United States of America

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' APPEAL BRIEF

PUBLIC RECORD VERSION

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The following abbreviations and citation forms are used:

CCOB	Complaint Counsel's Opening Brief
CCFOF	Complaint Counsel's Proposed Findings of Fact
CCRB	Complaint Counsel's Reply Brief
CX	Complaint Counsel's Exhibit
ID	Initial Decision
RFOF	Respondents' Proposed Findings of Fact
ROB	Respondents' Opening Brief
RRB	Respondents' Reply Brief
RX	Respondents' Exhibit

STATEMENT OF THE CASE

STATEMENT OF FACTS

Chicago Bridge & Iron ("CB&I") acquired the Engineered Construction and Water Divisions of Pitt-Des Moines, Inc. ("PDM") for approximately $80 million (the "Acquisition") on February 7, 2001. The Acquisition was part of PDM's strategy to sell its assets and unlock the value of its thinly-traded stock. Pre-Acquisition, CB&I and PDM competed in many markets, including the markets for liquid natural gas ("LNG") tanks, liquid petroleum gas ("LPG") tanks, liquid nitrogen and liquid oxygen ("LIN/LOX") tanks, and thermal vacuum chambers ("TVCs"). The parties notified the FTC and the Department of Justice of the transaction pursuant to the HSR Act; the HSR waiting period expired on October 12, 2000 without action. Shortly thereafter, the FTC began its investigation. Respondents voluntarily delayed closing until February 7, 2001 to accommodate this investigation. On October 25, 2001, the FTC filed its Complaint in this matter.

Since the Commission last reviewed this transaction in October of 2001, the relevant markets have changed dramatically, as numerous strong competitors have entered the relevant markets. The LNG market is a case in point. At the time Respondents met with the Commissioners, CB&I and PDM had been the only two companies that had bid on (with the exception of one project) LNG tanks in the U.S. in the last decade. By the time trial in this matter began, three powerful firms with substantial global expertise in constructing LNG facilities had already entered the market. *See* Part II, *infra*. Each firm owns or is allied with a U.S. constructor to form a combination focused on competing for U.S. LNG projects. Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V have already actively sought U.S. LNG work; they have solicited LNG owners and have bid on available projects. One of these competitors has already won a large U.S. LNG project. Further, four additional experienced multinational corporations are poised to enter the market, having already made efforts to secure a U.S. presence and having already made sales calls to U.S. LNG owners. Most importantly, prospective LNG customers who have researched the market have expressed comfort with these new entrants, universally agreeing that they can effectively compete in the U.S. CB&I has already recognized this new competitive threat, which has had a significant impact on its business.

The LIN/LOX market has seen an even more dramatic change. American Tank & Vessel ("AT&V"), the third-largest tank manufacturer in the U.S., entered around the time of the Acquisition and has won three of four competitively-bid jobs since that time at pre-Acquisition prices. In fact, AT&V has yet to lose a LIN/LOX bid contest in which it has participated. Matrix Services Company ("Matrix") has also become a frequent market participant, bidding on all available post-Acquisition jobs. Chattanooga Boiler & Tank ("Chattanooga") -- a well-equipped and qualified tank company -- has also entered this market. LIN/LOX customers now have more bidding choices than ever and are receiving post-Acquisition prices equal to or better than pre-Acquisition prices. CB&I is losing bids in this market at or near zero margin.

The LPG market is characterized by extremely low demand. In the past five years, only four LPG tanks have been built. (Harris, Tr. 7288). CB&I had not built one in the eight years prior to the Acquisition. Despite lack of demand, new entry has occurred in the past few years. AT&V has bid on both available LPG projects and has won one of the two -- beating out CB&I. In addition, Matrix has recently entered, bidding on both of these jobs. Finally, Chattanooga -- armed with the equipment and ability to build an LPG tank -- is prepared to enter the market. Evidence shows that LPG customers are receiving competitive pricing. *See* Part II, *infra*.

The TVC market is virtually nonexistent. Since 1990, only one project has been built. CB&I has not built a TVC since 1984. Future demand in this market is projected to *decrease*. Because there has been no activity in this market, it is impossible to discuss entry. To some degree, the other three markets suffer from the same problem. Even the largest (in terms of number of projects) has yielded only one or two projects per year since the Acquisition.

DESCRIPTION OF PROCEEDINGS BELOW

The complaint charged that the Acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Trial commenced on November 12, 2002 and concluded January 16, 2003. In an initial decision filed June 12, 2003, Administrative Law Judge D. Michael Chappell ("the ALJ") ordered "complete divestiture" of the Acquisition. He found that "the effect of the Acquisition of PDM's EC and Water Divisions by CB&I may be to substantially lessen competition in the relevant markets." (ID at 3). He also held that Complaint Counsel's HHI evidence was unreliable, but nonetheless found that Complaint Counsel made its prima facie case by demonstrating that CB&I and PDM were each other's closest competitors in the relevant markets pre-Acquisition. (ID at 89-98).

Respondents offered extensive rebuttal evidence that: 1) actual entry had occurred; 2) entry barriers were low; and 3) customers were sophisticated, but the ALJ found that this evidence was insufficient to rebut the prima facie case because entry was insufficient to constrain CB&I's market power and because entry barriers were high. (ID at 103-09). Respondents also presented evidence that the Acquisition did not reduce competition because PDM was exiting these markets and would not have competed after 2001. The ALJ concluded that PDM did not make sufficient efforts to sell its EC Division to anyone besides CB&I. (ID at 114-18).

The ALJ ordered "complete divestiture" (ID at 121-22) even though Respondents presented substantial evidence that this remedy was not desired by customers and would not achieve Complaint Counsel's objectives. Complaint Counsel presented no credible evidence on the efficacy of such a remedy. Because the ALJ believed that assets of the EC and Water Divisions were "inextricably intertwined" at the time of the Acquisition, he ordered divestiture of the Water Division in his Order, even though it was not related to the relevant markets. (ID at 122).

QUESTIONS PRESENTED

1. Did Complaint Counsel fail to prove a prima facie case under Section 7?

2. Assuming *arguendo* a prima facie case, did Respondents rebut it under *United States v. Baker Hughes*?

3. Assuming *arguendo* the existence of liability, is the ordered remedy consistent with record evidence and applicable legal standards?

4. Does evidence that PDM would have liquidated its EC Division absent the Acquisition constitute a defense?

COMMISSION STANDARD OF REVIEW

On appeal from an ALJ, the Commission's standard of review is *de novo*, exercising "all the powers which it could have exercised if it had made the initial decision." FTC Rule 3.54(a); *In the Matter of Trans Union Corp.* No. 9255, 2000 WL 257766 (F.T.C. Feb 10, 2000).

SUMMARY OF THE ARGUMENT

Unlike a typical merger case where judges must speculate about the future because such cases are heard as preliminary injunctions, the ALJ here had the benefit of a "natural market experiment" -- nearly two years of post-Acquisition competition. This period, not the pre-Acquisition period, is the appropriate focus for analyzing the Acquisition's competitive effects. *See*, *e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 589, 607 (1957). The ALJ also had the benefit of the D.C. Circuit's guidance in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), a case factually and legally similar to the instant matter that *is dispositive of this case*. The ALJ's decision was erroneous because he disregarded post-Acquisition competition and the controlling authority of *Baker Hughes*.

Baker Hughes provides the analytical approach governing a Section 7 case. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). Complaint Counsel always bears the ultimate burden of proof, including proving a prima facie case that the transaction presumptively will substantially lessen competition. 908 F.2d at 982-83. If Complaint Counsel is successful, Respondents must produce evidence to rebut this presumption. The amount of evidence that a respondent must produce is measured on a sliding scale; the stronger the prima facie case, the more evidence needed to rebut it. *Id.* If the respondent is successful, the burden of producing additional evidence of anticompetitive effects shifts to Complaint Counsel, and "merges with the ultimate burden of persuasion, which always remains with" Complaint Counsel. *Id.*

Baker Hughes is factually and legally on-point, and is dispositive of this case. There, the government sought to enjoin Tamrock from acquiring Secoma -- a key competitor in the sale of hardrock hydraulic underground drilling rigs (pieces of heavy equipment similar to the products at issue in this case) -- because the two entities were fierce competitors in a concentrated market. *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 4, 9-10 n.3 (D.D.C. 1990). Respondents respectfully submit that, although the ALJ recognized *Baker Hughes* as the governing standard and correctly found many facts, he misapplied *Baker Hughes* and made three fundamental errors. Each error requires reversal.

First, although he correctly disregarded Complaint Counsel's HHI evidence, the ALJ erroneously found that Complaint Counsel established a prima facie case. He disregarded the fact that Section 7's substantiality requirement was not met because demand is extremely thin in some relevant markets and nonexistent in others. Further, he disregarded major structural changes and pro-competitive results in these markets post-Acquisition.

Second, the ALJ erred in finding that the prima facie case had not been rebutted. Respondents presented evidence that was far stronger than that presented in *Baker Hughes* -- conclusive evidence regarding actual entry, low entry barriers, potential entry, customer sophistication, sufficiency of entry, and the Acquisition's competitive effect. Yet, the ALJ improperly disregarded or downplayed this evidence, which may be summarized as follows:

- *Actual entry has occurred post-Acquisition*. In the LNG market, Dynegy rejected a bid effort from CB&I on an LNG project worth over $500 million because it was satisfied with prices received from three other bidders -- Skanska/Whessoe and Black & Veatch, Technigaz/Zachry, and TKK/AT&V. Under *Baker Hughes*, this fact alone is dispositive of the LNG case. New entrants have also won three of four competitively-bid LIN/LOX projects and half of all competitively-bid LPG projects since 2001. This evidence was more than sufficient to rebut a prima facie case.
- *Entry barriers are low. Actual and potential competition threatens CB&I*. The ALJ erroneously held that entry barriers in the relevant markets are high. The crucial fact he

disregarded is that the entry barriers identified have *already been surmounted* by new entrants. Further, current LNG customers know these new actual and potential entrants and recognize that they are more than capable of successfully competing for U.S. LNG projects. In the LIN/LOX market, ease of entry is even more apparent -- in the past two years, new entrants have won *a majority of business*. Potential competition resulting from ease of entry is a competitive threat. As *Baker Hughes* noted, even companies that do not participate in a market can exert competitive pressure. 908 F.2d at 988. Since the Acquisition, CB&I's prices have been checked by the competitive threat resulting from this ease of entry. This evidence successfully rebutted any prima facie case.

- *Customers in the relevant markets are large and sophisticated.* Under *Baker Hughes*, this is an important rebuttal factor. The ALJ correctly found that customers in the relevant markets are large companies with sophisticated procurement processes. (ID at 109). Yet again, the ALJ erred, concluding that this sophistication was essentially meaningless because past pricing is not well-known to these customers. To the contrary, these customers have access to and use expert consultants, providing them with the knowledge necessary to extract from suppliers detailed cost and pricing information. It was reversible error to hold that major corporations such as BP, Dynegy, Air Liquide, El Paso, and Fluor are not sufficiently sophisticated in these markets under *Baker Hughes* to rebut a prima facie case.
- *Entry is sufficient to keep the markets competitive*. Respondents presented conclusive rebuttal evidence that actual and potential entry has kept the markets competitive and will continue to do so. The ALJ dismissed this evidence out of hand.

- *The absence of PDM from the market had no competitive significance.* The Acquisition did not substantially lessen competition because PDM independently decided to exit the market absent the Acquisition. Because PDM would not have participated in the relevant markets after 2001, the Acquisition has no competitive significance.

Third, the ALJ erred in ordering a complete divestiture. Respondents amply demonstrated that divestiture will not assist competition. The ALJ ignored this evidence, and imposed a remedy that will not restore competition. Assuming *arguendo* liability, his remedy went too far by ordering divestiture of assets that are irrelevant to competition in these markets.

Additionally, the ALJ erred in finding that Respondents did not make the requisite factual showing to invoke the exiting assets defense. Instead, the ALJ misanalyzed the facts under a failing firm defense -- a defense that Respondents did not raise.

Respondents have more than rebutted the purported prima facie case with evidence of actual entry, potential entry, customer sophistication, sufficiency of entry, and unique economic circumstances. Because Complaint Counsel failed in its burden to prove anticompetitive effects, it did not meet its ultimate burden of proof. Accordingly, the Initial Decision should be reversed and the Complaint dismissed.

ARGUMENT

I. COMPLAINT COUNSEL DID NOT MAKE A PRIMA FACIE CASE.

Complaint Counsel has the initial burden of proving a Section 7 violation, and carries the ultimate burden of persuasion "at all times." *Baker Hughes*, 908 F.2d at 983. This burden is not trivial. Complaint Counsel must show that the Acquisition is reasonably likely to have "demonstrable *and* substantial anticompetitive effects." *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 358 (S.D.N.Y. 1995) (emphasis added). A "mere possibility" of anticompetitive effect is not enough to win; there must be a "reasonable probability" of such an effect. *Id.* at 359. (citing *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 351 (2d Cir. 1979)). In finding that Complaint Counsel made its prima facie case, the ALJ erred in two ways: First, he failed to consider that, in light of the small size of the relevant markets, substantial effects on competition are unlikely. Second, he failed to consider fundamental market changes and pro-competitive results that have occurred post-Acquisition, while relying exclusively on outdated market share data. These considerations compel a conclusion that Complaint Counsel has not made a prima facie case. At best, any prima facie case is weak and therefore, under *Baker Hughes*, is more easily rebutted. 908 F.2d at 989.

