observations regarding CB&I's pricing directly contradict Complaint Counsel's argument. He acknowledged that CB&I's "price has been consistent and *has not changed*" since the Acquisition. (Fan, Tr. 1006) (emphasis added) (RFOF 5.185).

44 CB&I originally won the Spectrum Astro contract in December of 2000. (Thompson, Tr. 2061-62; Scorsone, Tr. 5115-16) (RFOF 6.169-6.170). The project never went forward. Ten months later, Spectrum Astro asked CB&I for a new price to reflect changes in project scope. (*See, e.g.*, ID 64; Thompson, Tr. 2069; Scorsone, Tr. 5047) (RFOF 6.176). CB&I submitted a price that was higher than its winning bid price to account for these scope changes and increased risk associated with the project. (Scorsone, Tr. 5049, 5116-17, 5235; Scully, Tr. 1172-73, 1222; Thompson, Tr. 2071, 2074, 2121-22; ID 64-65) (RFOF 6.180-6.184).

(4) The Cove Point project provides no evidence of anticompetitive effects.

Complaint Counsel accuses Respondents of raising prices on the Cove Point LNG project. The ALJ properly rejected this argument. (*See* ID 110-12; *see also* RRB 48-49; RFOF 3.618-3.641; RRFOF 777-830). Complaint Counsel's claim that "[t]he margin increases at the Cove Point LNG project from 4-7%, pre-Acquisition, to over 22%, post-Acquisition, are undisputed" (CCRAB 9, 53) is patently false. This statement compares PDM's initial bid on the Cove Point project to CB&I's final bid over a year later. This is comparing apples to oranges. The 4.7% figure and the 22% figure refer to different tanks of different sizes bid at different points in time. Further, the 4.7% margin figure was a projected margin while the 22% figure was an actual margin -- realized only after project execution began. (RRFOF 777-830; RRB 48-49). Finally, the 22% figure is a *gross margin*, inclusive of all applicable overhead charges. It is not, as Complaint Counsel implies, the actual net profit margin that CB&I expects to earn on this project -- the actual profit margin is far less. (*See* Scorsone, Tr. 5333-36).

It is uncontroverted that CB&I expects to earn a greater than expected margin on this project because **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5336-38, ID 111-12). Complaint Counsel complains that the ALJ relied on allegedly "self-serving" testimony (CCRAB 53) on this issue, yet cannot cite any contrary testimony on a point that is entirely its burden to prove. Such argument without evidence is neither persuasive nor proper.

(5) The CMS and Southern LNG projects provide no evidence of anticompetitive effects.

Complaint Counsel accuses Respondents of raising prices on LNG projects for CMS Energy and Southern LNG. (CCRAB 53-55). This argument is a recent concoction that Complaint Counsel failed to raise before the ALJ. It is also incorrect. While Complaint Counsel

argues that the **[xxxxxxxxx]** figure provided to CMS[45] is far higher than the price "CB&I quoted to **[xx]**, prior to the Acquisition, for the same size tank" (CCRAB 9, 54) there is *no evidence in the record* that CB&I ever provided a firm, fixed bid price to **[xx]** for an LNG tank. The only evidence cited by Complaint Counsel -- RX 157 --- is a cryptic document that contains no explanation of the numbers it contains.[46] Even if this phantom price existed, it could not be compared to pricing obtained by CMS for its Lake Charles project because there is no evidence as to where the tank would be located, when and under what schedule it would be built, the type of features it would have, when the price was provided, and under what terms the price was quoted. All of this information is essential to determine whether it can be compared to CMS's project (or any other project.)

Complaint Counsel also argues that the price provided to CMS constitutes evidence of anticompetitive effects because it is close to the allegedly "inflated cost for the Cove Point LNG tank . . . " (CCRAB 54; *see also* CCRAB 9). This argument assumes without evidentiary support that CB&I's Cove Point price was "inflated." As discussed above, it was not. Further, it assumes that the Cove Point project can be compared to the CMS project. This is patently erroneous because the two projects are located in different areas of the country, on different properties, and for different customers with different requirements. As one current LNG customer noted, it is extraordinarily difficult -- because of these differences -- to compare

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45 Complaint Counsel falsely argues that CB&I charged a margin on the Lake Charles project "over and above the price quoted by CB&I for the LNG tank." (CCRAB 54). **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxx). xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** This is a sign of healthy competition in the LNG market.

46 Interestingly, Complaint Counsel chose not to ask any **[xx]** witnesses about this document.

projects in this way. (Eyermann, Tr. 7071-72). The Commission should reject Complaint Counsel's unprincipled effort to do so here.

Finally, Complaint Counsel attempts to compare CB&I's firm, fixed bid price [xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] As discussed *supra*, it is not appropriate to compare budget prices to firm, fixed bid prices. Although the evidence clearly shows that [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (CCRAB 12). The Commission should reject this argument.

(6) The [xx] projects provide no evidence of anticompetitive effects.

