UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9300

PUBLIC VERSION

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.,

CHICAGO BRIDGE & IRON COMPANY,

and

PITT-DES MOINES, INC.

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The following abbreviations and citation forms are used:

ID-	Initial Decision
IDF-	Initial Decision Finding of Fact
CCPFO	Complaint Counsel's Proposed Final Order
CX	Complaint Counsel exhibit
RX	Respondents exhibit
CPF-	Complaint Counsel's Proposed Findings of Fact, filed February 14, 2003
CRF-	Complaint Counsel's Corrected Proposed Reply Findings of Fact, filed March 14, 2003
RPF-	Respondents' Corrected Proposed Findings of Fact, filed March 27, 2003
RAB-	Respondents' Appeal Brief, filed August 4, 2003

Citations to the trial transcript include the witness name and page number: Neary, Tr.1420.

Pages of exhibits are referenced by bates number: CX212 at CB&I-PL031718.

References to investigational hearing or deposition transcripts that have been included in the trial record as exhibits include the exhibit number, the transcript page(s), the witness name, and the designation "IH" or "dep": JX 23a at 89 (Cutts, Dep.).

In camera material is bracketed and appears in bold.

STATEMENT OF THE CASE

Administrative Law Judge Chappell found correctly that "reliable and probative evidence" established "that the effect of the Acquisition of PDM's EC and Water Divisions by CB&I may be to substantially lessen competition" in the field-erected, LNG, LPG, and LIN\LOX tank and thermal vacuum chamber ("TVC") markets in the United States. ID-3. Evidence of extremely high concentration and barriers to entry, and in Complaint Counsel's view, undisputed evidence of actual or attempted collusion and dramatically higher prices and margins, establish that this Acquisition clearly violates Clayton Act § 7.

Prior to the Acquisition, CB&I and PDM knew that they were taking a beating from each other, and they wanted to eliminate that competition to obtain higher margins. *See* Statement of Facts ¶4 *infra* (evidence of head-to-head competition bidding down price; and that CB&I and PDM were the lowest-cost competitors). PDM EC's President, Luke Scorsone told his Board that a combined CB&I/PDM could achieve "market dominance in the Western Hemisphere." IDF-492; Scorsone, Tr.5169. He later "brainstorm[ed]" with his staff and decided on a CB&I-PDM post-merger strategy to "create barriers to entry," "defend an expanding market share," and prevent "smaller competitors to take share." IDF-495; Scorsone, Tr.5204-5205. His plan was to achieve higher prices for their products and to increase margins from "12.5% to 17%." IDF-495. PDM then discussed this strategy directly with CB&I, prior to the closing and pending an FTC investigation. Scorsone, Tr.5209; IDF-496.

After receiving numerous customer complaints, Staff commenced an investigation, this Commission authorized compulsory process, subpoenas and CIDs were issued, and Respondents asked for an extension of time to respond. Respondents then used this time to consummate the Acquisition.

Despite CBI's dominance in each of the relevant markets, Respondents tell an "entry" story that is without merit. No domestic competitor has competed successfully against CB&I/PDM in LNG or LPG tanks or TVCs for decades, with the exception of Morse Construction, which built an LPG tank near its facilities in the Pacific northwest, and AT&V, which built a very small LPG tank. Strikingly, while this case was pending, CB&I acquired Morse too. The smaller domestic competitors that, from time to time, build smaller LIN\LOX tanks have been doing so for years without making any headway against CB&I, and thus do not constitute entry that constrains the merged firm as the two firms would have constrained each other absent the merger. And there is no evidence of domestic entry in the LPG or TVC markets.

Respondents' claim of foreign entry is equally unfounded. None of the foreign competitors identified by Respondents has ever – either before or in the more than two years since the Acquisition – built any of these products in the United States. Indeed, despite Respondents' unfounded assertions about foreign entry in the LNG market, there is not one single document from the companies expressing any concern about this alleged, new competition. Instead, just before the trial, CB&I's CEO, Gerald Glenn was asked by an investor whether competition had changed since the Acquisition; he responded that because CB&I had lower costs, it could be the "low bidder and make more money. . . than most of our competitors, if not all of them," and that CB&I can "win the work" every time, unless someone tries to bid below cost, in which case the attempted entrant will just "go out of business." CX1731 at 42-44. Mr. Glenn expressed absolutely no fear that any of these other firms could constrain pricing by CB&I.

Indeed, as Mr. Glenn said after the Acquisition, CB&I "now ha[s] unequaled capability." CX1720. No wonder! Now that the "first and second lowest cost sellers" have merged into CB&I, the merged firm has the ability to "cause prices to rise to the constraining level of the next lowest-cost

seller." Dept. of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* (1992, rev'd 1997) § 2.21, n.21. CB&I management even acknowledged that the Acquisition had created a "900-pound gorilla" and that its margins were now going up dramatically. CX1681; CX1628-23. As Mr. Scorsone had planned, higher margins were gained from higher prices, once PDM had been eliminated.

Respondents did not present any evidence of pro-competitive efficiencies or cost savings arising out of the merger. Nor does PDM's "exiting assets" defense help Respondents, since PDM's assets were not "exiting," and PDM did not try to sell the assets to anyone else.

Finally, Complaint Counsel has little quarrel, generally, with the thorough work of Judge Chappell's Initial Decision, except for two points: First, we believe that the undisputed evidence established actual anticompetitive effects – an independent ground for affirmance. Detailed evidence of higher post-merger margins and prices, none of which are attributable to pro-competitive efficiencies or cost savings, demonstrate the illegality of this Acquisition. The ALJ also discounted undisputed incidents of collusion, even though in one case the other bidder admitted that CB&I asked to "coordinate on making a price bid to TRW," and the customer testified that it was now "basically hosed." Gill, Tr.247, 274; Neary, Tr.1451.

Second, while Judge Chappell recommended "complete" divestiture of PDM as a "viable and going concern that will enhance competition" in the relevant markets, he omitted details of typical Commission orders to ensure that such a divestiture be completely effective, including, *inter alia*, a transfer of ongoing business. These additional measures are critical to restoring competition "to the state in which it existed prior to, and would have continued to exist but for," the unlawful Acquisition. ID-120 (citation omitted). Accordingly, with the addition of these two points, Complaint Counsel asks this Commission to affirm the ALJ's Initial Decision. A proposed order is

attached.