A. "SUBSTANTIAL" ANTICOMPETITIVE EFFECTS ARE UNLIKELY TO OCCUR.

Complaint Counsel must prove that the Acquisition is likely to have a "substantial" effect on competition. *Baker Hughes*, 731 F. Supp. at 11. The *Baker Hughes* court criticized the government's prima facie case, noting that "[t]he miniscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" *Id.* (citing *du Pont*, 353 U.S. at 595). There, the court found a market where 20-45 units (totaling approximately $10 million in commerce) were purchased per year to be "miniscule." Because the markets here are far smaller than the market in *Baker Hughes* (there are often *no units sold* in a given year), Complaint Counsel has not made a prima facie case that the Acquisition is likely to cause *substantial* anticompetitive effects in any relevant market. In the five years preceding the Acquisition, only four LNG projects and four LPG projects have been built. (Harris, Tr. 7205-06, 7288). Even the LIN/LOX market is far smaller than the *Baker Hughe*s market. In the five years preceding the Acquisition, only ten LIN/LOX tanks -- on average -- have been built. (CX 1663; *see also* Simpson, Tr. 3422). Despite this evidence, the ALJ erroneously found that Complaint Counsel established a prima facie case.

The most egregious example of a market that fails to meet the substantiality requirement of Section 7 is the TVC market. Although the ALJ correctly found that demand in this market is "extraordinarily thin," that "[o]nly one field-erected TVC has been built since 1990," and that this already extraordinarily thin demand is *decreasing* (ID at 55-56)[1], he misapplied these facts and the law in finding a prima facie case. (*See* ID at 97). At best, only one TVC is purchased approximately every five to ten years, making this market less than 1 percent the size of the *Baker Hughes* market. Further, *CB&I has not built a TVC in nearly 20 years.* (ID at 56). By holding that the Acquisition could substantially affect competition in this market, the ALJ read the word "substantial" out of Section 7.

Sporadic demand and a small number of sales in all of these markets led the ALJ to conclude that "Complaint Counsel failed to demonstrate that a valid and credible HHI had been calculated in any of the relevant markets." (ID at 90). He noted that "CB&I did not build

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1 The ALJ found that "Spectrum Astro will likely procure a new TVC in the next 3-4 years." (ID at 61). This finding is irrelevant; the referenced TVC is shop-fabricated and is not a relevant product. (*See* Thompson, Tr. 2104-05) (RFOF 6.200).

an LNG tank, LPG tank or TVC between 1996 and the date of the Acquisition, resulting in zero change in the HHI in three of the four markets." (ID at 91). Significantly, however, these factual conclusions cannot be squared with the ALJ's ultimate legal conclusion that the Acquisition "substantially" lessened competition in these markets. Indeed, Respondents are unaware of a single reported case that imposed Section 7 liability against an acquiring company that had no sales within the relevant markets during the five years immediately preceding the challenged acquisition.

B. THE ALJ FAILED TO CONSIDER RECENT STRUCTURAL CHANGES IN THE RELEVANT MARKETS.

The ALJ correctly held that the Acquisition must be evaluated at the time of trial, not at the time the Acquisition occurred. (ID at 89). Yet, in finding that Complaint Counsel made a prima facie case, the ALJ relied exclusively on pre-Acquisition market share data. This was error. *See United States v. Syufy Enters*., 903 F.2d 659, 665, 670 (9th Cir. 1990) (relying on post-acquisition events as "conclusive" evidence that the transaction did not harm competition); *United States v. Archer-Daniels-Midland Co*., 781 F. Supp. 1400, 1421-22 (S.D. Iowa 1991) (finding post-acquisition events to be "significant" evidence of the transaction's legality).

The relevant markets have undergone massive structural changes since the Acquisition which render pre-Acquisition data mostly irrelevant. Several powerful international conglomerates have recently entered the U.S. LNG market and have established themselves as formidable competitors. Other major competitors stand ready to enter as demand increases. *See* Part II-D, *infra*. Further, current LNG customers are familiar with these new and potential entrants, know them to be strong competitors, and fully expect them to keep the market competitive. In the LPG and LIN/LOX markets, some of the largest U.S. tank companies have recently entered and won a majority of available work. *See* Part II-D, *infra*. In assessing whether Complaint Counsel made its prima facie case, the ALJ wholly ignored this evidence.[2] This was reversible error.

In finding that Complaint Counsel established its prima facie case, the ALJ refused to consider that PDM was irrevocably committed to selling all of its assets and exiting the market. *See* Part IV, *infra*. As a result, competition in the relevant markets absent the Acquisition would have been exactly the same as existing competition. Accordingly, pre-Acquisition market share information is irrelevant; it is not predictive of how competition would have looked today absent the Acquisition. *See* Part II, *infra*. To find that Complaint Counsel established its prima facie case without assessing this evidence was error.

In short, Complaint Counsel did not make a prima facie case and the Complaint as to all product markets should be dismissed. Even if the Commission believes that Complaint Counsel established a prima facie case, it is weak at best. Under the sliding scale approach adopted by *Baker Hughes*, Respondents' strong rebuttal evidence compels a finding that the Acquisition did not violate Section 7.

[2] The ALJ relied on Respondents' documents purporting to analyze the relevant markets. (*E.g.*, ID at 15, 36, 43). These documents are mostly irrelevant because they are outdated and do not account for major post-Acquisition structural changes and pro-competitive results. (*See*, *e.g.*, Scorsone, Tr. 4787-89). Other documents relied on by the ALJ (ID at 71-72) -- in addition to being outdated -- are of little relevance because they do not reference specific product markets.

II. RESPONDENTS HAVE FORCEFULLY REBUTTED ANY PRIMA FACIE CASE.

Under *Baker Hughes*, evidence regarding unique economic circumstances and the particular market's structure, history and probable future can rebut a prima facie case. *See* 908 F.2d at 984-85; *see also United States v. General Dynamics Corp*., 415 U.S. 486 (1974). Such circumstances exist here: 1) actual entry has occurred in the relevant markets; 2) there are several companies poised to enter the relevant markets; 3) such actual and potential entry is sufficient to forestall any potential anticompetitive effects; 4) customers are large and sophisticated; and 5) PDM's exit from the relevant markets was certain. These circumstances dictate that the Acquisition caused no anticompetitive effects in any relevant market.

A. ACTUAL ENTRY REBUTS A PRIMA FACIE CASE.

The ALJ correctly observed that *Baker Hughes* controls the outcome of this case. (ID at 98-101). However, he erred in holding that "the evidence of entry in this case is not as compelling as the evidence in *Baker Hughes*." (ID at 101). Actual entry evidence in *Baker Hughes* was minimal. In a market with over 30 units sold per year, respondents showed only that: 1) one new entrant had studied the U.S. and world markets, made a substantial sale in the Soviet Union, and had a hydraulic rig order in the U.S.; and 2) another new entrant sold one unit and "may be poised" to make future sales. 731 F. Supp. at 10. Here, evidence regarding actual entry is far more compelling. As shown below, several new entrants are bidding on projects in the relevant markets and are winning in competition against CB&I.

(1) Actual entry in the LNG market rebuts a prima facie case.

Post-Acquisition competition for the Dynegy project in Hackberry, Louisiana ("the Dynegy Project") is dispositive of this case with respect to the LNG market. Dynegy, a global energy company, sought bids for a large LNG import terminal worth over $500 million that will be the largest in the U.S. when completed. (Puckett, Tr. 4540-41, 4565). Three new entrants -- Skanska/Whessoe and Black & Veatch, Technigaz/Zachry, and TKK/AT&V have submitted firm, fixed price bids on the tank portion of this project. (Puckett, Tr. 4556). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxx) (xxxxxxxxx]** Moreover, Skanska has *already won* the job of EPC contractor for this project, beating out CB&I and several major international engineering and construction firms. (*See* Puckett, Tr. 4545-47) (RFOF 3.240).[3] Under *Baker Hughes*, the size of the Dynegy Project, coupled with the fact that foreign entry has already occurred in connection with this project is dispositive as to the LNG market. For this reason alone, the Commission should reverse.

These entities are actively pursuing other U.S. LNG work. For example, Skanska/Whessoe has provided pricing to Yankee Gas Services for its peakshaving facility in Connecticut (the "Yankee Gas Project") and to **[xxxxxxxxxxxxx]** for its import terminal in **[xxxx xxxxxxxxxxxxxxxxx]** (*See* Andrukiewicz, Tr. 6445-46; **[xxxxxxxxxxxx])** (RFOF 3.69, 3.70, 3.342, 3.473). Skanska/Whessoe has also contacted major LNG customers who are developing U.S. projects, such as Freeport LNG **[xxxxxx]**, to discuss their capabilities. (Eyermann, Tr. 6981-83, 6986-87, 6992; **[xxxxxxxxxxxxxxxxx]**) (RFOF 3.65, 3.72, 3.424, 3.576, 3.662). Further, Skanska/Whessoe has allied itself with Black & Veatch, a leading manufacturer of process equipment necessary for construction of LNG facilities. (*See* Puckett, Tr. 4579; Eyermann, Tr. 6992) (RFOF 3.65, 3.273).

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[3] An EPC contractor is responsible for overall engineering, procurement, and construction. Dynegy entrusted Skanska with the enormous responsibility of overseeing all aspects of the Dynegy Project. As discussed in Part II-C, *infra*, Dynegy elected to separate bidding for the EPC contract from the LNG tank bidding process to secure the best possible price. (Puckett, Tr. 4543-44, 4550) (RFOF 3.68, 3.265).

TKK/AT&V has also entered the market. Like Skanska/Whessoe, TKK/AT&V was prequalified by Dynegy and bid on the Dynegy Project. (Puckett, Tr. 4552-54). The alliance has bid on three separate LNG projects within the past year and has provided pricing on several others. (Cutts, Tr. 2447, 2464-65) (RFOF 3.114).[4] The alliance has also marketed its capabilities to U.S. LNG customers (Eyermann, Tr. 7000-01) (RFOF 3.121), developed methods for staffing and procurement associated with LNG projects (Cutts, Tr. 2437) (RFOF 3.112), and is in the process of partnering with a U.S.-based firm to provide LNG process equipment. (Kistenmacher, Tr. 902-03, 915) (RFOF 3.113).

Technigaz/Zachry has also entered the market. Like Skanska/Whessoe and TKK/AT&V, Technigaz/Zachry was prequalified by Dynegy and bid on the Dynegy Project.[5] The alliance has also made formal presentations regarding its "keen interest" in the market to other U.S. LNG customers, such as **[xxxxxxxxxxxxxxxxxx]**, Freeport LNG, and **[xx]**. (**[xxxxxx, xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**; Eyermann, Tr. 6994-96) (RFOF 3.361, 3.174, 3.175, 3.394, 3.432).

Three major foreign consortia have entered the U.S. market in the past two years. They have actively pursued work in this market and have actually won some of that work. Evidence establishes that each consortium plans to compete aggressively in the future. In addition, these new entrants are known by LNG customers to be powerful global competitors in the LNG market that can provide strong competition in the U.S. *See* Part II-B, *infra*. Because

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[4] TKK/AT&V has been a successful bidder in North America. As discussed *infra*, it won a large LNG project in Trinidad in November of 2002, beating out CB&I.

[5] The ALJ dismissed Technigaz/Zachry's competitive significance because **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxx]** (ID at 18). There is no evidence that the **[xxxxxxxxxxxxxxxxxxx "xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

this showing far exceeds entry evidence set forth in *Baker Hughes*, the ALJ erred by concluding that this evidence does not rebut a prima facie case.

(2) Actual entry in the LPG market rebuts a prima facie case.

Actual entry in the LPG market also surpasses the evidence found to successfully rebut a prima facie case under *Baker Hughes*. In *Baker Hughes*, two new entrants won a small percentage of available jobs. *See* 731 F. Supp. at 10. Here, two new entrants have entered the market and have won *half* of the available jobs in the past three years.[6]

AT&V has successfully entered this market, having completed three LPG projects in the U.S. and elsewhere. (Cutts, Tr. 2436-37; CX 396; CX 397) (RFOF 4.18, 4.20, 4.22). AT&V has bid on two U.S. LPG projects over the past few years -- one for ABB Lummus and one for Intercontinental Terminals ("ITC"). It *won* the ITC project with pricing that "beat the socks off of CB&I." and built the tank to the customer's satisfaction. (*See* N. Kelley, Tr. 7086, 7137; Scorsone, Tr. 5040) (RFOF 4.35, 4.66).

Matrix has also entered this market. Matrix is an accomplished tank constructor with annual revenues over $200 million. (RX 135 at 6). In 2001, Matrix bid on its first LPG tank for ITC. Matrix won the right to bid on this project because they were "good reputable contractors that have the capability of building the tank." (N. Kelley, Tr. 7083-84) (RFOF 4.34). ITC perceives Matrix as a large, capable contractor and plans to solicit bids from Matrix for future LPG projects. (N. Kelley, Tr. 7085, 7090-7191) (RFOF 4.44-4.46).