Complaint Counsel accuses Respondents of forcing [xx] to enter into a sole-source arrangement with CB&I, alleging that [xx] found that foreign competitors such as Skanska/Whessoe were "higher-priced." (*See* CCRAB 12, 55-56). The ALJ properly rejected this argument because "the evidence presented at trial did not establish conclusively" that that arrangement has resulted in higher prices to [xx]. (*See* ID 110; *see also* RRB 57-58; RFOF 3.408-3.427; RRFOF 831-928). The testimony of [xxxx] own witness is consistent with the ALJ's conclusion -- he testified that [xx] believes it has enough options available to it for LNG tank contractors and that [xx] is not concerned that the Acquisition has affected its ability to obtain LNG tanks in the U.S. ([xxxxxxxx], Tr. 6075) (RFOF 3.427).

The only evidence Complaint Counsel cites in support of its argument is [xxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] The document contains no indication as to whether this pricing was provided in the U.S. or overseas[47], when the pricing was received, what assumptions were given to the vendors for purposes of making their estimates, or for what purpose the estimates were submitted.[48] The Commission should reject these unsupported allegations.

(7) Projects for [xxxxxxx] provide no evidence of anticompetitive effects.

Complaint Counsel accuses CB&I of raising prices to [xxxxxxx] It points out that PDM provided a [xxxxxxxxxxx] price to [xxxxxx] for a TVC [xxxxxxxxxxxxxxxxxxxxxxxx] in 1999, and that CB&I provided a [xxxxxxxxx] price for this project post-Acquisition. (CCRAB 9, 57-58). The ALJ properly held that the evidence did not support this allegation. (ID 114; *see also* RRB 52-53; RFOF 6.154-6.168; RRFOF 1181-1220). In fact, the evidence affirmatively established that Complaint Counsel's attempt to compare a firm, fixed bid price (PDM's price) to CB&I's "rough order of magnitude" pricing was inappropriate. As discussed *infra*, there are many differences between budget prices and firm, fixed bid prices that make such comparisons meaningless. Here, PDM's firm, fixed bid price was provided in 1999 and was given after PDM had complete information regarding the project. (*See* Scorsone, Tr. 5081-82) (RFOF 6.154). By contrast, CB&I's budget price was given three years later (*e.g.*, ID 68) without [xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] CB&I needed this information to produce a firm, fixed bid price and made this fact clear to [xxxxxx] in writing. (*See* Scorsone, Tr. 5000-20,

47 Complaint Counsel has presented no evidence that [xx] was planning to purchase an LNG tank in the U.S. in 1998.

48 After the date of the estimates contained in RX 157, Whessoe beat CB&I and PDM on firm, fixed bid prices in India and in Trinidad. Whessoe has also bid on the Dynegy project, providing a price that satisfied the customer. (Puckett, Tr. 4557) (RFOF 3.288).

5084; CX 1573; ID 68).[49] Accordingly, the ALJ properly concluded that CB&I did not implement a price increase on this project. (*See* ID 114). The Commission should reject Complaint Counsel's arguments to the contrary.

2. CONTRARY TO COMPLAINT COUNSEL'S CLAIMS, THE ALJ PROPERLY EXCLUDED EVIDENCE REGARDING ALLEGED ANTICOMPETITIVE CONDUCT.

Complaint Counsel complains that the ALJ improperly refused to consider certain evidence that it proffered at trial. These arguments are meritless. For example, Complaint Counsel argues that the ALJ improperly struck certain demonstrative exhibits that were not received into evidence, arguing that such exhibits were nothing more than "pedagogical aids" to understanding already-admitted evidence. (CCRAB 50). Yet, Complaint Counsel fails to disclose that it attempted to introduce these so-called "pedagogical aids" into evidence at trial, and that the ALJ *rejected them* because they were unreliable. For example, in CCFOF 826, Complaint Counsel presented a chart relating to the Cove Point project. This chart had originally been marked as CX 1761, offered as a demonstrative exhibit, *and rejected* by the ALJ because Complaint Counsel could not prove that it was reliable, probative evidence. (*See* Tr. 8106-09).[50] These charts and graphs are not mere representations of an undisputed number (as were the charts found to be probative in *Schering*.) They are misleading comparisons in graphic form and were properly stricken.

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49 [xxxxxx] never paid the ROM price quoted by CB&I, as it subsequently cancelled the project. In fact, [xxxxxx] never even asked CB&I for a follow-up firm price. ([xxxxxx], Tr. 1947, 1951; ID 69).

50 Other similar findings include CCFOF 882 and CCFOF 913. CCFOF 882 is a replica of CX 1760, which was admitted into evidence as a demonstrative exhibit only after Dr. Harris made numerous changes to it. (Tr. 8035-42). Yet, Complaint Counsel did not bother to discuss Dr. Harris' changes in CCFOF 882. Similarly, CCFOF 913 is a reincarnation of CX 1763. Complaint Counsel questioned Dr. Harris regarding the substance of the exhibit; it did not discuss any of that testimony in CCFOF 913. (Court, Tr. 7977).