STATEMENT OF FACTS

1. A History of the Proceedings

On August 29, 2000, CB&I agreed to acquire PDM's EC and Water Divisions for $93.5 million. IDF-521-22. The Acquisition was consummated on February 7, 2001 (IDF-545), despite the concerns communicated by FTC staff about the proposed merger and the outstanding subpoenas and CIDs directed to the parties. Thereafter, the FTC staff continued its investigation.

The Commission issued the Complaint on October 25, 2001. The hearing commenced November 12, 2002, and concluded January 16, 2003. In an initial decision filed June 12, 2003, the ALJ found that there was reliable, probative, and substantial evidence that the Acquisition may substantially lessen competition in the relevant markets. ID-3. The ALJ ordered divestiture of the PDM EC and Water Divisions, finding that divestiture is the appropriate remedy to restore competition. ID-121.

2. The Relevant Markets

Judge Chappell correctly found, and Respondents do not dispute, that the relevant geographic market is the United States, and the relevant product markets are: (1) liquefied natural gas ("LNG") storage tanks, (2) liquid nitrogen, oxygen and argon ("LIN/LOX") storage tanks, (3) liquid petroleum gas ("LPG") storage tanks, and (4) TVCs. IDF-14-85. LNG, LIN/LOX and LPG storage tanks are large, field-erected tanks that store gases and other products at low or cryogenic temperatures. IDF-20-36. TVCs are large (over 20' in diameter), field-erected chambers that simulate the outer space environment and are used to test satellites. IDF-37-45.

3. A 2-1 Merger that Creates a Dominant Firm with Market Shares of 73% to 100% and HHIs of 5,800 to 10,000

Prior to the Acquisition, CB&I and PDM were, by far, the largest competitors in the relevant markets, each of which was highly concentrated.[1] Table 1 below shows the market shares of the merged entity, the post-merger HHIs and the increase in the HHIs (IDF-68, 218, 273, 371).[2]

TABLE 1

Product Market	Post-Merger Market Share	Post-Merger HHI	HHI Increase
LNG[3]	100%	10,000	4,956
LIN/LOX[4]	73%	5,845	2,635
LPG[5]	91%	8,380	3,910
TVC[6]	100%	10,000	4,999

[1] For more detail, *see* CPF-129-46 (LNG), 147-70 (LIN/LOX), 171-78 (LPG) and 189-195 (TVC).

[2] Complaint Counsel measured market shares and computed market concentration based on historical sales since 1990. This methodology mirrors industry recognition of historical experience as a critical factor in selecting vendors, a fact emphasized in Respondents' business strategy and marketing material. CPF-119-124.

[3] Since 1975, CB&I and PDM were the only firms that built LNG tanks in the United States. IDF-64. No foreign company has ever built an LNG tank in the United States. IDF-67.

[4] The only other competitor with significant sales since 1990, Graver, is out of business. IDF-269-270. Two fringe competitors, Matrix and AT&V, comprise 4% of sales. IDF-269.

[5] The only remaining competitor is AT&V (IDF- 213) since CB&I acquired the other fringe competitor (Morse). IDF-214. Including Morse's sales, the CB&I/PDM/Morse combined market share is nearly 100%. IDF-213-214.

[6] Since 1960, CB&I and PDM have been the only builders of TVCs. IDF-363. As recently as six weeks before the Acquisition, CB&I vigorously competed against PDM, and advised customers that CB&I would be a "long-term supplier and partner" of TVCs. CX 1599 at 7.

4. CB&I and PDM Were Each Other's Closest Competitor

With one or the other company accounting for nearly every LNG, LIN/LOX, LPG and TVC project in the United States since 1990, not surprisingly Respondents' ordinary course of business documents repeatedly refer to each other as the closest competitor. Respondents' business records identify each other – to the exclusion of all other firms – as the "main competitor," the "only competitor," the "major competitor," the "two main players," and a "formidable" competitor. IDF-75-8, 228-30, 277-82, 376-77. Industry customers testified that "before [PDM] was taken off the street . . . PDM was either number one or number two . . . [and CB&I was] either number one or number two." Gill, Tr.204-05; IDF-380.

The intense rivalry drove prices and margins down. For example, in March 2000, a CB&I sales manager e-mailed his team to lament that PDM is "'eating our lunch' and we know much of it is because of a CB&I cost problem. . . . What is PDM doing that gives them the ability to be this low, this often? . . . We need to come up with a strategy to combat the effort PDM is making to erode our market share." IDF-484-86. A handwritten note from the files of PDM EC's President described 1998-1999 as a period in which PDM was "forced to bid at lower margins" due to "competition w/CBI." IDF-488. Other documents warn that the price competition was forcing each company to bid at "unattractive prices," "negative margins" or only "slightly over PDM EC's flat cost." IDF-288, 487-90. There are numerous other examples of Respondents' aggressive pricing, all of which benefitted customers with lower prices. IDF-83-87, 286-89, 388-406.

Based on this evidence, the ALJ correctly found that prior to the Acquisition, "no other still existing company challenged CB&I's market power" like PDM, and having "bought its closest competitor . . . CB&I is no longer required to submit the lowest possible bid to win projects." ID-95-96.

5. Respondents Accurately Predicted that the Acquisition Would Permit the Merged Entity to Raise Prices and Margins

Respondents' initial assessments of a possible merger recognized its likely impact: **[**

] and **[**

] [**]**. But they also saw an opportunity to gain "market dominance in Western Hemisphere." IDF-492. Executives described the combined entity as the "900 pound gorilla," a "powerhouse" and a "dominant force." IDF-492-94; CPF-737.

While the Acquisition was still pending, PDM and CB&I executives met to "brainstorm" about the merger's "Objectives." IDF-495. The group outlined the following objectives: (1) "Create barriers to entry as they can be built;" (2) "Defend an expanding market share;" (3) "Ensure that we do not allow smaller competitors to take share and pursue business in our attractive markets;" (4) "Put plans in place to command premiums for the services we provide;" and (5) "Improve pricing to achieve margin growth from 12.5% to 17%." IDF-495. Respondents refined this strategy and worked on it together ***prior to the closing of the Acquisition***. IDF-495-96; Scorsone, Tr.5209; **[**

] at CBI003609-HOU; *see* CPF-729-748.