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Jolly, Tr. 4691; *see also* Puckett, Tr. 4559-60) (RFOF 3.304).

[6] Two LPG projects have been bid in the 21st century. AT&V won the ITC job in 2000, months before the Acquisition. (N. Kelley, Tr. 7081-82) (RFOF 4.18, 4.26). The ABB Lummus project was awarded several months after the Acquisition. (Scorsone, Tr. 5042; *see also* ID at 104) (RFOF 4.66-4.67).

(3) Actual entry in the LIN/LOX market rebuts a prima facie case.

Entry in the LIN/LOX market also surpasses the amount of entry that rebutted a prima facie case in *Baker Hughes*. New entrants have won a *majority share* of the market in the short time since the Acquisition. AT&V has won three of the four competitively bid projects.

AT&V has the necessary equipment and personnel to build LIN/LOX tanks, and has invested significant effort to enter the market. (Cutts, Tr. 2331-32, 2393, 2426-27, 2454, 2501-04, 2570-71) (RFOF 5.26-5.30, 5.33, 5.222). AT&V has won all three LIN/LOX projects on which it has bid. (Cutts, Tr. 2330, 2435-36; Kamrath, Tr. 2006) (RFOF 5.31, 5.34). AT&V continues to compete in this market and believes it can compete effectively with CB&I. (Cutts, Tr. 2332, 2452-53, 2533; *see also* Cutts, Tr. 2550-52, 2572) (RFOF 5.35, 5.37).

Matrix has also entered this market, having invested effort to obtain the necessary expertise and equipment. (RX 137; Newmeister, Tr. 2188, 2213-14) (RFOF 5.43, 5.44). Matrix began pursuing LIN/LOX work in 1998, winning projects for three different customers. (RX 135 at 8-9) (RFOF 5.47-5.55). It has constructed several LIN/LOX tanks in the U.S. and continues to bid on these projects. (Newmeister, Tr. 2173-74, 2176-77; Patterson, Tr. 456-57; Scorsone, Tr. 4878-79) (RFOF 5.47-5.52). Matrix plans to continue bidding because it is a competitive force in this market and believes that it can compete with CB&I. (Newmeister, Tr. 2166-67). [7]

Chattanooga is an accomplished tank manufacturer possessing the necessary equipment and personnel to build LIN/LOX tanks. (Stetzler, Tr. 6308-09, 6312-29, 6384-85)

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[7] CB&I is aware of this competition. A pre-Acquisition company document contained intelligence that Matrix was entering the market: "I also asked about Matrix, as I knew they had build [sic] the Kingsport, TN for them in 1999. He says they did a good job for Air Products and they definitely consider them a player in the market. . . . Based on this, it appears that Air Products considers [Chattanooga] and Matrix viable competitors in the LOX/LIN tank market." (RX 273) (RFOF 5.54).

(RFOF 5.56, 5.58-5.66). Chattanooga has recently entered this market; it bid on a project for BOC and has submitted a budgetary proposal to MG Industries. (Stetzler, Tr. 6351) (RFOF 5.70). Chattanooga believes that the Acquisition has created an opportunity for it in this market, and plans to take advantage of that opportunity because it is a smaller, more responsive company with a lower overhead structure. (*See* Stetzler, Tr. 6367-69) (RFOF 5.66-5.68).[8]

Actual entry in this market surpasses the actual entry that rebutted the government's prima facie case in *Baker Hughes*. In just three years, three companies have entered the market and won a majority of the available work. This strong showing forcefully rebuts any prima facie case.

B. EVIDENCE OF POTENTIAL ENTRY REBUTS A PRIMA FACIE CASE.

Baker Hughes recognized that "other potential competition must be taken into account when prognosticating likely competitive trends." 731 F. Supp. at 10. As the D.C. Circuit observed, "a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs." 908 F.2d at 988 (emphasis in original); *see also Heinz*, 246 F.3d at 717. In *Baker Hughes*, evidence of potential entry rebutted a prima facie case, even though new entrants faced challenges, including lack of reputation, commitment of time, and access to capital and despite a lack of substantial evidence that any potential entrant had made a "firm, long-term commitment" to enter the market. *Id.* at 10-11; 908 F.2d at 989 n.10; *see also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 55

[8] CB&I became aware of this threat when it learned that Chattanooga acquired key LIN/LOX equipment and personnel from Graver, and that customers viewed this acquisition as giving Chattanooga "credibility" in this market. (RX 273; *see also* Scorsone, Tr. 5026-28) (state of mind) (RFOF 5.59, 5.72, 5.73).

(D.D.C. 1998) (holding that "a court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's prima facie case").

More compelling than the ease of entry case proved by respondents in *Baker Hughes*, Respondents here showed that new entrants were powerful global competitors which had *actually entered* the market in the past two years, empirically demonstrating that entry barriers are low. Respondents also showed other potential entrants exist and that in light of ease of entry, they can be expected to enter, keeping these markets competitive. Actual and potential entrants already own relevant assets, have pertinent experience, and possess the characteristics desired by customers. Thus, the supposed entry barriers identified by the ALJ, all of which relate to *de novo* entry, are inapposite. Respondents respectfully submit that the Commission should recognize ease of entry and reverse.

(1) Entry is easy: Barriers to the relevant markets are low.

The ALJ identified several requirements that new entrants must meet in order to enter the relevant markets. However, these requirements are not the same as entry barriers. (*See* Harris, Tr. 7246-49). The ALJ incorrectly held that these entry requirements constitute high entry barriers.

(a) Barriers to the LNG market are low.

Entry into the U.S. market is easy for global LNG competitors. Due to increased demand, three large multinational corporations have already entered the market, and several others are planning to do so. The ALJ rejected the significance of this entry; his conclusion ignores that these companies have *already surmounted* the so-called entry barriers that he identified. It was fundamental error to ignore this crucial fact. Further, the evidence demonstrates that these powerful foreign consortia can or already have met the requirements for successfully doing business in the U.S. that the ALJ incorrectly characterized as entry barriers.

Reputation -- The ALJ, relying primarily on general statements by some LNG customers expressing a preference for experienced suppliers, concluded that reputation is an entry barrier. (ID at 27-28, 107-08). However, the mere fact that customers "typically place[d] great importance on assurances of product quality and reliable future service -- considerations that may handicap new entrants" does not constitute a high entry barrier. 908 F.2d at 989 n.10.[9] Further, the ALJ's conclusion ignores that new entrants are *already powerful global competitors with deep experience in the LNG field*. Skanska/Whessoe is a world-class construction group with a well-established reputation in the LNG industry. (RX 770 at 33; RX 839 at 4; RX 870 at 25; RX 908 at 1) (RFOF 3.57-3.58). TKK is a world leader in the LNG industry with over 50 years of experience in building LNG facilities. (Cutts, Tr. 2572-73; RX 186 at TWC 000084; RX 772 at 2-21; RX 818; RX 872 at 2, 5) (RFOF 3.99-3.101). Technigaz is a subsidiary of a $3 billion global corporation with extensive experience constructing LNG facilities. In fact, Technigaz is *currently building* eight different LNG tanks around the world. (Jolly, Tr. 4439-40, 4725, 4732; Carling, Tr. 4487; RX 43 at ZCC 000005) (RFOF 3.144, 3.148, 3.150, 3.151, 3.185). Current LNG customers testified that these companies have excellent reputations worldwide and that they could rely on those reputations for building LNG tanks in the U.S. (*See* ROB at 20-46). Moreover, these customers have no doubt that these entrants can effectively compete in the U.S., keeping prices low. *See* Part II-D, *infra*.

U.S. Standards and Regulations -- Although Complaint Counsel argued that foreign companies cannot effectively compete because they are unfamiliar with applicable standards, such as American Petroleum Institute ("API") standards, the evidence was to the

9 In *Baker Hughes*, customers placed great emphasis upon reputation for quality and service and favored suppliers who provided good quality and service. *See* 731 F. Supp. at 14-15; 908 F.2d at 989 n.10. Yet, this did not constitute an "entry barrier." *See id.*

contrary. U.S. standards are de facto international standards and are used in building LNG facilities internationally. (Scorsone, Tr. 4924-25; Rano, Tr. 5950, 5891; Bryngelson, Tr. 6147) (RFOF 3.512, 3.513). New entrants have all built LNG tanks overseas to these standards. (Scorsone, Tr. 4926-27; Rano, Tr. 5890-91; Rapp, Tr. 1332; Carling, Tr. 4463, 4479; Izzo, Tr. 6488) (RFOF 3.515, 3.516).

Access to Raw Materials -- Access to raw materials is easy; these materials are equally available to all competitors. In fact, 9 percent nickel steel, the most specialized material needed for LNG tanks, is internationally sourced from Japan or Europe. (*See* Izzo, Tr. 6503; **[xxxxxxxxxxxxxxxxxxxxxx]**; Cutts, Tr. 2474-75) (RFOF 3.548, 3.561). Like its competitors, CB&I and PDM purchased (and CB&I continues to purchase) this steel overseas because it was not (and is not) readily available in the U.S. (Glenn, Tr. 4116-17; Scorsone, Tr. 4890-91; Rano, Tr. 5896-97) (RFOF 3.31, 3.547).

Steel Fabrication -- Steel fabrication for LNG tanks is easy; it typically occurs at or near the producing mill, which in the case of LNG tanks is located overseas. CB&I cannot fabricate this steel in its domestic facilities in a cost-effective manner. Accordingly, it has no significant competitive advantage in this regard. (Rano, Tr. 5899; Bryngelson, Tr. 6153; Izzo, Tr. 6503) (RFOF 3.561, 3.562, 3.563). In fact, CB&I and PDM often purchased prefabricated 9 percent nickel steel from foreign vendors for U.S. LNG projects, as opposed to using their own fabrication shops. (Glenn, Tr. 4118-19; Scorsone, Tr. 4893-95; *see also* Harris, Tr. 7249-51) (RFOF 3.36).

Welding Skills -- Contrary to the ALJ's findings (ID at 11), welding of LNG tanks is easy. Welding processes for LNG tanks are non-specific; the same procedures are also used for LPG tanks, water tanks, and oil tanks. (Rano, Tr. 5931) (RFOF 3.48). Welding 9 percent nickel steel involves the same processes and techniques used to weld carbon steel and is much easier to weld than stainless steel or aluminum. (Rano, Tr. 5872-73, 5947) (RFOF 3.532). It is unnecessary to find welders skilled in welding 9 percent nickel steel, because new welders can be easily trained to weld this material. (Glenn, Tr. 4121-22; Rano, Tr. 5918, 5936-37; Carling, Tr. 4459; *see also* Rano, Tr. 5931-33, 5935-36, 5942-47) (RFOF 3.533, 3.534, 3.536, 3.538, 3.539). Further, new entrants *already have* the necessary welding technology and experience and can transmit it to local workers. (*See* Carling, Tr. 4459, 4462; Bryngelson, Tr. 6152; Cutts, Tr. 2324-26) (RFOF 3.109, 3.530, 3.539).

Financial Size -- Contrary to the ALJ's conclusions (ID at 28-29), access to bonding and capital requirements is easy for the new entrants, who are large, sophisticated companies with strong financials. (*See* Jolly, Tr. 4438; RX 736 at 6; 737; RX 770 at 33; RX 839 at 4; RX 870 at 25; RX 908 at 1) (RFOF 3.57-3.58, 3.144, 3.195). They can easily meet bonding requirements of LNG customers. (*See*, *e.g.*, Jolly, Tr. 4438; Bryngelson, Tr. 6125-26, 6128; Izzo, Tr. 6511-12) (RFOF 3.142, 3.371). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]** (*See* Glenn, Tr. 4222-23) (RFOF 3.191, 3.211, 3.230).

Access to Labor -- Finding field workers to build an LNG facility is easy. All competitors, including CB&I, use local labor in areas with a skilled labor pool. (*See* Bryngelson, Tr. 6150; Scorsone, Tr. 4921; Rano, Tr. 5906-07, 5909, 5916-17) (RFOF 3.552, 3.553, 3.557). It is not difficult to recruit field labor; in fact, it is easier to recruit labor in the U.S. than in other countries. (Rano, Tr. 5908-09, 5972-73) (RFOF 3.555). All competitors have equal access to U.S. laborers; field laborers are paid as independent contractors on an hourly basis. (Rano, Tr. 5952-53) (RFOF 3.550, 3.552).

Trinidad Natural Market Experiment -- Recent empirical evidence shows that entry in this market is easy. During trial, TKK/AT&V won a project to build an LNG tank for Atlantic LNG in Trinidad -- undercutting CB&I's price by approximately 5 percent. (Glenn, Tr. 4095, 4105; Carling, Tr. 4488-89; Scorsone, Tr. 4950-52, 4954) (RFOF 3.326, 3.327, 3.329). These facts shed light on whether entry barriers exist in the U.S. (Harris, Tr. 7218-19) (RFOF 7.103). Further, under *Baker Hughes*, the threat of potential entry from companies succeeding in nearby markets can rebut a prima facie case. *See* 908 F.2d at 988-89; 731 F. Supp. at 10-12 (recognizing that potential entrants posed a credible competitive threat in the U.S. when they had already entered the Canadian market).