Similarly, Complaint Counsel complains that the ALJ refused to admit certain excerpts from the deposition of a potential CB&I expert witness (John Vaughn) -- who never testified in this case -- regarding the ability to compare budget prices to firm, fixed bid prices. (*See* CCRAB 58). The ALJ properly excluded this testimony for several reasons: *First*, Complaint Counsel failed to provide proper notice that it intended to use Mr. Vaughn as an expert witness. (*See* Court, Tr. 7671). *Second*, because Respondents chose not to call Mr. Vaughn as a witness, he was not authorized to testify on Respondents' behalf and his statements could not be used against Respondents. (*See* Court, Tr. at 7672). *Third*, and finally, the scope of Mr. Vaughn's expert testimony was limited to a refutation of one of Complaint Counsel's witnesses.[51] Because the testimony proffered by Complaint Counsel is unrelated to that topic, the ALJ properly excluded it. (*See* Court, Tr. at 7674).[52]

3. COMPLAINT COUNSEL IMPROPERLY ATTEMPTS TO SHIFT THE BURDEN OF PROOF REGARDING ITS ALLEGATIONS OF ANTICOMPETITIVE EFFECTS.

Complaint Counsel's story of alleged anticompetitive effect is nothing more than a collection of misstatements and unsupported interpretations of a few documents. Yet, Complaint Counsel argues that the ALJ erred in requiring it to present reliable, probative evidence in support of its allegations, citing to *Lenox, Inc.*, 73 F.T.C. 578, 603-04 (1968). (*See* CCRAB 49-50). This argument assumes that Complaint Counsel can make any unfounded allegation that it pleases, and that Respondents have the burden of proving that allegation untrue. Such a rule

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51 This witness was Chung Fan of Linde Process Plants.

52 Even if the ALJ had admitted Mr. Vaughn's testimony, it would not outweigh the extensive evidence demonstrating that comparing budget pricing to firm, fixed bid prices is improper. *See infra.* This is especially true in light of the fact that Mr. Vaughn was an estimating manager (not a sales manager) who retired from CB&I three years ago. *See* Respondents' Motion to Withdraw Inadvertently Stipulated Documents from Evidence, at 4 (filed Dec. 31, 2002) (granted Jan. 10, 2003) (Court, Tr. 7667, 7670-71).

would upset the settled principle that Complaint Counsel bears the burden of proof in a Section 7 case *at all times*. *See Baker Hughes*, 908 F.2d at 983. The ALJ properly held Complaint Counsel to this standard with respect to its allegations of anticompetitive effects.

Complaint Counsel's reliance on *Lenox* is misguided. *Lenox* merely limits Respondents' ability to invoke the hearsay rule to defeat the admission of documents into evidence. It does not require Respondents to prove that Complaint Counsel's reckless assumptions related to those documents are inaccurate. *See Lenox*, 73 F.T.C. at 603-04. Indeed, were *Lenox* to be read otherwise, it would contravene the settled principle that Complaint Counsel always bears the burden of proof in a Section 7 case. The Commission should not endorse such a reading of *Lenox*.

B. COMPLAINT COUNSEL'S PROPOSED REMEDY IS OVERBROAD, WHOLLY UNSUPPORTED BY RECORD EVIDENCE, AND ITS POTENTIAL EFFECTS ARE UNKNOWN.

Respondents have argued that, regardless of whether the Commission finds that the Acquisition violated Section 7, divestiture is not appropriate in this case. (*See* RAB 52-57).[53] This conclusion is mandated by the evidence, and it should be a strong factor in the exercise of the Commission's discretion to create an equitable remedy that will fit the "exigencies of [this] particular case." *United States v. E.I. DuPont de Nemours*, 366 U.S. 316, 319 (1961). As Dr. Harris testified, in order to increase the level of competition from current levels, the Commission must ensure that a remedy results in two low-cost competitors. (*See* Harris, Tr. 7367-68).

Despite the paucity of evidence supporting the imposition of any divestiture in this case, Complaint Counsel has appealed the divestiture remedy imposed by the ALJ, seeking to significantly augment it. Its Proposed Order is overbroad and advocates unprecedented remedial measures that were not even part of the proposed order presented to the ALJ. Most critically, the Proposed Order -- with its array of financial commitments imposed on CB&I -- is structured in such a manner as to virtually guarantee that CB&I will not be able to remain a low-cost competitor in all of its product lines, including the relevant products. This will translate directly into higher prices for customers -- a result that is 180 degrees from the Commission's mandate to promote competition and protect customers.

1. THE PROPOSED ORDER IS OVERBROAD.

Complaint Counsel has never, in any fully-litigated antitrust case, obtained relief of the type and scope that it seeks here.[54] The Proposed Order contains numerous provisions that

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[53] Complaint Counsel incorrectly asserts that it is "undisputed that divestiture is the appropriate remedy." (CCRAB 65).