6. Since the Acquisition, CB&I Publicly Acknowledged that Competition Has Been Substantially Lessened

For years before the Acquisition, CB&I's SEC filings warned investors that intense competition was one of the "Risk Factors" confronting CB&I. One typical SEC filing reported that "aggressive price competition" has put "substantial pressure on pricing and operating margins." CX1633 at 18; *see also* CPF-754. However, with the elimination of PDM as its closest competitor, CB&I's post-merger SEC filings say nothing about competitors restraining its pricing power. CX1021 at 7-13; *see also* CPF-757-758. CB&I's recent presentations to investors emphasize

"margin improvement and accelerating earnings growth," unimpeded by competition from any close competitor. CX1527 at 2; *see also* CPF-761-766.

On October 31, 2002 (six weeks before testifying before the ALJ), Gerald Glenn, CB&I's CEO, met with investors to explain CB&I's ability to "win the work every time" against competitors. CX1731 at 44-45. When asked about the increase in gross margins, Mr. Glenn confirmed that the "margin levels are high. . . . [w]e can still be low bidder and make more money on it than most of our competitors, if not all of them." CX1731 at 41-42. When asked about changes in the competitive landscape, Mr. Glenn responded that the "markets and prospects appear more attractive to us today than at any time in our recent past. . . . [m]aybe its 30%" better. CX1731 at 4, 28; *see* CPF-753-776.

7. The Merger Has Had Actual Anticompetitive Effects

As predicted by Respondents in their business plans, and by economic theory, the elimination of CB&I's closest competitor has allowed the merged entity to raise prices and increase margins. In the LNG market, Respondents' business records show pre-merger margins ranging from 2.5% to 15%. CPF-1027. CB&I's documents show that post-merger margins range from 15% to 30% and more. CPF-1028. In the other relevant markets, CB&I has raised prices dramatically since the Acquisition. None of the increases in margins is attributable to reduced costs – Respondents did not present any evidence of pro-competitive efficiencies or cost-savings arising out of the merger.

There are numerous instances of post-merger anticompetitive effects.[7]

- ***Spectrum Astro***: After they announced the merger but months before the deal closed, CB&I and PDM executives met and discussed bidding on a TVC project, saying that the customer was now "D.O.A." Two months before the deal closed, CB&I discussed colluding with PDM to

[7] For more detail, *see* CPF-1108-64 (Spectrum Astro), CPF-1165-80 (TRW), CPF-1181-1220 ([ ]), CPF-777-830 and CRF 3.95, 3.618-3.641 (Cove Point), CRF 3.95, 3.254 (CMS), CPF-929-954 (Memphis), CPF-1007-26 (Yankee Gas), CPF-831-882 (BP), CPF-1058-70 (Linde), CPF-1071-86 (Praxair), and CPF-1087-1107 (MG Industries).

[ ] to the customer. Then, for the first time they did not have "fractious competition" and quoted high prices. After the merger, CB&I raised the price and the margin above pre-merger levels (from 7.77% to 11.97% margin). IDF-425, 431-32. The customer was extremely unhappy. Scully, Tr.1194; Scorsone, Tr.5112, 5114; CX1489 at 3; **[ ]**, *in camera*; CX1705.

! ***TRW***: Just weeks before this trial, CB&I met with its claimed competitor, Howard Fabrication, and agreed to "coordinate on making a price bid" on a TVC project for TRW. CB&I knew that it and Howard were bidders on this same project. As the customer, Mr. Neary, testified: TRW is now "***basically hosed***." Gill, Tr.247, 274; Neary, Tr.1451 (emphasis added).

! **[**] Prior to the merger, competition between Respondents reduced the price by over $4 million on a TVC project for [ ]. **[ ]** On another TVC project for **[ ]**, Respondents initially bid **[ ]** before the merger. **[ ]**. After the merger, CB&I was asked for a firm offer, and it proposed a price of **[ ]**. **[ ]**. The only logical reason that CB&I would raise its price is the lack of competition post-Acquisition.

! ***Cove Point***: Before the Acquisition, CB&I competed against PDM and forced the price on an LNG tank down by about $5 million and to a margin of 4-7%. But, once the merger was announced (but before the deal closed), Respondents met to discuss pending bids. CB&I then dropped out of the bidding, and the price went up in what PDM called a "fat" and "rich" bid, and the margin increased to 16%. RX323 at 12. After the merger, CB&I again increased its price, and it increased its margin to 22.3%, nearly double CB&I's worldwide average margin. RX323 at 12; Scorsone Tr.5263; CX1628 at 23.

! ***CMS***: Using the "fat" and "rich" post-merger bid on Cove Point as a new benchmark, CB&I submitted a bid on CMS' LNG project that is **[ ]** than what CB&I had bid for the same-sized tank before the merger**. [ ]** The customer became "comfortable" with CB&I's post-merger bid after checking [ ] price and because CB&I's bid was [ ] **[ ]**, but unknown to CMS, CB&I's post-merger Cove Point price provides a margin **[ ]** than the pre-merger margin and **[ ]** the current worldwide margin level; nor can CMS know that CB&I's current bid is **[ ]** than what CB&I had normally bid when PDM existed as a competitive restraint. **[ ]**; *see* graph opposite page 54, *infra*.

! ***Memphis***: In 1995, with an [ ], CB&I beat PDM for an LNG tank. **[ ]**. Both their bids were well below any other competitor's bid. IDF-84. After the merger, CB&I bid more than a [ ] margin for a similar tank in Memphis. CB&I based this **[ ]** margin on the actual margin they had at **[ ]**. **[ ]**. The customer, who is obviously aware of foreign suppliers, has chosen not to pursue any of them, calling CB&I the "only qualified supplier." CX1157.

- Other instances of higher prices and margins post-merger include bids to Yankee Gas, Linde, Praxair, MG Industries and [ ], all of which also demonstrate that CB&I has had few competitive restraints on it once PDM was eliminated. [ ], 1007-26, 1058-1107.

8. Entry Has Not Restrained CB&I from Exercising Market Power Since the Merger

Respondents argue that entry by any number of foreign firms can provide the same competitive restraint as PDM. However, the record is devoid of any CB&I documents or evidence that mention these would-be entrants.[8]

- CB&I's business documents speak of the [ ] that will be created upon acquiring PDM [ ], of the existence of "barriers to entry" (IDF-496), and efforts to "ensure that we do not allow smaller competitors to take share and pursue business in our attractive markets" and efforts to increase "pric[es] to achieve margin growth." IDF-495.