The ALJ's refusal to consider this evidence on the basis that the Trinidad project was outside the relevant geographic market was error because the facts surrounding the Trinidad project are analogous to the U.S. As in the U.S., CB&I had extensive prior experience working in Trinidad; it was familiar with Trinidadian subcontractors as well as local workers and regulations. (Scorsone, Tr. 4954-56) (RFOF 3.332). In fact, at the time it lost to TKK/AT&V, CB&I was building an LNG tank *on the same site* and was currently employing many local workers. (Scorsone, Tr. 4954-56; *see also* Simpson, Tr. 3852) (RFOF 3.332, 7.218). These "advantages" mirror the "advantages" that, according to the ALJ, CB&I allegedly enjoys in the U.S. Further, TKK/AT&V was "disadvantaged" in Trinidad in the same manner that -- according to the ALJ -- potential U.S. entrants are "disadvantaged." CB&I nevertheless lost the Trinidad job to TKK/AT&V -- an entity that had never built an LNG tank there. (*See* RX 838). The Trinidad project is a natural market experiment conclusively proving ease of entry in the LNG market.

(b) Barriers to the LPG market are low.

Entry in the LPG market is easy. In the past decade, two tank companies have successfully entered despite virtually nonexistent demand. AT&V successfully entered the market in 2001, building an LPG tank for ITC. (N. Kelley, Tr. 7086) (RFOF 4.18, 4.35). Morse Tank ("Morse"), a small Washington State tank builder, proved the ease of hit and run entry in this sporadically-constructed market when it built a large LPG tank for Texaco in Ferndale, Washington. (Crider, Tr. 6714-16; *see also* Maw, Tr. 6560-63, 6586) (RFOF 4.84, 4.86, 4.87). The Morse Tank project is a significant example of ease of entry in the LPG market. The ALJ disregarded it.

Contrary to the ALJ's conclusion (ID at 38), access to experienced personnel is not an entry barrier. The Morse Tank example confirms this fact. Prior to constructing the Ferndale facility, Morse had never constructed an LPG tank. Nonetheless, Texaco asked Morse to bid and awarded Morse the Ferndale project. (Maw, Tr. 6550; Crider, Tr. 6713-14) (RFOF 4.90). In 1994, before it had ever built any low temperature field-erected tanks, Morse had about 20 salaried employees (including two engineers.) Morse hired no additional salaried employees to fabricate or construct the Ferndale facility. (Maw, Tr. 6557, 6572) (RFOF 4.96, 4.98).

(c) Barriers to the LIN/LOX market are low.

Entry to the LIN/LOX market is easy. AT&V and Matrix *have already successfully entered the LIN/LOX market* in recent years. In fact, AT&V has won a majority of U.S. LIN/LOX business. (*See* V. Kelley, Tr. 5291-92; Cutts, Tr. 2397-98, 2436-37, 2504-06) (RFOF 5.31, 5.34). AT&V won the first job it ever bid on, and since that time, has never lost a LIN/LOX tank bid. (*See* RFOF 5.31-5.34). Not only can new entrants compete in this market, they can dominate it.

With respect to specific aspects of LIN/LOX sales and construction, Respondents proved that subcontracting was not an entry barrier because LIN/LOX tank construction does not require many subcontractors -- AT&V used only three subcontractors for its first project. (Cutts, Tr. 2521-22) (RFOF 5.219, 5.220). Similarly, Respondents proved that access to experienced welders is not an entry barrier, as AT&V hired experienced welders merely by placing newspaper ads. (Cutts, Tr. 2427-28) (RFOF 5.221). AT&V's welding systems were sufficient to successfully construct LIN/LOX tanks for BOC. (Cutts, Tr. 2565) (RFOF 5.31). Respondents also showed that assembling of sales staff and engineering forces is not an entry barrier. AT&V's current sales staff enabled it to sell LIN/LOX projects to BOC and Air Liquide. (Cutts, Tr. 2568-69) (RFOF 5.222). Further, AT&V has developed its own technical specifications which enabled AT&V to successfully construct LIN/LOX tanks. (Cutts, Tr. 2563-64) (RFOF 5.29). All this evidence was erroneously disregarded.[10]

(2) Because entry barriers are low, evidence of potential entry rebuts a prima facie case.

"If entry barriers are low, the threat of outside entry can significantly alter the anticompetitive effects of the merger by deterring the remaining entities from colluding or exercising market power." *Heinz*, 246 F.3d at 717 n.13 (citing *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973)). Respondents presented substantial evidence demonstrating that potential entrants plan to enter the U.S. market as well as evidence regarding their efforts to

[10] In dismissing Matrix and AT&V as competitive threats, the ALJ fully credited opinion testimony by W.T. Cutts (of AT&V) and John Newmeister (of Matrix) regarding their views on future competitiveness. (ID at 47-49). In so doing, he ignored the fact that these companies *have already proven* they can compete effectively with CB&I. Competitors' statements regarding their inability to compete should be viewed with skepticism. *See Jim Walter Corp.*, 90 F.T.C. 671, *195 (1977), *rev'd and remanded on other grounds*, 625 F.2d 676 (5th Cir. 1980); *Baker Hughes*, 908 F.2d at 987-88; *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 361 (S.D.N.Y. 1995); *United States v. Calmar Inc.*, 612 F. Supp. 1298, 1305 (D.N.J. 1985); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 675-76

do so. This is particularly true in the LNG market. Besides Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V, four other global engineering and construction firms are poised to enter as demand increases. Current LNG customers are familiar with these potential entrants and believe that they can compete effectively with CB&I in the U.S. Further, economic testimony supports the conclusion that these companies are formidable potential entrants that can keep the market competitive. (Harris, Tr. 7245-47) (RFOF 7.100). As in *Baker Hughes*, with low entry barriers, evidence regarding such potential entrants rebuts a prima facie case. The ALJ erroneously ignored or understated that evidence. Companies poised to enter the LNG and LPG markets are discussed below:

(a) Daewoo/S&B is poised to enter the LNG market.

Daewoo Engineering & Construction Co., Ltd. ("Daewoo") of South Korea boasts revenues exceeding $2.3 billion and is a world leader in construction of full-containment LNG tanks. (RX 736 at 6; RX 760 at 10, 29; RX 873 at 3-6) (RFOF 3.195, 3.196). S&B Engineers and Constructors, Ltd. ("S&B") is a U.S. engineering and contracting firm offering many services, including engineering, procurement, and field construction. (RX 873 at 61) (RFOF 3.197). In 2002, Daewoo and S&B announced an alliance to pursue LNG work in North America. (RX 10) (RFOF 3.198) (state of mind). Customers have accepted this alliance as a strong competitor. For example, Dynegy viewed Daewoo/S&B as qualified for the Dynegy Project. (Puckett, Tr. 4553) (RFOF 3.204, 3.284).[11] Similarly, Freeport LNG has already hired Daewoo to provide technical assistance for its upcoming LNG project and, based on the good work it has already done, plans to solicit a bid from the alliance for its LNG tanks. (Eyermann,

(D. Minn. 1990). This is especially true here where AT&V and Matrix stand to benefit from any divestiture.

[11] Daewoo did not receive a bid package because Dynegy already had enough qualified bidders. *Id.*

Tr. 7008, 7010-11, 7014) (RFOF 3.206). Other current LNG customers, such as Bechtel, BP and El Paso consider this alliance to be a quality potential bidder for future LNG projects. (Rapp, Tr. 1327; Sawchuck, Tr. 6062-63; Bryngelson, Tr. 6145-46) (RFOF 3.205-3.209).[12]

(b) Tractebel is poised to enter the LNG market.

Tractebel is a large Belgian company involved in building, owning and operating LNG facilities. It is a subsidiary of SUEZ, a French-Belgian conglomerate boasting revenues of over $30 billion. (Glenn, Tr. 4094; RX 874 at 1; RX 389 at CBI065924) (RFOF 3.212). Tractebel recently acquired, and now operates, an LNG import terminal in Everett, Massachusetts. It also recently acquired international LNG tank constructor Entrepose. (RX 389 at CBI065921; Glenn, Tr. 4150; Scorsone, Tr. 4998) (RFOF 3.213). Tractebel is often a direct global competitor of CB&I for LNG terminals. (Glenn, Tr. 4150-51) (RFOF 3.215). It has recently become involved in the North American LNG market, bidding on a large LNG project for Enron in the Bahamas in late 2001. (Carling, Tr. 4480-81) (RFOF 3.443). Current LNG customers and competitors believe that Tractebel has the necessary financial stability and technical capabilities to effectively compete for LNG projects in the U.S. and elsewhere in North America. (Carling, Tr. 4489-91, 4514; *see also* Bryngelson, Tr. 6125-26, 6129-32; **[xxxxxxxxxx 4703]**) (RFOF 3.214, 3.217, 3.379, 3.381).

(c) MHI is poised to enter the LNG market.

Mitsubishi Heavy Industries ("MHI") is renowned for its LNG cryogenic technology. (RX 767 at 16) (RFOF 3.217). It has built cryogenic storage tanks for decades, and has built numerous LNG tanks around the world. (RX 875 at 5-7, 9) (RFOF 3.217). Current

12 CB&I also believes that Daewoo/S&B is a formidable competitor. CB&I has experience competing against Daewoo in the LNG market, is aware of Daewoo's extensive LNG construction record worldwide, and knows the alliance is trying to enter the U.S. market. (*See* Scorsone, Tr. 4857-62; RX 10) (RFOF 3.210).

LNG customers, such as Bechtel, BP, and El Paso, are familiar with MHI's capabilities and believe that it can compete effectively for LNG tanks in the U.S. and elsewhere in North America. In fact, some customers have already prequalified MHI for North American LNG projects. (*See* Rapp, Tr. 1309, 1316; Carling, Tr. 4492; Bryngelson, Tr. 6125-26, 6128-29, 6131-32; Sawchuck, Tr. 6062-63, 6092) (RFOF 3.218, 3.219, 3.220, 3.221).

(d) IHI is poised to enter the LNG market.

Ishikawajima-Harima Heavy Industries, Co., Ltd. ("IHI") is a world leader in the construction of LNG facilities; its tanks are currently operating at all LNG terminals in Japan. Recently, IHI has begun to enter the U.S. market. For example, IHI has approached Freeport LNG to discuss its LNG capabilities. (Eyermann, Tr. 7015-16) (RFOF 3.225). U.S. customers recognize IHI as a major player and consider it to be a potential bidder for future U.S. projects. (*See*, *e.g.*, Rapp, Tr. 1309, 1316; Bryngelson, Tr. 6126; Eyermann, Tr. 7014-17; Sawchuck, Tr. 6062-63) (RFOF 3.224-3.226).

(e) Chattanooga is poised to enter the LPG market.

Chattanooga has not yet entered the LPG market, but is poised to enter if and when demand for these products materializes. Chattanooga has built a variety of ambient temperature storage tanks and can design and construct low-temperature tanks. As the ALJ noted, Chattanooga "has the capability to construct field-erected LPG tanks." (ID at 37). Chattanooga is interested in pursuing these jobs in the future, and is a presence in the LPG market that can keep it competitive. (Stetzler, Tr. 6365; Harris, Tr. 7304-05).

Respondents submit that the ALJ ignored or downplayed this potential entry and erred in so doing.

C. CUSTOMER SOPHISTICATION REBUTS A PRIMA FACIE CASE.

"Well established precedent and the . . . Merger Guidelines recognize that the sophistication and bargaining power of buyers play a significant role in assessing the effects of [an acquisition]." *FTC v. R.R. Donnelley & Sons Co.*, Civ. A. No. 90-1619SSE, 1990 WL 193674, at *4 (D.D.C. Aug. 27, 1990) (citation omitted). Customers in the relevant markets are highly-sophisticated multinational companies with substantial bargaining power. This fact rebutted any prima facie case. *See, e.g.*, *Baker Hughes*, 908 F.2d at 988-89. The ALJ correctly found that "[i]n all four of the relevant product markets, the customers purchasing the products are large companies, with sophisticated procurement processes, who generally seek to have two or more bidders for their projects." (ID at 109). Yet, he erroneously discounted this fact because "past pricing is not well-known" and because "most customers do not have significant bargaining power." (ID at 109). Customers in the relevant markets *do have* sufficient knowledge regarding past pricing and their sophistication *does provide* them with significant bargaining power, which precludes the exercise of market power by any competitor in the relevant markets.

This error is most egregious in the LNG market. No fewer than *seven recent or current LNG customers*, including BP, CMS Energy, and El Paso, testified that they either have purchased or plan to purchase an LNG tank in the near future and that the Acquisition has not affected their ability to purchase LNG tanks in the U.S. at competitive prices. Yet, the ALJ dismissed their conclusions because he believed they lacked foundation. (ID at 102-04). This was clear error. These customers are large multinational corporations with extensive LNG experience. (*E.g.*, Rapp, Tr. 1303-04; Sawchuck, Tr. 6054) (RFOF 3.231, 3.580). They have carefully examined credentials of new entrants. (*E.g.*, Puckett, Tr. 4554, Eyermann, Tr. 6981-83, 6994-96, 7000-01, 7015-16; Sawchuck, Tr. 6062-63) (RFOF 3.277, 3.394, 3.423). They also use highly-developed procurement processes designed to secure the best possible prices. Many insist on taking multiple, confidential bids. In some cases, they take even more aggressive measures to ensure good prices. For example, Dynegy bifurcated its bidding process for the Dynegy Project -- competitively bidding the EPC portion separately from the tank portion. (Puckett, Tr. 4543-44, 4550) (RFOF 3.68, 3.265).