[54] As discussed *infra*, Complaint Counsel's citations to negotiated consent decrees are inapposite.

have no support in either fact or antitrust law. For example, Complaint Counsel seeks to require CB&I to pay its employees to go work for a new acquirer and to pay its customers to allow assignment of their contracts to that acquirer. (CCRAB 69-75; CCPO 6-9). To Respondents' knowledge, the Commission has never imposed burdens on this scale in a Part III proceeding. Similarly, Complaint Counsel seeks to force CB&I to divest foreign contracts without presenting evidence that any of them have any connection to U.S. commerce. (*See* CCRAB 71). To Respondents' knowledge, the Commission has never authorized the divestiture of overseas assets in such a way, nor has Complaint Counsel made any showing that the Commission has the power to do so. *See* 15 U.S.C. § 18. Indeed, such a remedy would be particularly inappropriate given that Complaint Counsel limited the geographic definition of the markets at issue to the U.S. (*See, e.g.*, ID 5).

In fact, the Proposed Order is so far-reaching and overbroad that it contradicts the very antitrust laws that the Complaint Counsel is charged with protecting, as it would require CB&I to exchange confidential information with a potential acquirer. For example, it grants an acquirer carte blanche access to "all Customer Contracts" currently held by CB&I for a period of 60 days. (*See* CCPO 6). Such a provision potentially violates pre-existing confidentiality agreements between CB&I and its customers, and would provide the acquirer with detailed information regarding costs, margins, and other proprietary information. Exchange of such information would promote collusion.

In short, the broad scope of this Proposed Order is wholly unsupported by fact or law. For this reason alone, it should be rejected.

2. THE PROPOSED ORDER IS THE LATEST VERSION OF A CONSTANTLY-CHANGING COLLECTION OF PROPOSED REMEDIAL MEASURES.

Throughout this litigation, Complaint Counsel kept its intentions regarding the specifics of its proposed remedy close to the vest. It provided only the barest sketch of its contemplated remedy in its Notice of Contemplated Relief. (*See generally* Complaint). Complaint Counsel failed to ask a single question regarding the impact of its planned remedy on CB&I's ability to remain a low-cost competitor or upon the customers it was seeking to protect.[55] Complaint Counsel's closing argument eschewed any obligation to provide specifics regarding the implementation or impact of its proposed remedy, shifting the burden to the Compliance Division to address specifics long after the trial concluded and without the accountability afforded by cross-examination.[56] This directly contradicts the position taken by Complaint Counsel in this litigation -- that cross-examination is "the greatest legal engine ever invented for the discovery of truth." (*See* Complaint Counsel's Opposition to Respondents' Motion to Call Certain Witnesses By Deposition, at 4, filed November 3, 2002) (citing *United States v. Green*, 399 U.S. 149, 158 (1970)).

It was not until February 14, 2003 -- eighteen months after the Acquisition and four weeks after the conclusion of the trial -- that Complaint Counsel revealed a proposed order as part of its post-trial briefing to the ALJ. (*See generally* CCOB). This proposed order -- for the first time -- contained detailed provisions regarding, *inter alia*, assignment of contracts and

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55 The only questions asked were overly general and not probative -- their predicates assumed that PDM could be magically recreated. (*See, e.g.*, Neary, Tr. 1502).

56 (*See* Robertson, Tr. 8346) ("They're going to have to send the PDM Water Division and EC Division back in a way that is competitive. They've said, well, we don't know how to do this. Well, they may not know how to do it, but we do. We have a whole section here, Your Honor, and I don't know how much dealings you've had with them, but there is a Compliance Section here at the FTC. They deal with these types of issues all the time.").

divestment of employees and intellectual property. The ALJ rejected many of these provisions based on application of existing law. (*See* ID 121-23). Now, on appeal nearly one year after the trial began, Complaint Counsel has presented a Proposed Order containing new and substantially modified provisions that are *even more draconian* than the one submitted to the ALJ. For example, as discussed more fully *infra*, Complaint Counsel's Proposed Order contains -- for the very first time -- provisions that would require CB&I to use "all available means" to secure customer consent to assign contracts to the acquirer, including the payment of incentives or discounts. (*See* CCPO 6). Another brand-new provision would require CB&I -- if it is unsuccessful in securing such consent -- to "enter into such agreements, contracts, or licenses . . . as are necessary to realize the same effect as such transfer or assignment." (*See id.*) Other new and substantially modified provisions abound throughout the Proposed Order, including provisions that require CB&I to: 1) divest a third of its contracts outside the U.S. (CCPO 6); 2) provide an Acquirer carte blanche access to "all Customer Contracts" currently held by CB&I for a period of 60 days (*see* CCPO 6); and 3) incentivize its employees (with large salaries and pension benefits) to go work for an acquirer. (*See* CCPO 8-9).