- CB&I's 1999 10-K boasts of its "long-term presence" in local markets, and how this experience translates into a "competitive advantage through knowledge of local vendors and suppliers, as well as of local labor markets and supervisory personnel." CX1032 at 8; *see also* CX1033 at 4-5 (because of CB&I's "long and outstanding safety record, we are invited to bid on projects for which other competitors do not qualify").

- CB&I's post-merger SEC filings say nothing about perceived or threatened competition from foreign or domestic firms as a "Risk Factor," whereas pre-merger filings repeatedly cautioned investors that "competition has resulted in substantial pressure on pricing and operating margins." *Compare* CX1633 at 18 with CX1021 at 7-13 and CX1718 at 3.

- CB&I has achieved significant growth in margins and revenues since the merger. As noted above, *Statement of Facts* ¶7, margins on LNG projects are double and triple their pre-merger levels. Prices have increased as well. *Id*. CB&I's investor presentations tout that CB&I is "well positioned for revenue growth and margin improvement," and do not identify foreign or domestic entry as a potential threat. CX1628 at 22; *see generally*, CPF-761-766.

- CB&I's October 2002 conference call with investors, led by CEO Glenn, distinguished CB&I's ability to "win the work every time" because of customers' desire to award projects to firms

[8] Respondents' principal witnesses on the entry issue were senior executives of CB&I, Messrs. Scorsone and Glenn, who spoke only about press releases by foreign firms mentioning possible future entry into the United States LNG market, but these press releases were admitted into evidence under the "state of mind" exception to the hearsay rule, and Mr. Scorsone conceded that the press releases themselves were obtained from CB&I's attorneys rather than kept in the ordinary course of business. Scorsone, Tr.5096-5097.

with a proven track record against the "low price and a potential second class job or shoddy welding" provided by other firms. CX1731 at 44-45. Given its superior reputation with customers, Mr. Glenn opined that "our markets and prospects appear more attractive to us today than at any time in our recent past." CX1731 at 4, 28.

- Of the eleven new LNG projects in the United States currently under development, CB&I has won or is currently the sole source on at least six projects, has a good chance of winning four other projects, and has refused to submit pricing in a timely manner on the 11th project (Dynegy). ID-103; CPF-581-591.

Respondents have come up with a long list of foreign and domestic firms as new entrants. The specific evidence about each firm and why, even in combination, they will not restore competition to pre-merger levels are discussed at CPF-448-570 and CRF 3.57–3.227. Generally, the firms identified by Respondents are not "new entrants" because they are the same firms that have tried, and failed, to compete against Respondents in the United States for decades. None of the firms, including the large foreign ones touted by Respondents, has ever constructed an LNG tank in the United States.[9] The firms attempting to compete in the LIN/LOX, LPG and TVC markets are small fringe firms with poor reputations.

Foreign and domestic competitors cannot overcome the large cost-advantage enjoyed by CB&I. A key merger planning document reveals that CB&I will "use pricing advantage as necessary to not lose market share to competitors during the merger." IDF- 496; CX1544 at CBI057941; *see* CX1731 at 42, 44-45 (Mr. Glenn's October 2002 investor conference call: "we can still be low bidder and make more money on it than most of our competitors, if not all of them. . . . short of somebody

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[9] Skanska/Whessoe won a recent LNG project for Dynegy in Louisiana, but only after CB&I refused to bid. CPF-978-1006; IDF-89-101. Dynegy's consultant on the project, who has experience and knowledge of bids submitted by Respondents and foreign firms on other United States projects, expressed "concerns" that the price Dynegy will pay for the LNG tanks from Skanska/Whessoe will be "higher" without CB&I's participation in the bidding. Price, Tr.622. Indeed, Whessoe's Dynegy bid is **[ ]** than its bid four years earlier to another United States customer for the same-sized LNG tank. **[ ].**

coming in, which they do, and just taking a big dive on the price, that we can win the work every time technically. And if they want to dive [and] take the work for less than they can execute it for, that's fine, we'll just sit and watch them go out of business, too"). Mr. Glenn added that CB&I was doing better now than it had done in a decade and expressed no fear of competition.

CB&I's internal assessment of its cost advantage is borne out by past bidding experiences for LNG tanks in the United States. In 1994, Memphis Light and Gas received bids from CB&I and PDM that were almost identical in price, but the quotes from Whessoe and TKK and their United States partners were 40-60% higher. IDF-84. In 1998, **[ ]** compiled bids from PDM, CB&I and Whessoe for various sizes and types of LNG tanks -- while PDM's and CB&I's prices were comparable, Whessoe's prices were **[ ]** higher than CB&I's prices. RX157 at [**]**02004; *see also* CPF-869-872. CB&I's recent bid to CMS demonstrates that even after raising prices by **[ ]** from pre-merger levels, CB&I's bid was still **[ ]** below **[ ]** bid.] **[ ]**.

Other barriers that impede entry into the relevant markets include (1) the lack of a fabrication facility in the United States (IDF-174; CPF-307-08); (2) an insufficient revenue base and scale sufficient to compete for large projects (IDF-175-76; CPF-309-20); (3) lack of know-how (IDF-166, 329, 416; CPF-321-34); (4) lack of prior experience (IDF-167-73, 252, 328, 334, 415; CPF-335-64); (5) inability to complete projects on schedule (CPF-365-69); (6) lack of knowledge about local business conditions (CPF-370-85); and (7) high sunk costs (IDF-333, 418; CPF-386-91).

9. The Facts Do Not Support Respondents' So-called "Exiting Assets Defense"

In May of 2000, PDM decided to sell the company. Its investment bankers identified dozens of viable buyers. IDF-511, 528, 534. However, PDM never contacted any of these firms or any other entities (except CB&I and Enron). IDF-529 ("I don't know of anybody that PDM contacted,

anybody other than CB&I and Enron"); Scheman, Tr.2931. Indeed, PDM turned away prospective buyers who expressed interest in buying PDM. IDF-531.

Instead, shortly after PDM announced its decision to sell the company in July, PDM offered the company to CB&I. Glenn, Tr.4077-4078. CB&I offered $93.5 million for PDM, which was at the "high end" of PDM's own valuation estimates and unlikely to be matched by any other firm. IDF-524; Glenn, Tr.4261-62 (Mr. Glenn admits that PDM was worth more to CB&I than to other firms). PDM viewed CB&I as a "preemptive buyer" and this meant that PDM "never went out to other people." IDF-520.