The ALJ erred in concluding that, because they rely on input from consultants, LNG customers do not have sufficient ability to prevent the exercise of market power. (ID at 33, 108-09). These customers hire expert consultants, such as Kellogg, Brown, and Root, who have access to historical tank pricing and can determine whether prices are reasonable. (*E.g.*, Bryngelson, Tr. 6129-30; Scorsone, Tr. 4940-41).[13] Some owners, **[xxxxxxxxxxx]**, have developed a sophisticated pricing model to assess LNG tank pricing. (*E.g.*, **[xxxxxxxxxxxxxxxxx]**) (RFOF 3.415). The very fact that customers have access to this type of information *shows that they are sophisticated and that they can prevent CB&I from exercising market power*.

Recent empirical evidence supports the conclusion that large LNG customers can prevent the exercise of market power. As discussed *infra*, both CMS Energy and Southern LNG used their clout to force CB&I to cut its prices on recently-purchased LNG tanks and to provide an "open book" arrangement. During these negotiations, both companies obtained information regarding CB&I's costs and profit margins (Bryngelson, Tr. 6136; J. Kelly, Tr. 6266-67) -- information typically not shared with customers in most markets. The ability to obtain this

[13] This directly contradicts the ALJ's conclusion that LNG owners have no information regarding past LNG tank pricing. (ID at 109). In any event, the ALJ failed to acknowledge the lack of relevance of past pricing information because of variables such as location, land characteristics, and containment type. (*See* Eyermann, Tr. 7071-72) (RFOF 3.641).

information demonstrates that these customers, because of their size and expertise, ensure that the market remains competitive. This evidence rebuts Complaint Counsel's prima facie case.[14]

Similarly rebutting any prima facie case, but receiving almost no weight by the ALJ, is the fact that customers in the LPG and LIN/LOX markets are also savvy and experienced, keeping these markets competitive. In the LPG market, ITC solicits multiple, confidential bids and has deep experience in tank purchasing. (N. Kelley, Tr. 7079-80; *see also* ID at 39-40) (RFOF 4.159, 4.160). The same is true in the LIN/LOX market. Customers such as MG Industries, BOC, Air Liquide, and Air Products have purchased many LIN/LOX tanks -- both domestically and overseas -- in the past and have information regarding the costs of those tanks. (*See*, *e.g*., V. Kelley, Tr. 4599-4601; Patterson, Tr. 478-79; Kamrath, Tr. 1979-80, 1983-85; Hilgar, Tr. 1390-91) (RFOF 5.82-5.84, 5.87, 5.116). Customers understand the market and develop new suppliers when necessary. (*See* V. Kelley, Tr. 4619-20; **[xxxxxxxxxxxxxxxxxxxxx]**) (RFOF 5.81). Customers have also developed hard-nosed negotiating strategies to maintain competition. For example, MG Industries has a demonstrated ability to secure good tank prices through disinformation campaigns. During the 1990s, it would drive tank prices down by informing vendors that they were higher-priced (even though they were not). These tactics enhanced competition. (*See* Patterson, Tr. 350) (RFOF 5.82).

D. ACTUAL ENTRY AND POTENTIAL ENTRY ARE SUFFICIENT TO KEEP THE RELEVANT MARKETS COMPETITIVE.

Contrary to the approach taken by the ALJ, the law is clear that Respondents need not show that entry will be quick and effective. The D.C. Circuit in *Baker Hughes* rejected such a standard because it would force respondents to carry the ultimate burden of persuasion in a

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[14] Further, as discussed in Part II-D, *infra*, these sophisticated customers do not believe that the Acquisition has harmed competition, primarily because they find new entrants to be capable U.S. competitors.

Section 7 case. 908 F.2d at 991. The ALJ erred in challenging the validity of *Baker Hughes*. (*See* ID at 101-02).[15] He flatly misinterpreted evidence conclusively proving sufficiency of entry. The ALJ erred by using the wrong standard -- incorrectly holding that, in order for a new entrant to create sufficient competition, it must be able to replicate PDM in all respects. (*See, e.g.*, ID at 106) ("AT&V does not provide the competitive force that PDM once did."). This is wrong. As Dr. Harris noted, "you never have to duplicate somebody exactly the same. There are different ways of providing the same service . . ." (Harris, Tr. 7255). The proper legal analysis requires a determination of whether competitors -- *in the aggregate* -- have sufficient capacity and capability to keep the markets competitive, not whether a clone of PDM exists. (Harris, Tr. 7255-56).[16] While Respondents are under no duty to prove that entry will be quick and effective, Respondents have rebutted any prima facie case with strong evidence that entry -- *in the aggregate* -- has been and/or will be timely, likely, and sufficient, such that the markets remain competitive.[17]

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[15] The ALJ cited *United States v. Tote, Inc.*, 768 F. Supp. 1064, 1073-75 (D. Del. 1991) and *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1035-36 (W.D. Wis. 2000) in suggesting that a "quick and effective" standard may no longer be "novel." (ID at 101). To the extent the ALJ held that *Tote* and *Franklin Electric* overruled *Baker Hughes*, he clearly erred. *Tote* and *Franklin Electric* are federal district court cases. *Baker Hughes* was a unanimous decision of the D.C. Circuit which included a panel consisting of two currently-sitting Supreme Court justices.

[16] Accordingly, the ALJ's conclusion that AT&V's was capacity constrained (even if it was correct) is irrelevant. Moreover, due to the small market size, it is unnecessary for AT&V to be able to build as many LIN/LOX tanks as PDM could have built. *See* Part I, *supra*. The evidence demonstrates that AT&V has sufficient capacity to service the relevant markets, as it has won a majority of post-Acquisition work in these markets.

[17] The government's own Merger Guidelines consider entry if it is timely, likely, and sufficient. *See* 1992 HORIZONTAL MERGER GUIDELINES § 0.2, *available at* http://www.ftc.gov/bc/docs/horizmer.htm. Here, Respondents have demonstrated that entry meets the Guidelines because it is timely and likely (it has already occurred) and, as discussed below, it has been sufficient. Although Respondents have made this showing, it is not necessary for Respondents to prevail in proving sufficiency. The Merger Guidelines are not binding on courts (ID at 88), and in any event do not charge Respondents with proving sufficiency.

(1) Entry in the LNG market is sufficient to keep the market competitive.

The ALJ concluded that actual and potential entry in the LNG market was "too preliminary to challenge CB&I's market power" and that "other manufacturers do not constrain CB&I's exercise of market power." (ID at 102-03). These conclusions are wrong: First, they give short shrift to evidence regarding recent U.S. LNG tank awards. Second, they ignore the results of LNG bidding contests elsewhere in North America -- contests predictive of how new entrants will fare in the U.S. Third, they accord little or no weight to views of current LNG customers on the ability of new entrants to preserve competition. This evidence demonstrates that this market is vibrantly competitive. It rebuts any prima facie case.

(a) The ALJ gave short shrift to recent LNG awards.

Since the Acquisition, three LNG projects have reached the final award stage. The ALJ ignored significant evidence regarding these projects. Most significantly, he failed to fully analyze the facts surrounding the Dynegy Project. He correctly found that Dynegy invited foreign entrants to bid on this project, that CB&I initially decided not to bid on this project, that CB&I later reversed course and attempted to bid, and that Dynegy rebuffed that attempt in part because of its satisfaction with the pricing it had already received. (ID at 17-18). However, he concluded only that "CB&I declined to submit a tank bid only because it did not like the conditions under which it was asked to bid." (ID at 103). This conclusion is flatly inconsistent with the ALJ's own findings.

The lesson from the Dynegy Project is clear: CB&I initially refused to bid because it was not satisfied with Dynegy's procurement method. Dynegy went ahead with the project on its terms and CB&I lacked the market power to get back into the bidding process; bids already received by Dynegy were more than satisfactory without CB&I's participation in the process. (Puckett, Tr. 4559-60) (RFOF 3.304). The competitiveness of new entrants preserved competition and permitted Dynegy to rebuff CB&I. This conclusion is supported by Dr. Harris' critical loss analysis, discussed *infra*. According to Dr. Harris, application of critical loss theory shows that CB&I does not have good information regarding its competitors' costs and cannot raise prices without losing a substantial amount of new work. (Harris, Tr. 7263-65) (RFOF 7.82).

CB&I is aware that Skanska/Whessoe, TKK/AT&V, and Technigaz/Zachry have bid on the Dynegy Project. Because customers such as Dynegy take these companies seriously, CB&I believes them to be strong competitors. (Glenn, Tr. 4092-95 (state of mind); *see also* Scorsone, Tr. 4863) (RFOF 3.97). CB&I has competed against Skanska/Whessoe around the globe and knows it to be one of the largest engineering construction companies in the U.S. and worldwide. (Glenn, Tr. 4093 (state of mind); Scorsone, Tr. 4852, 4863-64) (RFOF 3.95, 3.97). CB&I has similar views of TKK and AT&V. (*See*, *e.g.*, Glenn, Tr. 4092-95, 4102-03 (state of mind); Scorsone, Tr. 4850, 4853-58, 4860-66; RX 306) (RFOF 3.135-3.138, 3.143, 3.160, 3.189-3.193).

Beyond the visibly competitive market demonstrated by the Dynegy Project, the ALJ also failed to recognize the pro-competitive effects of new entrants in two recently-awarded LNG projects -- CMS Energy and Southern LNG:

CMS Energy -- The ALJ correctly found that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (ID at 18). Yet, the ALJ failed to draw any conclusions regarding the pro-competitive force of new entry; he simply observed that "CB&I was awarded the contract over **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx]** than the firm negotiated price submitted by CB&I." (ID at 103).[18] He ignored the fact that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5075; J. Kelly, Tr. 6266-67, 6272, 6284, 6300) (RFOF 3.472, 3.477, 3.479). He also ignored the fact that CMS found the **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** to be **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx,** CMS believes that "there's enough competition worldwide that no one vendor is going to be able to go off and just increase the price of the tank. I think it's going to have to remain competitive." (J. Kelly, Tr. 6263-64, 6284-85) (RFOF 3.474, 3.483).

Southern LNG -- While correctly finding that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (ID at 18; *see also* ID at 103), the ALJ failed to consider *the most important evidence* regarding the sufficiency of entry: CB&I **[xxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

[18] In assessing the competitive significance of the CMS story, the ALJ compared **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (ID at 103). This was error. As the ALJ himself noted, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx]** (ID at 18, 68).

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx[19] **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5078-80) (RFOF 3.485, 3.486).[20]

CB&I perceives competition on other U.S. LNG opportunities from Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V, Daewoo/S&B, MHI, and IHI. (*See, e.g.*, Glenn, Tr. 4102, 4105, 4141-45, 4147-48; Scorsone, Tr. 4988-91) (state of mind) (RFOF 3.346, 3.433). The teaching of Dynegy, CMS, Southern LNG, and CB&I's state of mind with respect to pending projects in the U.S. is that the LNG market is fiercely competitive. The ALJ erred in failing to consider this evidence.

(b) The ALJ ignored the importance of recent firm, fixed price bidding in North America.

Respondents presented extensive evidence regarding fixed, firm price bids for LNG projects located in the Bahamas and Trinidad -- instances in which CB&I directly competed against foreign competitors in North America. The ALJ disregarded this evidence in its entirety, failing to recognize its importance. He came to the unsurprising conclusion that "LNG projects that are outside the United States are outside the relevant geographic market."

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19 Although there are difficulties in comparing LNG projects (especially ones built at different points in time), Respondents note **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxx xxxxxxxxxxxxxxx.]** (*E.g.*, ID at 16; RX 595 at CBI 060850 (CMS), RX 640 at CBI 069126 (Southern LNG); Scorsone, Tr. 5079) (RFOF 3.486) (CCFOF 942). CB&I's inability to **[xxxxxxxxxxxxxxxxxxxxx]** is further evidence of strong competition.