In short, the Proposed Order is a moving target that Respondents were not even able to see until after the trial concluded and that *continues to move* during the appellate process. Complaint Counsel's attempt to raise new arguments now must be rejected on fundamental grounds of fairness because Respondents have no opportunity to present evidence against such provisions. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 452 (1985) (stating "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'" and "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a

hearing *before* he is deprived of any significant property interest.") (citations omitted). Complaint Counsel's approach also violates the Commission's own Rules of Practice, which prescribe that "[e]very party . . . shall have the right of due notice, cross examination, presentation of evidence . . . and all other rights essential to a fair hearing." F.T.C. Rule 3.41(c). Respondents have neither been given "due notice" nor a "presentation of evidence" in support of the Proposed Order that Complaint Counsel now pursues.

3. THE EVIDENCE INDICATES THAT THE PROPOSED ORDER WILL NOT ONLY BE INEFFECTIVE, BUT THAT IT WILL HARM THE VERY CUSTOMERS IT IS INTENDED TO PROTECT.

Complaint Counsel was obliged to present some evidence as to the efficacy and feasibility of its proposed remedy. (RAB 55-56). Courts that have addressed the issue of remedy have held that a "party has the right to judicial resolution of disputed facts not just as to the liability phase, but also as to appropriate relief." *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).[57] Even the authority cited by Complaint Counsel (CCRAB 65) is consistent with this principle. The Supreme Court, in *DuPont*, remanded the proceedings to the trial court *for the specific purpose* of receiving evidence regarding what would be a "necessary and appropriate remedy." *United States v. E.I. DuPont de Nemours*, 353 U.S. 586, 607 (1957). Here, Respondents have been deprived of proper judicial resolution on the issue of remedy because Complaint Counsel failed to present evidence regarding remedy at

57 Complaint Counsel has previously argued that *Microsoft* is irrelevant because it is not a Section 7 case. (*See* CCOB at 45; Robertson, Tr. 8137). This form over substance argument misses the mark. Both *Microsoft* and the instant case address the appropriate relief where the respondent has been adjudged to acquire market power. Further, *Microsoft* relied on Section 7 cases and other antitrust jurisprudence in support of its ruling that the district court was required to examine "remedy evidence" in order to properly enter an order to break up the company. *See Microsoft*, 253 F.3d at 101-02 (requiring the district court to hear remedy-specific evidence and citing cases such as *United States v. Ward Baking Co.*, 376 U.S. 327, 330-31 (1964) (requiring remedy evidence in a Section 1 Sherman Act case) and *Ford Motor Co. v. United States*, 405 U.S. 562, 578 (1972) (requiring remedy evidence in a Section 7 case)).

trial and failed to inform Respondents as to the specifics of its proposed remedy.[58] As discussed in detail below, the lack of evidence as to the Proposed Order makes it nothing more than an experiment lacking any guarantees of success. Further, this experiment entails a significant risk of harming competition in the relevant markets. To the extent the Commission believes that implementing portions of the Proposed Order may be appropriate, it should -- at a minimum -- remand this case for additional evidence as to the issue of remedy. *See* F.T.C. Rule 3.54(c) (permitting Commission to withhold final order to receive additional information).[59]

(a) The Portion Of The Proposed Order That Mandates Divestiture Of Employees Is Unsupported By The Evidence.

The Proposed Order would require CB&I to pay its employees a one-year severance, raises, and "bonuses and vesting of all current and accrued pension benefits" to incentivize them to work for an acquiring company. (*See* CCPO 8-9; CCRAB 74-75). While the ALJ properly rejected the notion of employee divesture because there is "no authority supporting the proposition that at-will employees are assets that may be divested," he ruled that CB&I could not prevent its employees from seeking employment elsewhere. (*See* ID 123). Here, in a provision never seen before, Complaint Counsel requests divestiture of employees through an incentive plan that would cripple CB&I's ability to offer low tank prices. It asks the Commission

58 Aware of some of the broad outlines of a potential remedy, Respondents were able to pursue some general questioning regarding potential provisions. However, the Proposed Order Complaint Counsel now advances in its cross-appeal is far more broad than Respondents could have imagined.

59 Complaint Counsel argues that Respondents' counsel "concede that effective relief must include much more than what is required in the ALJ order." (CCRAB 70 n.36) (citing J. Leon). This argument is off-base, and takes Mr. Leon's comments out of context. Mr. Leon merely made the point that Complaint Counsel failed to present any evidence on remedy and that there is no evidence from which a proper divestiture order (assuming one were proper) could be created. (*See* Leon, Tr. 8316 ("The witnesses in this case have raised a number of issues concerning the breakup remedy, and Complaint Counsel has no evidentiary response . . . .")).

to require CB&I to provide all employees who have received offers of employment from the "Acquirer" with a "payment of an incentive equal to up to twelve (12) months of such employee's base salary . . . ." (CCPO 9).