There is no evidence that PDM was failing or that its assets would have exited the market. For years leading up to the CB&I transaction, PDM was a "profitable" company. IDF-535. Its revenues and earnings steadily increased until 2000, when PDM suffered a loss, but the company believed the decline was "short lived" and projected a return to profitability and continued growth the very next year. IDF-544.

Had the CB&I transaction not proceeded, PDM's Board of Directors were advised that PDM would seek other buyers rather than liquidate the company: "the Company would continue its efforts to sell the PDM EC and PDM Water divisions by seeking other purchasers." IDF-551; *see also* RX163 at TAN1000406 (investment banker advises that PDM's EC and Water Divisions "could be marketed independently in stand-alone transactions"). Before making any recommendation to liquidate, PDM executives had a fiduciary duty to exhaust alternative avenues, but its executives never got to that point and the Board of Directors never took up the issue of liquidation because CB&I's offer had been accepted. IDF-549, 552.

10. The ALJ's Divestiture Order Is Insufficient to Completely Restore Competition

CB&I acquired both tangible and intangible assets of PDM's industrial and water tank construction businesses, which were "inextricably intertwined" because they routinely shared services, human resources, physical plant and equipment. IDF-566-72. Among the most important assets were PDM's proprietary rights in existing customer contracts. CX334. This backlog of PDM construction projects represented the block of business that CB&I obtained from PDM as a result of the Acquisition. At the time of the Acquisition, these construction projects represented future revenues for PDM in the form of work-in-progress as well as work to be started and completed in the future. Almost all of these contracts have now been completed. However, as of December 31, 2001, the merged firm's backlog of work orders had a total value of $835.1 million. CPF 1343.

The ALJ limited the divestiture to those assets that were purchased in the illegal Acquisition. ID-120. The ALJ denied Complaint Counsel's request for divestiture of "45% of the total combined dollar value of CB&I's Tank Business Customer Contracts," CCPO at II.C.3, because this would result in divestiture of assets not obtained in the Acquisition – regardless of the fact that CB&I would not have won all these contracts if PDM had still been in the market. ID-122.

In order to be a viable and effective competitor in the relevant markets, a new company must have a sufficiently large revenue base to compete for projects. IDF-586-90. Suppliers need a substantial revenue base in order to meet customer demands for bonding and other financial guarantees. IDF-589. Prior to the Acquisition, PDM's revenue base was sufficient for it to compete for LNG business. IDF-590. Moreover, the new company will need a track record of successful project completions in order to successfully compete in the relevant markets, but a track record takes time to build if a company is starting from scratch. IDF-579; CPF 1339-42.

A track record also requires experienced people, but the ALJ declined to order the transfer

of employees to the new company. ID-122. The Order issued by the ALJ only precludes CB&I from offering incentives to its employees or enforcing non-compete clauses to keep employees from transferring to the acquirer, but fails to require CB&I to take affirmative measures to assure that the acquirer has sufficient personnel.

SUMMARY OF ARGUMENT

1. Complaint Counsel Established a Strong Prima Facie Case

Respondents do not dispute the market definitions for LNG, LPG, LIN/LOX tanks and TVCs that are field erected in the United States. The ALJ found that CB&I bought its closest competitor, eliminating the strong bidding competition between them and allowing CB&I to achieve market dominance, thereby establishing the *prima facie* case. ID-96. HHIs confirm this conclusion. Whether one uses HHIs, a bidding model, or a "first" and "second" choice analysis, the Acquisition eliminated CB&I's most significant competitor in the relevant markets, with no new entry to constrain CB&I from raising prices.

2. Respondents Have No Evidence of Timely, Likely and Sufficient Entry

There simply is no evidence of any entry – only those same companies that were on the fringe before the Acquisition and remain so still. Respondents also failed to introduce any evidence relating to the "timely, likely and sufficient" standard that was established by the 1992 *Merger Guidelines* and adopted by both the Commission and federal courts. Thus, the ALJ properly concluded that Respondents could not rebut Complaint Counsel's *prima facie* case. Of all the LNG projects for which Respondents introduced evidence, only one, Dynegy's Hackberry project, may use a firm other than CB&I – and even then only because CB&I refused to bid for that project. Evidence relating to the activity of foreign LNG competitors in many instances consisted only of expressions of interest, which they have done for over a decade with no actual entry whatsoever. The only competition to

CB&I in LPG or LIN/LOX tanks is AT&V, which competed in its own small way both before and after the Acquisition, but has not restrained CB&I's pricing like PDM once did. As the ALJ properly found, AT&V does not compete on the same level as CB&I or PDM. There are no entrants of any kind in TVCs or LPG tanks.

The ALJ also properly recognized that barriers to entry are high in each of the relevant markets. Higher costs, reputation, the learning curve, specialized know-how, experience and fabrication capability are all entry barriers in each of these markets. Foreign LNG competitors have not surmounted these entry barriers. The alleged entrants in LIN/LOX, AT&V and Matrix, demonstrate the existence of high entry barriers: collectively they have not achieved a price constraining presence comparable to PDM. In the LPG and TVC markets, only CB&I is recognized as a possible manufacturer of these products.

Finally, Respondents' claim that CB&I was not a competitor in the TVC market is not true. For three decades, ***only*** CB&I and PDM competed for these projects. Right up to the Acquisition, CB&I and PDM competed for TVC projects, and this competition drove prices down. Now, CBI has the market to itself.

3. The Commission May Affirm for the Independent Reason of Proof of Anticompetitive Effects

Complaint Counsel also introduced substantial evidence, not relied upon by the ALJ, that CB&I has increased prices and margins post-Acquisition and engaged in collusive activity. Evidence of such conduct or price increases proves the absence of sufficient competitive constraints and "cements" Complaint Counsel's case. Von Kalinowski, J., ANTITRUST LAW & TRADE REGULATION (2d ed. 1996) at § 4.03[4] (hereinafter "Von Kalinowski"). The evidence of price and margin increases is contained in pricing documents that were admitted and should not have been discounted

by the ALJ. Moreover, he discounted erroneously the undisputed evidence of collusion, which established that the only CB&I sales manager for TVC products had attempted to collude with the only other potential competitor for a project. This evidence, too, demonstrates the risk of harm from this Acquisition.