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(ID at 16). Nevertheless, to disregard this evidence completely was error. As Dr. Harris explained, the ability of new entrants to compete effectively in places near the U.S., such as Trinidad and the Bahamas, sheds light on their ability to compete effectively in the U.S. (Harris, Tr. 7218-19) (RFOF 7.103). By showing that they can compete effectively in Trinidad and the Bahamas, new entrants such as TKK/AT&V, Skanska/Whessoe, and Tractebel have demonstrated that they can compete in the U.S. and check CB&I's prices. The ALJ disregarded this key evidence regarding post-Acquisition competition.[21]

Bahamas -- In 2001, approximately six months after the Acquisition, Enron received firm, fixed price bids from Tractebel, Skanska/Whessoe, and CB&I for an LNG import terminal in the Bahamas -- less than 100 miles from U.S. shores. (Carling, Tr. 4880-81; Glenn, Tr. 4149) (RFOF 3.442, 3.443). These bids were within 7-10 percent of each other; Tractebel was the low bidder, followed by Skanska. CB&I was third. (Carling, Tr. 4481-82) (RFOF 3.445). Enron executives involved in the project do not believe that the Acquisition has "adversely affected [a customer's] ability to get a competitively priced LNG tank." (Carling, Tr. 4494-95) (RFOF 3.253). In fact, they believe that competition has *increased* as a result of the Acquisition. (Carling, Tr. 4494, 4495) (RFOF 3.253).[22]

Trinidad -- In November of 2002, TKK/AT&V won an LNG tank project for Atlantic LNG in Trinidad by undercutting CB&I's -- the incumbent contractor on site -- price by approximately 5 percent. (Rapp, Tr. 1286-87, Glenn, Tr. 4095, 4105, 4138-40; Carling, Tr. 4488-89; Scorsone, Tr. 4950-54) (RFOF 3.316, 3.326, 3.327, 3.329, 3.330, 3.332). This

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21 CB&I also expects competition on other projects in North America. For example, it expects to face Skanska/Whessoe, TKK, Technigaz/Zachry, MHI, and IHI for El Paso's Mexican projects. (Glenn, Tr. 4146; Scorsone, Tr. 4992-93) (state of mind) (RFOF 3.372).

22 CB&I believes that Tractebel is using this project to enter the U.S. LNG market. (*See* Glenn, Tr. 4150-51 (state of mind); Scorsone, Tr. 4998) (RFOF 3.443, 3.446).

development provides valuable information regarding the ability of TKK/AT&V and other new entrants to compete with CB&I. Dr. Harris concluded that the Trinidad case is an example of the ability of foreign entrants to discipline CB&I in North America and cited it as evidence that prices have not risen post-Acquisition. (Harris, Tr. 7350-51) (RFOF 7.103).

CB&I has been told by the customer that TKK/AT&V recently beat it on a project in Trinidad. (Glenn, Tr. 4095, 4105; Scorsone, Tr. 4950-52) (state of mind) (RFOF 3.326). Because CB&I was the incumbent contractor, was already employing local laborers, understood the local labor force, and had done a good job for the owner, CB&I was surprised and upset that it lost future work at Trinidad. As a result, it currently believes that TKK/AT&V can compete effectively for projects in the U.S. and elsewhere in North America. (Glenn, Tr. 4139-40; Scorsone, Tr. 4951-58) (RFOF 3.323, 3.332, 3.333, 3.336).

(c) The ALJ ignored views of current customers regarding sufficiency of entry.

Seven major recent or current LNG customers testified that existing competition is sufficient to keep prices low. None of these customers provided affidavits to the Commission prior to the issuance of the complaint.[23] Yet, the ALJ ignored the testimony of these customers. This evidence demonstrates strong competition. For example, Freeport LNG plans to seek bids from Technigaz, TKK, CB&I, Daewoo, Skanska/Whessoe, and IHI for its upcoming project. Its representative testified that Freeport LNG is "comfortable with the options that it currently has available for builders of field-erected LNG tanks for the Freeport project." (Eyermann, Tr. 7018-24) (RFOF 3.395, 3.397, 3.398).

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[23] Other LNG customers who provided affidavits to the Commission, such as Robert Yowell of Williams, later altered their testimony based on evidence of recent entry. (*See* Simpson, Tr. 3630-39).

Other current U.S. customers agree. Calpine testified that it needs four bidders to "get a very good competitive bid" and that enough new entrants are qualified to provide such bids. (Izzo, Tr. 6494-95) (RFOF 3.405). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RFOF 3.229, 3.416, 3.427).[24] Similarly, El Paso does not believe that the Acquisition has harmed competition in any way because "no one participant controls the market." (Bryngelson, Tr. 6155, 6159-60) (RFOF 3.251). Further, it does not believe that CB&I has any competitive advantage in providing turnkey LNG services: "It's a very competitive global market and we haven't seen them exert dominance in any of our bid -- our one bid process to date or any other information I have from KBR or any of the other four advisers." (Bryngelson, Tr. 6146) (RFOF 3.251).

Even Complaint Counsel's witnesses agreed that the Acquisition has not substantially harmed competition. Bechtel can get a "reasonable price" as a result of bidding between CB&I and Technigaz for U.S. LNG projects. (Rapp, Tr. 1325, 1333-34) (RFOF 3.184, 3.249). Similarly, MLGW has seen no evidence that CB&I can control this market post-Acquisition and believes that there may be more competition today as compared to 1994-95. (Hall, Tr. 1858-1861) (RFOF 3.255).

The ALJ discounted views of current LNG customers, theorizing that "[m]ost owners of LNG facilities are not very knowledgeable about procuring LNG tanks." (ID at 33;

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[24] The ALJ cited a BP document stating that "there is less competition than we would like on a regional basis. Since the acquisition of PDM, CB&I now dominate the US market." (ID at 19) (citing CX 693). Yet, he ignored BP's testimony regarding this document; it testified that **[xxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6105-06).

see also ID at 109). In doing so, he gave undue weight to an industry consultant who has never been involved in the purchase of an LNG tank. (*See* Outtrim, Tr. 705). He disputed the sophistication of LNG owners because they employed consultants to assist them with issues of LNG pricing. (ID at 33). This conclusion is backwards; LNG owners spend hundreds of millions of dollars on LNG tanks -- it lacks credulity to contend that they are ignorant of LNG tank pricing. They employ consultants *precisely because* they are sophisticated and have ways of learning pricing information. (RFOF 3.288, 3.377, 3.579, 3.586, 3.592). The fact that LNG owners use consultants with deep industry expertise is a reason to credit their views on pricing and competition, not to dismiss them.

(2) Entry in the LPG market is sufficient to keep the market competitive.

The ALJ concluded that "Respondents have not demonstrated that actual or potential entry is sufficient to challenge CB&I's market power in the LPG market." (ID at 105). He failed to properly consider the fact that recent entry has kept the LPG market competitive.

First, the testimony of ITC demonstrates that new entry has kept pricing competitive. ITC was satisfied with pricing it received on its Deer Park LPG tank. (N. Kelley, Tr. 7088-89) (RFOF 4.38, 4.55). "AT&V beat the socks off of CB&I . . . they definitely can do it cheaper." (N. Kelley, Tr. 7137) (RFOF 4.56). Competition between AT&V, Matrix, and CB&I gives ITC the ability to obtain competitive pricing. The Acquisition has not hindered ITC's ability to obtain that pricing. (N. Kelley, Tr. 7091-92, 7134-37) (RFOF 4.56, 4.58, 4.60, 4.61):

> Q. And just to sort of sum up, do you believe that the merger between CB&I and PDM has had the -- has hindered ITC's ability in any way to obtaining any of those types of products at a competitive price?
>
> A. No. I don't think it's hurt us in any way.

(N. Kelley, Tr. 7135; *see also* N. Kelley, Tr. 7090-91, 7137-38) (RFOF 4.55-4.62). In fact, ITC noted that CB&I has trouble competing in the LPG market because of its large overhead costs. (N. Kelley, Tr. 7122).[25]

Second, the ABB Lummus project further demonstrates the competitiveness of this market. The ALJ correctly found that: 1) CB&I recently won an LPG project for ABB Lummus in Port Arthur, Texas; 2) CB&I competed against Wyatt and AT&V in bidding for this project; 3) CB&I was initially in last place in the bidding process; and 4) CB&I "sharpened its pencils" and developed an innovation that allowed CB&I to lower the cost of the overall project. (ID at 36-37). Yet, he refused to acknowledge the most important fact -- that the presence of Wyatt and AT&V kept this market competitive. (*See* Scorsone, Tr. 5039-43) (RFOF 4.66-4.70).

In summary, although the ALJ stated that Respondents "presented little evidence of recent entry in the LPG market" (ID at 104), the reality is that at least two new entrants have entered the market in the past two years. These new entrants have forced CB&I to lower its prices -- this is exactly the type of evidence that the district court in *United States v. Tote*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) found to be indicative of effective entry.

(3) Entry in the LIN/LOX market is sufficient to keep the market competitive.

The ALJ held that "Respondents have not demonstrated that actual or potential entry is sufficient to challenge CB&I's market power in the LIN/LOX market." (ID at 106). In so doing, the ALJ made a fundamental error: he ignored post-Acquisition pricing. Post-

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[25] The ALJ dismissed AT&V's competitiveness on this project because "the value of this project was a fraction of the value of the next largest tank built from 1990-2001." (ID at 105). Yet, he offers no explanation why this is relevant. As discussed *infra*, AT&V and others have provided significant competition to CB&I on the only available post-Acquisition LPG job.

Acquisition prices in this market amply demonstrate that new entrants have succeeded in keeping it competitive.

(a) Post-Acquisition pricing demonstrates that entry in the LIN/LOX market is sufficient to keep the market competitive.

(i) [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx).][26] Dr. Harris noted that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]** Harris, Tr. 7385-86). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Harris, Tr. 7390-91). In short, evidence regarding this project influenced Dr. Harris' conclusion that this market has remained as competitive as it was pre-Acquisition. (Harris, Tr. 7324).

Company documents confirm that the presence of Matrix and Chattanooga generates strong competition. MG made CB&I aware that there was competition for this project **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

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[26] The ALJ erroneously found that "**[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]**" (ID at 46). The evidence shows that MG **[xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Patterson, Tr. 486-87; Scorsone, Tr. 5023-24) (RFOF 5.151, 5.153, 5.155).

Originally, CB&I submitted a bid with a 4 percent margin. (Scorsone, Tr. 5022-23) (RFOF 5.151). After learning from MG that strong competition existed for this project, CB&I recalculated its bid, cutting its margin to approximately .5 percent. It was only after succumbing to this competitive pressure that CB&I won the job. (Scorsone, Tr. 5023-24) (RFOF 5.151, 5.152).

(ii) [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx] This shows that entrants can effectively compete and discipline CB&I's pricing. The ALJ also ignored evidence that Matrix can effectively discipline CB&I's pricing. (*See* Harris, Tr. 7322-24, 7385) (RFOF 7.127). For example, while the ALJ found that Matrix did not have the necessary equipment to compete with CB&I in this market,[27] he completely ignored the fact that Matrix, in the **[xxxxxxxxxxxxxxxxxx]**, proved that it *can compete on an equal footing* with CB&I. (RFOF 5.124). He also ignored the fact that both AT&V and Matrix created downward pressure on CB&I's pricing -- **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Kamrath, Tr. 2260-61) (RFOF 5.125).

[27] The ALJ erroneously found that Matrix would need to subcontract the fabrication of LIN/LOX tanks, and that it would not be as competitive as a result. (ID at 49). Matrix's current fabrication facilities are capable of fabricating LIN/LOX tanks. (Newmeister, Tr. 2197; *see also* Harris, Tr. 7309; RFOF 5.12, 5.17, 7.128).

CB&I's internal documents confirm that competition constrained its pricing. CB&I originally bid on this job at a 2 percent margin. (Scorsone, Tr. 5032-33; *see also* RX 627 at 2) (RFOF 5.128). Steve Knott -- a CB&I sales executive -- related a conversation with an Air Liquide purchasing employee who informed CB&I that they were in a "competitive situation." (Scorsone, Tr. 5033-34; RX 627 at 2) (RFOF 5.129). To deal with this situation, Mr. Knott proposed the following:

> We would like to contract for this work. In order to avoid a loss of this work to the competition, we should be prepared to cut the Florida margin to 1% and but leave the Texas margin the same as a first response to their pressure. In the end, in order to get both jobs, it may be necessary to go to 0% margin on both. That would be as low as we would go on this work unless you and I talk again.

(RX 627 at 2) (RFOF 5.130). In response, CB&I lowered its margins to zero percent on both tanks. Despite this move, CB&I lost to AT&V. (Scorsone, Tr. 5033-36) (RFOF 5.130). Evidence regarding the Freeport project influenced Dr. Harris' conclusion that this market has remained competitive. (Harris, Tr. 7317-18) (RFOF 7.133).

(iii) BOC received good prices for post-Acquisition projects.

Recent post-acquisition projects awarded by BOC Gases provide further evidence of healthy competition in the LIN/LOX market. BOC awarded a project to AT&V in Midland, North Carolina because it was the low bidder. (ID at 45). BOC was satisfied with AT&V's price because it was below the projected budget for this project. (ID at 45). Notably, BOC testified that it "was quite satisfied [with ATV] in all aspects." (V. Kelley, Tr. 5287) (RFOF 5.108). Specifically, BOC praised AT&V for being proactive in solving problems as they arose on the job site, as well as its turnover package and schedule execution. (V. Kelley, Tr. 5268, 5283-84, 5287-89) (RFOF 5.97, 5.108-5.110).[28] BOC believes that AT&V has "distinguished themselves as being capable LIN/LOX tank providers." (V. Kelley, Tr. 5281-82; *see also* V. Kelley, Tr. 5285) (RFOF 5.113). Mr. Kelley confirmed that BOC planned to use AT&V again in the future, and that another division of BOC had already selected AT&V as a LIN/LOX tank contractor because it had the low bid. (*See* ID at 45; *see also* V. Kelley, Tr. 4601, 5289-92; Cutts, Tr. 2419) (RFOF 5.113-5.117).[29]

These developments have constrained CB&I's prices. When BOC awarded the Midland project to AT&V, CB&I learned about it:

> To follow-up on LOX/LIN competitors, I just spoke to BOC and they have awarded the Midland, NC to ATV out of Houston. BOC says . . . ATV has picked up Graver and Brown Minny people over the last couple of years with the experience to do the work. Our final price to BOC was $1,520,000 at 2% profit and they bought the tank for approximately $1,325,000 which is about 2% below our total flat cost.