In support of these provisions, Complaint Counsel asserts that these provisions are similar to those contained in the *MSC Software* and *ADP* consent decrees. (CCRAB 75). This argument is meritless because, as the ALJ correctly noted, it is inappropriate to use negotiated consent decrees as precedent in litigation. (*See* ID 123) (quoting *E.I. DuPont*, 366 U.S. at 330 n. 12). Even if it were appropriate to do so, these consent decrees are far less burdensome than the remedy Complaint Counsel seeks here. The *MSC Software* consent decree did not require respondents to make incentive payments to employees to encourage them to leave. *See In re MSC Software Corp.*, No. 9299, Decision and Order (Oct. 29, 2002) (*available at* http://www.ftc.gov/os/2002/11/mscdo.pdf). In *ADP*, the respondents were permitted to match or exceed the compensation offered by the acquirer for its employees who did not come over with the business that it had acquired. *See In re Automatic Data Processing, Inc.*, No. 9282, Decision and Order (Oct. 29, 1997) (*available at* http://www.ftc.gov/os/1997/10/autoinfo.htm).

Whether or not prior consent decrees shed light on the appropriateness of such a remedy, there is no evidence here to support the inclusion of such provisions. There is no evidence that such an incentive would be necessary to convince employees to work for an acquirer, no evidence as to whether CB&I could afford to pay such incentives, and no evidence as to whether such incentives would drain CB&I's workforce to the point that it could no longer compete in the relevant markets -- or any other market for that matter. In fact, at least one large LNG customer has expressed concern that a divestiture could rob CB&I of the ability to engineer

LNG tanks because it was already light on employees with such experience and capabilities. (*See* Sawchuck, Tr. 6077-78) (RFOF 9.31).

(b) The Portion Of The Proposed Order That Mandates Assignment Of Contracts Is Unsupported By The Evidence.

Complaint Counsel argues that the Commission should force CB&I to reconvey to an acquirer PDM's fair share of business that it would have had "but for" the Acquisition. (CCRAB 64).[60] While the ALJ's remedy provides for divestiture of "all contracts formerly held by PDM and obtained by CB&I in the Acquisition that have not been fully performed . . . " (ID 122), Complaint Counsel seeks divestiture of contracts not acquired in the Acquisition. (*See generally* CCRAB 69-73). Specifically, it asks the Commission to force CB&I to divest "a total monetary value of no less that 33% of the total combined dollar value of CB&I's Tank Business Customer Contracts and no less than 48% of the total combined dollar value of CB&I's United States Tank Business Customer Contracts." (*See* CCPO 6). The ALJ properly refused to order divestiture of after-acquired assets because they are irrelevant, except to the extent that they "represent reinvestment of capital realized from the sale of property included in a forbidden acquisition and replacement of that property." *Reynolds Metals Co. v. F.T.C.*, 309 F.2d 223, 231 (D.C. Cir. 1962) (cited at ID 122).[61] Here, Complaint Counsel failed to present any evidence that divestiture of after-acquired contracts was necessary. Even Complaint Counsel's own expert

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60 Complaint Counsel's cites to *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-37 (1967) and *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1970) (CCRAB 66 n.27) miss the mark. In both cases, the Supreme Court found insufficient evidence on the issue of remedy and remanded for additional proceedings. *See* 386 U.S. at 137; 395 U.S. at 469. If the Commission believes that Complaint Counsel's remedy is appropriate, it should, at a minimum, remand this case for further proceedings on remedy. *See* F.T.C. Rule 3.54(c).

61 Complaint Counsel attempts to distinguish *Reynolds Metals* on the ground that it "found that there was no record support for divestiture of assets beyond what was acquired in the unlawful acquisition." (CCRAB 68 n.34). This is not a distinction -- Complaint Counsel's attempt to obtain after-acquired assets suffers from exactly the same problem. As discussed in detail below, it has utterly failed to present any evidence as to its proposed remedy.

failed to identify the assignment of contracts as something that would be required in order to recreate a competitive force equal to PDM. (*See* Simpson, Tr. 3606-09).

Whether or not Complaint Counsel adequately proved that its proposed contract divestiture plan was well-grounded and that it would assist in restoring competition, it presented no evidence showing that CB&I would *even be able* to divest the number of contracts contemplated by the Proposed Order. Indeed, the evidence demonstrates that most of CB&I's contracts contain non-assignability and key employee clauses which prohibit transfer to another company. (*See* ID 80-81; RFOF 9.16-9.17; Glenn, Tr. 4168-69; ROB 166). While the Proposed Order would require CB&I to "obtain all consents and waivers from all third parties" for the assignment of contracts (CCPO 6), it provides no guidance to CB&I on how to legally break terms of its contracts.

Complaint Counsel weakly argues that because PDM was easily able to obtain contract assignments to CB&I at the time of the Acquisition, CB&I can do so now. (CCRAB 73 n.44, 74 n.45). This argument is off-base. Customers were willing to accept a contract assignment to CB&I because: 1) PDM was going out of business and would not be able to perform the contracts; and 2) CB&I was already an established entity with the ability to build the project. By contrast, were the Proposed Order to be adopted, customers would be asked, in lieu of maintaining a relationship with CB&I (a company that would not be exiting the market), to assign their contract to a new company formed without the benefit of natural market forces. (*See* RRFOF 1349).[62]

Perhaps recognizing that customers may be reluctant to assign their contracts to a company that does not currently exist, Complaint Counsel -- in two provisions never seen before

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62 As discussed *infra*, the construction of a new competitor does not assure that competition will be improved or even that it will be as strong as current competition. Complaint Counsel has presented no evidence in this regard.