4. Even If There Were an "Exiting Assets" Defense, Respondents Cannot Satisfy Any Element Thereof

The Commission has rejected Respondents' so-called "exiting assets" defense. *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993). Even if this Commission were to create such a new defense, Respondents' argument fails, as the argument did in *Olin*, because they cannot establish either of the two proposed requirements for such a defense: (i) that the company made an exhaustive effort to sell the assets to others in the market; and (ii) absent the acquisition, the assets would actually exit the relevant market. ID-117-18; *Olin*, 986 F.2d at 1307.

5. Complete Divestiture of the Acquired Assets Is the Appropriate Remedy for Respondents' Illegal Conduct

The ALJ ordered "complete divestiture," yet his order falls short of achieving this. Although his Order provides a good basis for more competition than exists now, it is insufficient to accomplish the legally mandated goal of restoring competition "to the state in which it existed prior to, and would have continued to exist but for" the unlawful Acquisition. *B.F. Goodrich*, 110 F.T.C. 207, 345 (1988). The ALJ's Order eliminated or modified provisions of the Complaint Counsel's Proposed Order ("CCPO") that are critical to assuring a divestiture that results in a completely effective new competitor, including: (i) that CB&I divest an appropriate portion of the merged business and contracts; (ii) replace assets that have been disposed of or that have expired; (iii) take affirmative steps to encourage the transfer of key employees to the acquirer; and (iv) provide transitional technical assistance to the acquirer. The ALJ also eliminated, perhaps inadvertently, other language

and definitions that have been time-tested by this Commission in previous orders and which should be restored.

In sum, with the addition of the two points discussed herein (*i.e.*, findings on competitive effects and a more adequate divestiture), Complaint Counsel requests that the Commission affirm the ALJ's Initial Decision and issue the attached Order.

QUESTIONS PRESENTED

Complaint Counsel does not appeal the ALJ's Initial Decision, except as follows:

1. Should the ALJ's Initial Decision also be affirmed for the independent reason that the Acquisition has caused actual anticompetitive effects in the relevant markets?

2. In order to restore competition lost as a result of the illegal merger, should the Commission:

    a. Require CB&I to divest a portion of the merged business, including a portion of contractual business?

    b. Require CB&I to replace assets acquired from PDM that CB&I has eliminated?

    c. Require CB&I to take affirmative steps to facilitate the transfer of key employees to the divested company?

    d. Require CB&I to provide technical assistance to an acquirer for a transitional period?

    e. Appoint a person to monitor CB&I's compliance with the Commission's Order?

ARGUMENT

I. COMPLAINT COUNSEL ESTABLISHED A STRONG *PRIMA FACIE* CASE.

The ALJ found that Complaint Counsel had established its *prima facie* case by showing that CB&I's acquisition of PDM produced a firm controlling a large share in each of the four relevant markets. ID-88.

Section 7 of the Clayton Act prohibits acquisitions "***in any line of commerce*** or in any activity affecting commerce. . . [if] the effect of such acquisition ***may*** be ***substantially*** to ***lessen***

competition, or to tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). To prove a violation of Section 7, Complaint Counsel "need only prove that the [acquisition's] effect '***may be*** substantially to lessen competition.'" *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (emphasis in original) (citing 15 U.S.C. § 18). The law "does not require proof that a merger or other acquisition [will] cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) ("HCA"). Indeed, "Congress has empowered the FTC . . . to weed out those mergers whose effect 'may be to substantially lessen competition.' " *FTC v. Heinz Co.,* 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting H.R. Rep. No. 1142, at 18-19 (1914)). The purpose of the Clayton Act § 7 is to stop such a lessening of competition in its "incipiency." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

Whether competition in the relevant markets is likely to be "substantially" affected by the acquisition is measured by competition in the markets before and after the acquisition. *See, e.g., Merger Guidelines*; 4 P. Areeda, H. Hovenkamp & J. Solow, ANTITRUST LAW ¶ 927 (rev. ed. 2000) (hereinafter "Areeda"). The reason that high concentration may be a good barometer of whether an acquisition "may" affect a market "substantially" is the well-established economic theory "that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding," or unilaterally raise prices. *Heinz*, 246 F.3d at 715 (quoting *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D. C. Cir. 1986)); *Merger Guidelines* §§ 2.1, 2.2. Anticompetitive effects have already occurred in this case. But this is rare, and it is the statistical market-share analysis that creates a legal presumption that unilateral effects may be likely, and that is exactly what the ALJ found here. *Heinz*, 246 F.3d at 715; ID-88.

A. However Concentration Is Measured, the Acquisition Greatly Increased Concentration in Highly Concentrated Markets to Extraordinary Levels

No matter how concentration is measured in this case, the Acquisition greatly increased concentration in highly concentrated markets. Judge Chappell found that Complaint Counsel had established a *prima facie* case by presenting reliable and probative evidence demonstrating that CB&I and PDM were the number one and two competitors in all four product markets and that no other company is likely to provide effective competition. ID-88. Based on his analysis of bidders, both successful and unsuccessful, Judge Chappell properly held that "[w]here, as in the instant case, the two largest competitors in thin product markets merge, the increase in market concentration and substantial lessening of competition are merely common sense conclusions." ID-89.

1. HHI Analysis Demonstrates High Concentration

Under the *Merger Guidelines*, concentration may be measured by determining the market shares and the Herfindahl-Hirschman Index ("HHI"). *PPG Indus.*, 798 F.2d at 1503; *FTC v. University Health, Inc.,* 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (HHI is the "most prominent method" of measuring market concentration); *Merger Guidelines* § 1.5. The market definitions here are not in dispute. IDF-14-19.

When concentration is high in each relevant market, and the merger causes a significant increase in the concentration (*e.g.*, an HHI level over 1,800 and an increase of more than 100), an acquisition is "***presumed***" to be "likely to create or enhance market power." *Merger Guidelines* § 1.51 (emphasis added); *Heinz*, 246 F.3d at 715 (explaining that high concentration "establishes a 'presumption' that the merger will substantially lessen competition"). When post-acquisition HHI measurements are in the range of 3,500 to 4,800, the FTC and courts have uniformly held that there is "by a wide margin, a presumption that the merger will lessen competition." *Heinz*, 246 F.3d at 716;

See Coca-Cola Bottling Co. of the Southwest, 118 F.T.C. 452, 586 (1995) (HHIs of over 3,570 are "far above those that the courts have held to establish a legal presumption of illegality").