(RX 273) (state of mind) (RFOF 5.72, 5.213). From this information, CB&I concluded that AT&V had a "very strong commitment to entering into this market and that they made the proper new move to gain experience in the market" and that they have lower costs than CB&I. (Scorsone, Tr. 5026) (state of mind) (RFOF 5.40, 5.72). CB&I also believed that AT&V was bidding on LIN/LOX projects at prices *below those offered by PDM*. (RX 208) (state of mind). In fact, after CB&I learned of its loss to AT&V, it concluded that CB&I has "a very hard time competing on these [LIN/LOX] tanks." (RX 208 (state of mind); *see also* Scorsone, Tr. 5029-

[28] The testimony of BOC is corroborated by AT&V. BOC told AT&V that its "quality [on the Midland job] was exceptional, the schedule was good, and that the safety was exceptional." (Cutts, Tr. 2453-54, 2523) (RFOF 5.32).

[29] Despite this unequivocal testimony from BOC's designated corporate representative, the ALJ erred in holding that "[r]eviews of AT&V's price and performance for BOC's Midland project are mixed." (ID at 47). The ALJ improperly credited testimony of Hans Kistenmacher, who had no involvement in the Midland project, nor was he testifying on behalf of BOC.

30) (RFOF 5.212). Other pricing contests have given CB&I additional evidence regarding the viability of its competitors. While CB&I submitted budget pricing for a BOC LIN/LOX project in Oregon, it never had an opportunity to submit a firm fixed bid for this project because it was awarded to AT&V. (Scorsone, Tr. 5031) (RFOF 5.116, 5.120). Based on this information, CB&I has concluded that BOC is pleased with AT&V's performance. (Scorsone, Tr. 5032) (state of mind) (RFOF 5.121).

(4) Economic analysis confirms the existence of vibrant competition in the relevant markets.

Respondents also presented economic testimony demonstrating that the Acquisition has not adversely affected competition in the relevant markets. The ALJ erred in disregarding that economic analysis in its entirety.

Dr. Harris used critical loss analysis to determine that the Acquisition has not adversely affected competition. (Harris, Tr. 7259) (RFOF 7.59-7.81). "Critical loss" analysis is a calculation developed by Dr. Harris which seeks to quantify market power, either for purposes of market definition or analyzing market power, under the Merger Guidelines. (Harris, Tr. 7256-58) (RFOF 7.59, 7.60, 7.65).

An economist makes a critical loss calculation by identifying the entity being tested, and calculating how much sales could be lost before a given price increase would be unprofitable. (Harris, Tr. 7247-59) (RFOF 7.61, 7.62). The second step is performed by identifying an entity's variable costs and variable contribution margin. The larger the variable contribution margin, the more each unit of lost sales will harm the entity's profits; i.e., the larger the contribution margin, the lower the critical loss. (Harris, Tr. 7259) (RFOF 7.63). Simply put, if an entity's cost structure could be recovered on a single project, the entity would only need that one project and could afford to lose other projects. However, if the entity must cover certain costs regardless of whether a particular project is won or lost, the entity cannot afford to lose more than a "critical" number of projects. The critical loss is the level at which all sales become unprofitable. (Harris, Tr. 7259) (RFOF 7.62).

Dr. Harris performed a critical loss analysis in this case and concluded that CB&I cannot impose a price increase in light of the business it has already lost. (Harris, Tr. 7260-64, 7266, 7342-43) (RFOF 7.76, 7.80, 7.81). From a business perspective, CB&I simply cannot impose a price increase since it has already lost more than the quantity of business deemed to be "critical." (Harris, Tr. 7342-43) (RFOF 7.78).

E. RESPONDENTS HAVE REBUTTED ANY PRIMA FACIE CASE IN THE TVC MARKET.

Even if the TVC market were a viable line of commerce, there is no evidence that the Acquisition has substantially lessened competition. Indeed, the ALJ erroneously disregarded that it is questionable whether CB&I would have the necessary expertise to construct TVCs absent the Acquisition. (Scully, Tr. 1214) (RFOF 6.36). CB&I is not a particularly experienced TVC fabricator. It last constructed a TVC in 1984. (Scully, Tr. 1187-89, 1193; Scorsone, Tr. 5055-56; Higgins, Tr. 1276-77; Glenn, Tr. 4089, 4160) (RFOF 6.26). On its second-to-last TVC job in 1981, the chamber was so flawed that it taken out of operation. (*See* Thompson, Tr. 2113; Scully, Tr. 1188) (RFOF 6.45). Importantly, CB&I has never constructed a mailbox-shaped TVC -- the type that customers currently prefer. (Higgins, Tr. 1277-78; Scully, Tr. 1192-93; Scorsone, Tr. 5056; Neary Tr. 1467) (RFOF 6.27). Mailbox-shaped TVCs are much more difficult to design and more costly to build than traditional TVCs. (Scully, Tr. 1106-07; Higgins, Tr. 1277; Neary, Tr. 1467) (RFOF 6.28).

F. PDM'S EXIT WAS CERTAIN. THE ACQUISITION HAD NO IMPACT ON COMPETITION.

PDM was irrevocably committed to selling all of its assets and would have exited the industrial tank business absent the Acquisition. As a result, competition in the relevant markets would be the same regardless of the Acquisition. As both expert economists have explained, post-Acquisition competition must be compared to competition as it would have been absent the Acquisition -- not what it was pre-Acquisition -- to assess Section 7 liability. (Simpson, Tr. 5677, 5701; Harris, Tr. 7173-74, 7186-87) (RFOF 7.255). Further, evidence demonstrates that if PDM were sold to another party, it would not have been as effective a competitor as it was under PDM. Because of these uncontroverted facts, pre-merger market share and HHI statistics are unreliable indicators of the competitive effects of the Acquisition. The ALJ's failure to consider these facts constitutes reversible error.

(1) Absent the Acquisition, PDM EC would not have been a competitor to CB&I.

Post-Acquisition competition must be compared to competition as it would have been absent the Acquisition. (Simpson, Tr. 5677, 5701; Harris, Tr. 7173-74, 7186-87) (RFOF 7.255). In many merger cases, pre-acquisition competition is the same as competition absent the acquisition. If the transaction is enjoined or is otherwise not consummated, the selling company either continues to operate the assets or finds another buyer. This is a unique case. PDM was irrevocably committed to selling all of the assets. (Byers, Tr. 6742, 6762-63) (RFOF 8.20). It was not going to continue to operate the EC Division. (Byers, Tr. 6757-58) (RFOF 8.38). PDM EC could have continued as a competitive force only if another company had purchased it. (Simpson, Tr. 5675-76). As demonstrated below, there was no other purchaser to buy the PDM

EC Division.[30] (Byers, Tr. 6776-78; RX 28 at 2) (RFOF 8.55). Under these unique circumstances, competition if CB&I had not bought PDM EC is exactly the same as competition post-Acquisition. By itself, these facts establish that the Acquisition has not substantially lessened competition. *See United States v. General Dynamics*, 415 U.S. 486, 507 (1974) (holding that "the effect on competition . . . will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a 'lesser of two evils' approach. . . ."). While the ALJ properly rejected use of HHI statistics as unreliable, he erred by failing to consider that CB&I's acquisition of PDM EC had little competitive effect in those markets.

(2) Even if PDM EC had been sold as a going concern, it would not have been as effective a competitor as it was pre-Acquisition.

Absent the Acquisition, PDM EC would have been acquired -- if at all -- by a smaller company and would not have been as effective a competitor as it was under the PDM banner. PDM EC benefited from being part of the larger PDM corporation, which had revenues of over $600 million. (Byers, Tr. 6734-35) (RFOF 8.7, 8.11, 8.33). PDM EC would have been sold, if at all, to a purchaser with a substantially smaller revenue base. *See* Part IV, *infra*. Such a smaller company would have a harder time obtaining bonding for larger projects. (Byers, Tr. 6738) (RFOF 9.25).[31] Further, past industry transactions suggest that the purchasing entity could

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30 The ALJ also improperly rejected Respondents' affirmative defense that PDM EC was an exiting asset. *See* Part IV, *infra.*

31 Bonding capacity is a function of a company's revenue base and financial assets. (Byers, Tr. 6738; Bryngelson, Tr. 6127-28; Izzo, Tr. 6511-12) (RFOF 9.22, 9.25, 9.26). While a smaller company such as Matrix can compete in the LIN/LOX and LPG markets, it would have more difficulty obtaining bonding or making financial guarantees for larger LNG projects as compared to PDM pre-Acquisition. In fact, pre-Acquisition, PDM was the smallest LNG tank competitor, and had had trouble making parent company financial guarantees. (Izzo, Tr. 6488-89). Given the trend in the LNG market towards larger and more expensive facilities, it is questionable whether PDM under the ownership of Matrix or an even

have managed the assets in a less effective manner than PDM's management. (*See* Kamrath, Tr. 1991, 2026-27) (RFOF 8.128, 8.129).[32] There was no evidence at trial that PDM EC would have been able to exert the same competitive influence as it did pre-Acquisition; the ALJ erroneously ignored and made no findings regarding the competitive strength of a PDM EC under different ownership.

smaller company could have effectively participated in the LNG market. Had PDM EC been sold as a going concern, it is highly probable that it could not have bid for the majority of these projects.

[32] The demise of Graver after it was purchased by ITEQ constitutes a natural market experiment on this subject. (*See* ROB at 152) (RFOF 8.127-8.133).

III. DIVESTITURE IS INAPPROPRIATE IN THIS CASE.

Divestiture is inappropriate here. The ALJ made two critical errors in ordering divestiture, both of which are discussed below. First, he failed to properly consider evidence regarding efficacy of divestiture. Second, he erred in ordering the divestiture of assets irrelevant to competition in the relevant markets.

A. EVIDENCE DEMONSTRATES THAT DIVESTITURE COULD HARM COMPETITION.

Divestiture is not mandatory. The ALJ had significant discretion in fashioning appropriate relief. *In the Matter of Retail Credit Co.*, 92 F.T.C. 1, 258-59 (1978); *see also United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 321-22 (1961); *In the Matter of Ekco Prods. Co.*, 65 F.T.C. 1163, 1202 (1964); *In the Matter of The Grand Union Co.*, 102 F.T.C. 812, 503 (1983). Although the ALJ recognized that divestiture is not mandatory, he found that sufficient evidence was not presented "to depart from the usual remedy of divestiture" (ID at 120). He critically erred by failing to fashion a remedy to encourage competition and improve customers' ability to receive quality goods or services at a competitive price. The evidence demonstrated that divestiture will not improve competition, and *that such a remedy could actually harm customers*. For example, Joseph Hilgar of Air Products noted that the Acquisition has created some benefits for Air Products, and that a divestiture would "be bad for Air Products and the industrial gas business in general." (Hilgar, Tr. 1540) (RFOF 9.10).

Specifically, divestiture will lessen the number of competitors who can bid on large LNG projects. As the ALJ himself noted, a competitor's financial size can affect its ability to meet customers' bonding requirements. (ID at 82; *see also* Izzo, Tr. 6511-12) (RFOF 9.22). For many customers, financial viability of a prospective bidder is important to a prequalification process. (Rapp, Tr. 1313) (RFOF 9.24). Several customers have expressed concern that a divestiture could result in *fewer* qualified bidders for LNG projects. For example, Calpine noted that breaking up CB&I could result in two companies lacking the "bonding or guarantee ability to make our bid list." (Izzo, Tr. 6511-12) (RFOF 9.24). It explained that foreign companies, such as Skanska, Technigaz, and TKK had the financial strength to guarantee a large LNG project. (Izzo, Tr. 6511-12) (RFOF 9.22). By contrast, the two "residual" companies left by a divestiture could have difficulty:

> I'd be concerned about whether either of the two residual companies would have the bonding or guarantee ability to make our bid list, and unless a company could guarantee what we were asking them to do, which I feel comfortable with with the Skanskas and Technigazes and TKKs, I don't know -- I seriously doubt PDM's ability being able to backstop a large enough project as we're talking about. I don't even think PDM would make my bid list, and whether 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). Similarly, El Paso considers a company's ability to post performance bonds and provide necessary liquidated damages coverages to determine whether "they're a strong enough company, [so that] we can go and get some money to cover our damages." (Bryngelson, Tr. 6127-28, 6154-55) (RFOF 9.9, 9.26). The Acquisition has given "some comfort in the bid process" because CB&I is a "larger company now, with more assets to go after if they do fail in the process of constructing a tank." (Bryngelson, Tr. 6154) (RFOF 9.9). Divestiture would rob El Paso of this comfort:

> Q. Okay. If the FTC is successful in breaking up CB&I into two separate companies, would that concern El Paso?
>
> A. It would concern me, yes.
>
> Q. Why would it concern you?

A. It would be, as I mentioned before, a smaller company, and in that situation, I would be less inclined to do any more than maybe one or two jobs with them total.