-- asks the Commission to require CB&I to "use all available means" to secure customer consents, "including, but not limited to, offering *any* incentive or discount necessary to obtain such consent." (*See* CCPO at 6) (emphasis added). Further, if CB&I is unsuccessful in obtaining such consent, the Proposed Order would require it to "enter into such agreements, contracts, or licenses, only with the prior approval of the Commission, as are necessary to realize the same effect as such transfer or assignment." (*Id.*) None of these provisions are supported by evidence. There is no evidence that any customer would agree to such an incentive, what the value of the incentive would need to be in order to attract customers, or whether CB&I is financially capable of providing sufficient financial incentives to engineer the divestment of the prescribed number of contracts. Further, in the event that a customer refused substantial incentives to assign its contract, there is no evidence as to what types of other "agreements, contracts, or licenses" that CB&I could enter into that would have the same effect.

Finally, even if the Commission believes that a divestiture of contracts in excess of the amount provided by the ALJ's order is necessary, there is no evidence as to how many contracts must be divested. Complaint Counsel blithely asserts that CB&I should divest substantial portions of pending contracts, without regard to whether such a divestiture is necessary to restore any loss of competition.[63] To arrive at the specific amount of the proposed divestiture, Complaint Counsel arbitrarily combined the 1999 revenues of CB&I and PDM's tank businesses, and determined that PDM had 33.5% of the combined worldwide revenue and 48.2% of the combined U.S. revenue in these businesses. (*See* CCRAB 71-72). Based on this one fact, Complaint Counsel argues that CB&I should be forced to divest 33% of its *current* worldwide

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63 *See DuPont*, 366 U.S. at 326 ("The key to the whole question of an antitrust remedy is of course the discovery of measures *effective to restore competition*.") (emphasis added).

tank business and 48% of its *current* U.S.-based tank business. (CCRAB 71, 73). This approach is completely baseless for several reasons:

First, Complaint Counsel's approach is based on the unsupported assumption that there are contracts "which PDM likely would have won if it has not been acquired by CB&I." (CCRAB 72). Neither Complaint Counsel nor Respondents can even speculate as to which contracts would have "likely" gone to PDM but for the Acquisition. Indeed, there is substantial doubt as to whether PDM would have won any contracts absent the Acquisition because it was exiting the market. (*See* RAB 58-60; *see also* Part I-E, *supra*).

Second, Complaint Counsel has presented no evidence as to whether forcing CB&I to divest 33% of its worldwide tank business and 48% of its U.S. tank business would actually accomplish the goal of restoring "the competitive strength" of PDM at the time of the Acquisition. *See In re Ekco Prods. Co.*, 65 F.T.C. 1163, 1217 (1964). Indeed, if CB&I's current revenues exceed the combined CB&I/PDM revenue from 1999, the acquiring company would receive a company that was *stronger* than PDM was at the time of the Acquisition. There is no precedent for imposing such a punitive measure.

Third, Complaint Counsel fails to explain why it uses 1999 as its yardstick. Indeed, such an approach would be unduly prejudicial, as the evidence demonstrates that 1999 was a record year for PDM and that its revenues declined substantially in 2000 -- the last full year prior to the Acquisition. (*See* CX 525 at TAN 1000383 (2000 Revenue); CX 522 at TAN 1003382 (1999 Revenue)).

Moreover, there is no indication that such a plan would be workable and desirable to customers.[64] In fact, many customers testified that a divestiture could be harmful to

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64 Complaint Counsel asserts that "[s]everal witnesses testified as to the desirability of Complaint Counsel's proposed remedy." (CCRAB 70). This is false. Mr. Neary never testified that TRW would be

competition. (*See, e.g.*, Bryngelson, Tr. 6154-55; J. Kelly, Tr. 6265; Sawchuck, Tr. 6077; Izzo, Tr. 6511-12) (RFOF 9.8-9.10). Because Respondents never had a chance to see this proposal during the trial, it would defy due process to argue that they should have presented evidence on these topics. The Commission should reject Complaint Counsel's attempt to augment provisions regarding the assignment of contracts crafted by the ALJ.

(c) The Portion Of The Proposed Order That Mandates Divestiture Of Confidential Information Is Unsupported By The Evidence.

The Proposed Order requires CB&I to waive "any contractual impediments, such as any non-compete or confidentiality provisions of employment" of any employees seeking employment with the acquirer. (*See* CCPO 8). This provision essentially encourages the exchange of confidential business information between competitors, and denies CB&I confidentiality regarding issues unrelated to the relevant products. This provision serves no rational purpose, is unsupported by the evidence, and is nothing more that a punitive measure designed to punish CB&I.[65]

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willing to work with a newly-divested company, whether it would require incentives in order to agree to a contract assignment, and if so, what the value of those incentives would need to be. (*See* Neary, Tr. 1502). Similarly, Dr. Simpson was unable to offer any opinions on these topics. In fact, when asked to name a single customer who supported a divestiture, Dr. Simpson stated "None come to mind." (*See* Simpson, Tr. 5718).