In each of the relevant markets, CB&I and PDM accounted for ***over 70% of all sales made over the last decade***. CPF-5. In LNG tanks and TVCs, Respondents accounted for ***all*** of the sales, resulting in a post-Acquisition HHI of 10,000 – or, as the *Merger Guidelines* calls it "a case of pure monopoly." *Merger Guidelines* § 1.5, n.17; IDF-68, 371. In LIN/LOX, the post-Acquisition HHI is 5,845. IDF-273. In LPG, the post-Acquisition HHI is 8,380. IDF-218.

Because sales of the relevant products are made infrequently, Complaint Counsel examined market shares over eleven years, from 1990 to the time of the Acquisition in early 2001. *Merger Guidelines* § 1.41 ("where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time"). *See* CPF 110-128. Measuring market share over a long period of time is also consistent with the importance that customers place on reputation and experience in these markets. ID-107.

2. CB&I Acquired Its Closest Competitor, PDM, and Won Most of the Bids for a Significant Period of Time

Under the *Merger Guidelines*, the undisputed fact that both CB&I and PDM have been customers' "first" or "second" choices for well over a decade for more than 73% to 100% of the bids awarded in the United States demonstrates that "a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Merger Guidelines* § 2.211. The historical combined market shares of 100% for LNG; 73% for LIN/LOX (including Graver, which has since exited the market); 99% for LPG (including Morse's share, as it is now part of CB&I); and 100% for large, field erected TVCs, demonstrates the *prima facie* case. CPF-5, 180; *Merger Guidelines* § 2.211.

Although the ALJ did not rely on the HHI calculations, the market concentration evidence in this case reaffirms the ALJ's conclusion that Complaint Counsel has established a presumption of illegality in all four markets. ID-96. The Acquisition combined the two leading competitors and increased concentration substantially in each of the relevant markets, increasing the HHI to extreme levels of 5,800 to 10,000 – the level of "pure monopoly." *Merger Guidelines* § 1.5, n.17; CPF 99-109. When one compares these HHIs to recent decisions where the FTC has prevailed, it is apparent that Complaint Counsel's *prima facie* case has already been made overwhelmingly. *See, e.g., FTC v. Cardinal Health, Inc.,* 12 F. Supp. 2d 34, 54 (D.D.C. 1998) (2,224 HHI); *FTC v. Swedish Match,* 131 F. Supp. 2d 151, 167 (D.D.C. 2000) (4,733 HHI); *Heinz*, 246 F.3d at 716 (5,285 HHI); *FTC v. Libbey Foods, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002) (5,251 HHI).

3. Respondents' Contemporaneous Documents Confirm that CB&I and PDM Were Each Other's Closest Competitor

Moreover, Respondents viewed each other as their closest competitor. ID-96; IDF-75-78, 228-232, 277-282, 376-79. Customers and other industry members shared this view. IDF-79-82, 232, 283-285, 380-386. In early 2000, Mr. Scorsone estimated for the PDM Board that PDM and CB&I ***each*** had a 30% and Morse a 10% market share in domestic tanks (including cryogenic tanks) for a total of 70% market share for the combined CB&I/PDM/Morse. CX660 at 3; Scorsone, Tr.5179-5180. Mr. Scorsone also admitted that CB&I was PDM's ***only*** competitor on domestic LNG, LPG and TVC projects. Scorsone, Tr.5183; CX660 at 2, 5. He admitted that these were the "best" estimates he could make. Scorsone, Tr.5181. There is no evidence to the contrary. Moreover, competition between CB&I and PDM forced each company to reduce its price and margins for the relevant products. ID-96; IDF-83-87, 231, 286-291, 388-406.

Thus, no matter what method one uses to analyze the markets, before the Acquisition CB&I and PDM dominated them; now only CB&I does. The only difference is that the tough competition with PDM has been eliminated, and no one is poised to take PDM's place.

B. Respondents' Argument that the ALJ Ignored Post-Acquisition Evidence Is Factually Incorrect and Legally of No Consequence

Respondents argue that in finding a *prima facie* case, the ALJ erroneously relied exclusively on pre-Acquisition market share data and ignored recent structural changes in the relevant markets. RAB-12. Respondents are wrong in asserting that a court must take into account post-acquisition evidence in determining whether the government has established a *prima facie* case. Courts have consistently said market share data is sufficient to establish the government's *prima facie* case. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990). In *Syufy*, cited by Respondents, the 9th Circuit did <u>not</u> require the district court to take into account anything but market share data in finding that a *prima facie* case had been established. *United States v. Syufy Enters.*, 903 F.2d 659, 665, n.6 (9th Cir. 1990) ("evidence of high market shares establishes a prima facie antitrust violation, shifting to the defendant the burden of rebutting the prima facie violation."). Similarly, in *Archer-Daniels,* also cited by Respondents, the court stated that "The HHI and firm concentration ratios" "are sufficient to make out a *prima facie* case for the government." *United States v Archer-Daniels-Midland Co.,* 781 F. Supp. 1400, 1421 (S.D. Iowa 1991).

Moreover, courts have consistently held that post-acquisition evidence must be viewed with skepticism. "[P]ost-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp.*, 807 F.2d at 1384; *see also B.F. Goodrich Co.*, 110 F.T.C. 207 at 341 (1988). If "post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their

time." *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965).

Nevertheless, the ALJ made extensive factual findings on post-acquisition competition and entry in each of the relevant markets: LNG (IDF-88-165); LPG (IDF-233-49); LIN/LOX (IDF-292-327); TVCs (IDF-407-414). Rather than ignoring this evidence, Judge Chappell considered it for its proper purpose, deciding whether Respondents had rebutted the FTC's *prima facie* case. ID-98. Judge Chappell properly concluded that "the totality of the evidence establishes that potential and actual entry is slow and ineffective and cannot keep these markets competitive." ID-101.