* * *

Q. If CBI were split in two, would you be concerned that both of the newly created companies as a result of the breakup might not have a sufficient size to satisfy El Paso that they could back up, you know, the necessary work to be done?

A. Yes. That would concern me.

(Bryngelson, Tr. 6155-56) (RFOF 9.23). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**[33] Complaint Counsel introduced *no evidence* as to the impact of its proposed remedy on the bonding ability of CB&I or the divested entity. Accordingly, the ALJ erred in ordering divestiture.

Respondents also presented economic testimony regarding the effect of a divestiture. Dr. Harris considered customer testimony regarding potential effects of divestiture on their businesses and concluded that divestiture is "unsupported in the record." (Harris, Tr. 7375-76) (RFOF 7.141, 7.143). He explained that the goal of divestiture should be to create

[33] The sale of PDM's assets provides an instructive example of how financial size can affect a company's ability to compete. During 2001 and 2002, various divisions of PDM were sold off (CB&I acquired the Water and EC Divisions). The last division sold was PDM Bridge, which sometimes required bonding to perform its projects. PDM Bridge's ability to obtain necessary bonding was lessened because it was no longer associated with revenues from PDM's other divisions. (Byers, Tr. 6738) (RFOF 9.25).

"two low-cost companies," and observed that divestiture may create higher-cost companies, which would "hurt competition in all four markets." (Harris, Tr. 7375-76) (RFOF 7.143):

> It 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. That's, according to the FTC, that's what we have now, we have a low-cost CB&I and a bunch of new competitors that are high cost. So for this relief to have any impact you must have confidence that the two firms that will be the result will both, not one but both, be low-cost producers in the markets. And you know, there's no evidence in the record that I've seen to suggest that's true.

(Harris, Tr. 7367-68).

Respondents offered this evidence to show that divestiture would harm competition. Complaint Counsel offered no credible evidence in its case-in-chief or its rebuttal case. Yet, the ALJ ordered divestiture because it is the "usual and proper remedy" under Section 7. (ID at 119-20). This was error. The fact that a remedy is "usual" or "proper" does not mean that it should be imposed if the evidence demonstrates that it will harm competition. In previous antitrust cases, Complaint Counsel was required to present evidence in support of its proposed remedy. For example, in *United States v. Ford Motor Co.*, 405 U.S. 562, 571 (1974) -- another Section 7 case -- the trial court took *nine days* of remedy testimony even though divestiture was the "usual and proper" remedy. Similarly, in *United States v. Microsoft*, 253 F.3d 34, 46 (D.C. Cir. 2001), the D.C. Circuit reversed a divestiture order in part because the trial court failed to take any evidence regarding the feasibility, desirability or effectiveness of this remedy. 253 F.3d at 46.[34]

[34] The ALJ should have held Complaint Counsel to the same standard. Yet, he improperly rejected *Microsoft* because it was a Section 2 case and not a Section 7 case. (ID at 119-20). *Microsoft* held that, in order to create a proper antitrust remedy, it is necessary to take evidence in order to ensure that the remedy imposed makes sense. 253 F.3d at 101-02. The same is true here. The mere fact that Section 7 (and not Section 2) is at issue does not permit the imposition of a remedy that is neither preferred by customers nor likely to create competition.

In light of this evidence, the ALJ should have required Complaint Counsel to present credible evidence on the efficacy of divestiture. He failed to do so. Here, the *only evidence* presented by Complaint Counsel was conclusory testimony from FTC staff economist John Simpson. The ALJ erred in crediting this evidence. Dr. Simpson was not a fact witness. He, by his own admission, had no background in breaking up companies and had no fact evidence available to him to offer opinions regarding remedy. (Simpson, Tr. 5715) (RFOF 9.3). He offered no evidence that creating an independent company from the ribs of CB&I would be practical, desirable or effective, nor could he cite any evidence showing that customers would favor disassembly of CB&I. (Simpson, Tr. 5718) (RFOF 9.4).

B. PORTIONS OF THE ORDERED REMEDY ARE UNNECESSARY TO PROMOTE COMPETITION.

The Order includes provisions unnecessary to restoring competition. Specifically, the Order requires CB&I to divest the PDM Water Division, even though "only the products made by the EC Division are within the affected lines of commerce." (ID at 121). The ALJ based divestiture of the Water Division on evidence that the groups sometimes share personnel, equipment, and fabrication facilities, and that "PDM did not find it practical or value optimizing to split the EC and Water Divisions when it evaluated the best course of action for the assets prior to the Acquisition." (ID at 121). This measure does nothing to restore competition in the relevant markets and is improper punitive relief. *See Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) (finding that the primary purpose of antitrust remedies is remedial, not punitive).

Further, the ALJ failed to consider potential effects of divesting the Water Division. Complaint Counsel presented no evidence that water customers wished to see CB&I's water business divested from it or that CB&I's ownership of PDM's Water Division (and its integration with CB&I's current water assets) impacted competition in any way. He also misinterpreted PDM's desire to sell the EC and Water divisions together. PDM would have needed to spend $5-$10 million to separate the divisions. (Scheman, Tr. 2959-60, 6922-23; RX 163 at 27) (RFOF 8.37). There is no evidence that the two divisions *could not have been sold separately*. Nor is there evidence that a party purchasing the EC Division could compete in the relevant product markets without Water Division assets. For these reasons, inclusion of the Water Division in the Order is unwarranted and is entirely different from the divestiture in *Olin*, which involved integrated manufacturing facilities for two separate products that were located at the same plant and could not have been separated for purposes of sale. *In the Matter of Olin Corp.*, 113 F.T.C. 400, 619-20 (1990).

IV. THE EXITING ASSETS DEFENSE COMPELS REVERSAL OF THE INITIAL DECISION AND DISMISSAL OF THE COMPLAINT.

The exiting assets defense compels dismissal of the Complaint. The Supreme Court has recognized a "failing firm" defense, which requires a showing that: 1) the acquired company is "so depleted and the prospect of rehabilitation so remote" that there is a "grave possibility of business failure"; and 2) the "company that acquires the failing company . . . is the only available purchaser." *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 136-38 (1969). The exiting assets defense is similar to the failing firm defense; it addresses companies that are not necessarily failing, but are leaving the market. Kwoka and Warren-Boulton, *Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis*, 31 Antitrust Bull. 431, 450 (Summer 1986). Its elements are: 1) the acquired firm would shortly be leaving the market; and 2) the acquiring company is the only available purchaser. *See id.* at 449-50. The defense's purpose is to promote market efficiency. *Id.*

Although the Commission and the Ninth Circuit have addressed the possibility that such a defense might exist, it has never been addressed in a case where the above criteria have been met. *See Olin*, 113 F.T.C. 400; *Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993). Because Respondents have proven that PDM would have shortly exited the market, and that CB&I was the only viable purchaser of PDM's EC Division, application of the exiting assets defense is appropriate here.

A. ABSENT THE ACQUISITION, PDM WOULD HAVE SHORTLY EXITED THE MARKET.

Absent the Acquisition, PDM would have liquidated its EC Division and exited the market. (Scheman, Tr. 6952) (RFOF 8.115). There is no evidence that PDM would have done otherwise. Yet, the ALJ concluded that liquidation was unlikely because PDM's CFO testified that he had a fiduciary duty to try one more time to sell the assets. (ID at 117). This conclusion directly contradicts testimony from PDM's CFO and its investment banker, who testified that that *liquidation was the likely alternative to the Acquisition*. (Byers, Tr. 6769-70, 6773; Scheman Tr. 6952) (RFOF 8.115, 8.118). The likely decision to liquidate was created by the history and circumstances of PDM as a corporation, its need to receive cash and not stock for selling off its component parts, as well as the poor state of the economy at the time PDM was selling its EC division. (*See, e.g.*, Byers, Tr. 6731-32, 6763-64; Scheman, Tr. 6948-49) (RFOF 8.1-8.3, 8.23, 8.83).

As a publicly traded company, PDM was small and its stock was thinly traded. (Byers, Tr. 6732-33; Scorsone, Tr. 4791-92) (RFOF 8.3). A sale of even a small quantity of stock could negatively impact share value. (Scheman, Tr. 2916-17, 6909-10; Scorsone, Tr. 4791) (RFOF 8.11). The PDM Board decided to address this problem in June 2000 by selling off the company's assets and returning cash proceeds to stockholders. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907) (RFOF 8.16, 8.20, 8.38).[35] In December of 2000, the deal with CB&I nearly cratered and PDM was forced to consider alternatives. (Byers, Tr. 6770, 6773) (RFOF 8.118). PDM's CFO was prepared to recommend that the Water Division be sold via a leveraged buyout, and that the PDM EC Division be liquidated by selling off its assets. (Byers, Tr. 6769-70, 6773, 6775-77) (RFOF 8.55, 8.118). Liquidation of the EC Division was probable given the prevailing financial circumstances and lending environment. (Scheman, Tr. 6952-53, 6924-26; RX 28 at 2) (RFOF 8.115-8.116, 8.122).

The unrebutted evidence demonstrated that PDM needed to move quickly to consummate an all-cash transaction in a tightening credit market, and that the asset it was trying

[35] By contrast, the acquired company in *Olin* was not exiting the market "shortly"; it was continuing its operations. 986 F.2d at 1307.

to sell was performing poorly and hemorrhaging money. In the face of this evidence, liquidation of PDM EC was probable. (Byers, Tr. 6774-75; Scheman, Tr. 6952-53) (RFOF 8.115, 8.126). Despite this evidence, the ALJ rejected the possibility of liquidation because it was theoretically possible that another buyer could have purchased the EC Division at a price above liquidation value. This conclusion is wholly unsupported by the evidence and is inconsistent with the detailed analysis of purchasers performed by PDM's investment bankers. Further, it is also inconsistent with the law -- CB&I need not prove with certainty that no other purchasers existed. Section 7 cases "deal with probabilities, not certainties." *Baker Hughes*, 908 F.2d at 987. Consistent with *Baker Hughes*, the standard of proof is a preponderance of the evidence; Respondents need only show that it is more likely than not that another purchaser of the PDM EC assets did not exist, a burden that it has met by showing there were no other buyers available to purchase the EC Division at above liquidation value. (*See* ROB at 146-152).

B. PDM ENGAGED IN A REASONABLE MARKETING EFFORT. CB&I WAS THE ONLY POTENTIAL PURCHASER FOR PDM EC.

The ALJ erred in holding that Respondents did not present "sufficient evidence to demonstrate that PDM conducted an exhaustive effort to sell the package of assets sold to CB&I." (ID at 117). The only record evidence supports the conclusion that PDM did everything possible to sell its EC Division, and that CB&I was the only potential purchaser. In suggesting that PDM could have done more, the ALJ engaged in speculation devoid of evidentiary support.

CB&I was the only potential purchaser for PDM EC. It was the only company with sufficient financial strength to give PDM what it needed: a quick, all-cash transaction. Speed was critical, as the ultimate disposition of PDM, a final rollup transaction, was to occur approximately six months after the PDM Board authorized liquidation. (Byers, Tr. 6761-62) (RFOF 8.5, 8.25, 8.33, 8.34, 8.39). As part of this rollup, the last remaining division would be sold to an investment company who would, simultaneously at closing, resell it to a third party. (Byers, Tr. 6759-61) (RFOF 8.24). The evidence demonstrates that this transaction would have been far more difficult if the EC Division's assets were still within the company at the time of the final transaction. (Byers, Tr. 6759-61) (RFOF 8.24).

To locate motivated and interested purchasers, PDM's investment banker relied on a process of wide dissemination of PDM's intent to sell the company. (Scheman, Tr. 2921-22, 6884-85, 6910-11) (RFOF 8.49, 8.50). It published a press release in the *Wall Street Journal* and relevant trade publications. This effort was successful, as the fact that PDM EC was for sale was well-known throughout the industry. (Scheman, Tr. 6945-46) (RFOF 8.52). It compiled lists of callers who expressed interest in purchasing one or more of PDM's divisions, evaluated potential purchasers, and determined that only CB&I could purchase the EC and Water Divisions at above liquidation value. (Scheman, Tr. 2922, 6911, 6924-26; RX 164-66) (RFOF 8.53, 8.116).

Based on the evidence presented, the ALJ should have recognized the exiting assets defense and applied it in this unique case.

CONCLUSION

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

Dated: August 8, 2003

Respectfully submitted,

____

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

In the Matter of CHICAGO BRIDGE & IRON COMPANY N.V., a foreign corporation, CHICAGO BRIDGE & IRON COMPANY, a corporation, and PITT-DES-MOINES, INC., corporation.	Docket No. 9300

ORDER

Upon consideration of Respondents' Appeal Brief, it is hereby ORDERED that the Complaint as to all product markets is dismissed with prejudice.

Dated: ________________

____
The Commission

CERTIFICATE OF SERVICE

CHI:1243974.1

I, Nada S. Sulaiman, hereby certify that on this 8th day of August, 2003, I served a true and correct copy of Respondents' Appeal Brief -- Public Version, by hand delivery upon:

Office of the Secretary
Federal Trade Commission
Room H-159
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I caused one copy of Respondents' Appeal Brief to be served by hand delivery upon the following persons:

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