65 Information exchange provisions in *MSC Software* and *ADP* were far narrower. MSC was not required to turn over all of its customers files (only those of the companies it acquired) and was not required to provide the acquirer with access to all confidential and proprietary information. Although MSC was required to license its own software program as well as the software it had acquired, MSC was allowed to retain full rights to all of the software. *See In re MSC Software Corp.*, No. 9299, Decision and Order (Oct. 29, 2002) (*available at* http://www.ftc.gov/os/2002/11/mscdo.pdf). In *ADP*, the consent decree did not require ADP to turn over all of its confidential and proprietary records. *See In re Automatic Data Processing, Inc.*, No. 9282, Decision and Order (Oct. 29, 1997) (*available at* http://www.ftc.gov/os/1997/10/autoinfo.htm).

(d) The Portion Of The Proposed Order That Requires CB&I To Provide Transitional Assistance Is Unsupported By The Evidence.

The Proposed Order requires CB&I to provide the acquirer with "transitional technical assistance and administrative services . . . to the acquirer." (CCRAB 75-76; CCPO 9). The ALJ correctly rejected such a provision because "Complaint Counsel did not demonstrate that [these transitional services] are not available from a source other than CB&I." (ID 123). Indeed, Complaint Counsel failed to make any showing that such assistance was necessary, that CB&I was capable of providing such assistance, or that such assistance was not available via other means. For these reasons, the Commission should reject this provision.[66]

4. THE PROPOSED ORDER PRESENTS SEVERE OBSTACLES TO CB&I'S ABILITY TO BE A LOW-COST COMPETITOR.

In order for any relief to be effective, it must create two low-cost competitors. (Harris, Tr. 7367-68). To do otherwise would "hurt competition in all four markets." (Harris, Tr. 7375-76) (RFOF 9.18-9.20). As Dr. Harris explained, "[i]t does no good to create two new competitors with both of them having higher costs and it also does no good for one low cost and one higher cost. . . ." (Harris, Tr. 7367-68). There is no evidence in the record to suggest that any divestiture could create two low-cost companies. (*Id.*) Further, there is good reason to believe that the Proposed Order would do just the opposite by imposing massive costs on CB&I and reducing its ability to be a low-cost competitor.[67] For example, CB&I would conceivably need to spend millions of dollars in customer incentive payments to secure permission for contract assignments. Similarly, CB&I could easily end up paying tens of millions of extra dollars in employee incentives over the next two to three years. As discussed above, there is no

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66 Complaint Counsel's request for a monitor trustee (CCRAB 76) should be denied for the same reasons.

67 Of course, Dr. Harris was unable to examine the proposed order provided to the ALJ or the Proposed Order currently before the Commission, as neither was available for review during the trial.

evidence as to how much CB&I would need to spend on these items or whether that amount is one that CB&I could afford. CB&I would likely need to raise prices in order to pay for these costs. In the end, while the Proposed Order may well create two companies, those companies are likely to be higher-cost. This would be a Pyrrhic victory for consumers, who would need to pay higher prices.

Even if CB&I could remain a low-cost competitor, these added costs would certainly reduce CB&I's overall financial size. A competitor's financial size can affect its ability to meet customers' bonding requirements. (RAB 52-55; ID 81-82; *see also* Izzo, Tr. 6511-12) (RFOF 9.22-9.26). In fact, some customers have expressed concern that a CB&I with less financial clout may not be as effective a competitor, and that such a result would actually lead to less competition in the LNG market. (*See, e.g.*, Bryngelson, Tr. 6127-28, 6154-56; Izzo, Tr. 6511-12; [xxxxxxxxxxxxxxxxxxxxxxxxx]) (RFOF 9.9, 9.21-9.26). As one current LNG customer explained:

> I'd be concerned about whether either of the two residual companies would have the bonding or guarantee ability to make our bid list. . . [W]hether a split company -- whether CBI would make it would depend on what was left of the company. *I think they would be disadvantaged compared to the other companies I'm talking about from an ability to guarantee the work to the owner.*

(Izzo, Tr. 6511-12) (RFOF 9.24) (emphasis added). Absent further entry, such a result may ultimately lead to higher prices.

CONCLUSION

For the reasons set forth above, Respondents respectfully submit that the Complaint as to all product markets should be dismissed with prejudice.

Dated: October 17, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nada S. Sulaiman, hereby certify that on this 17th day of October, 2003, I served a true and correct copy of Respondents' Reply and Cross-Appeal Response Brief, by hand delivery upon:

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I caused one copy of Respondents' Reply and Cross-Appeal Response Brief to be served by hand delivery upon the following persons:

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