In LNG, Judge Chappell analyzed the progress of eleven new LNG projects proceeding post-Acquisition. ID-102. At the time of the decision, CB&I had been awarded one project and was negotiating sole-source contracts for five others. ID-103. Four other projects were not sufficiently advanced to provide any basis for concluding that other manufacturers constrain CB&I's exercise of market power. ID-103. For some of these, Judge Chappell found that "the recent or potential entrants' level of participation rises only to the level of expressing an interest or participating in preliminary meetings." ID-103. For Dynegy's Hackberry facility, the only post-Acquisition LNG tank project that CB&I has not won, CB&I declined to submit a tank bid because it did not want the customer to bid the tank competitively. ID-103; IDF-94-96. Judge Chappell similarly analyzed post-Acquisition conditions in the LPG, LIN/LOX, and TVC markets and determined that actual or potential entry is insufficient to challenge CB&I's market power in those markets. ID-104-06. Rather than ignore post-acquisition evidence, the ALJ used it for its proper purpose and examined it in detail. Respondents simply do not like the conclusions the ALJ drew from it.

1. Small Market Size Is Irrelevant as to Whether an Acquisition Meets Section 7's Substantial Lessening of Competition Requirement

Respondents' argument that Complaint Counsel cannot show a substantial lessening of competition because of the small size of the relevant markets is legally and factually incorrect. To think that products costing $10-50 million apiece are somehow insignificant would be plain error.

First, since the 1950 Celler-Kefauver Amendments to § 7 of the Clayton Act, the sales volume or size of commerce affected by an acquisition is not a factor in determining the legality of a horizontal merger. S. Rep. No. 1775, 81st Cong., 2d Sess. p. 5, (1950). This is the plain meaning of the phrase "in any line of commerce," which the 1950 amendment added to the statute. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D.N.Y. 1958) (A "merger violates Section 7 if the proscribed effect occurs in any line of commerce 'whether or not that line of commerce is a large part of the business of any of the corporations involved'"); *United States v. du Pont*, 353 U.S. at 594 n.13. Thus, a properly defined or economically significant market is not exempt from Section 7 liability simply because it is relatively small.[10] Courts have uniformly rejected Respondents' argument. *FTC v. Food Town Stores*, 539 F.2d 1339, 1345 (4th Cir. 1976) ("The fact that the markets in which the firms compete may be small is irrelevant under the Clayton Act, and does not affect the legality of the merger"); *United States v. Phillipsburg National Bank*, 399 U.S. 350, 358 (1970) ("Mergers of directly competing small commercial banks in small communities, no less than those of large banks in large communities, are subject to scrutiny under [§ 7 of the Clayton Act]").

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[10] Similarly, there is no *de minimis* exception to the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S.150, 224 n.59 (1940) ("the amount of interstate or foreign trade involved is not material . . ., since § 1 of the [Sherman] Act brands as illegal the character of the restraint not the amount of commerce affected"); *see Polygram Holding, Inc*, 5 Trade Reg. Rep. (CCH) ¶15,453 at 22,461 (July 24, 2003) (rejecting respondents' argument that a joint advertising moratorium should be excused because "the moratorium applied 'only' to two products and 'only' for a period of ten weeks").

Moreover, the four markets had combined sales of about $250 million over the eleven years prior to the Acquisition.[11] This amounts to about $23 million per year, which is several times the annual market size in *Baker Hughes*, 731 F. Supp. at 6, 9, n.6, which Respondents round upward to "approximately $10 million." RAB-10-11. Additionally, the amount of commerce in the United States LNG tank market in the near future is likely to be high, both because of the upsurge in interest in LNG and because of the high prices for LNG tanks following the Acquisition. Since the Acquisition, CB&I has sold two LNG tanks in the United States, one to CMS and one to El Paso. IDF-105; RAB-31. LNG tanks can cost around $50 million each. IDF-90. Numerous other projects, some of which will require multiple LNG tanks, are currently planned. ID-103-04. Respondents' brief concedes that "LNG owners spend hundreds of millions of dollars on LNG tanks." RAB-41. Even in the smallest line of commerce, TVCs, TRW plans to purchase a TVC, with construction commencing in 2004, and Spectrum Astro may procure a large TVC within three to four years. IDF-369, 408-09; Thompson, Tr.2104.

II. RESPONDENTS FAILED TO REBUT THE PRESUMPTION OF ANTICOMPETITIVE EFFECTS IN ANY OF THE RELEVANT MARKETS

Once Complaint Counsel has established a strong *prima facie* case through market share evidence, the burden shifts to Respondents to provide similarly strong evidence to rebut the presumption of anticompetitive effects. *General Dynamics*, 415 U.S. 486, 497-98 (1974). *See B.F. Goodrich*, 110 F.T.C. at 305; *Baker Hughes*, 908 F.2d at 991 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully"). The ALJ properly found

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[11] Between 1990 and early 2001, eight LNG tanks were sold in the United States with a total value of $118.5 million (CPF 136, 146); 109 LIN/LOX tanks were awarded with a total value of $107.3 million (CPF 151); fourteen LPG tanks were awarded with a total value of $52.1 million (CPF 172); and one TVC was sold, with a total value of $12.3 million CPF 192.

that evidence presented by Respondents on alleged entry and customer sophistication simply did not rebut the *prima facie* case, because they are not sufficient to constrain CB&I's ability to increase prices in the relevant markets. ID-101-02, 108-09.

A. The ALJ Utilized the Correct Legal Standard: Entry Must Restore Competition to Pre-Acquisition Levels

Respondents have the burden to offer evidence that highly concentrated markets do not prove a likelihood of anticompetitive effects. Respondents attempted an "entry" story, the legal standard for which is clear, as set out in the *Merger Guidelines* and utilized by the D.C. Circuit and Commission merger cases and recognized by the ALJ: entry must be (i) timely (within two years); (ii) likely to be "profitable at premerger prices"; and (iii) sufficient to "deter or counteract" the possible anticompetitive effects of the acquisition. *Merger Guidelines* §§ 3.0-3.4; *Heinz*, 246 F.3d 715-17 n. 13; *Coca-Cola Bottling*, 118 F.T.C. at 586; ID-100-02.

The key factor in evaluating entry, as Judge Chappell correctly found, is whether it will restore competition to pre-Acquisition levels and constrain CB&I from raising prices. ID-101-02. Both testifying economic experts, Drs. Simpson and Harris, agreed that entry would not be sufficient to constrain CB&I from raising prices if CB&I and PDM had lower costs than the potential competition. Harris, Tr.7438; Simpson, Tr.3151-52. As the ALJ properly recognized, entry in this case cannot restrain CB&I: "the decisive issue is that CB&I bought its closest competitor [PDM] which is not likely to be replaced by an equally cost-effective and qualified competitor in any of the four markets." ID-95. This is classic footnote 21 *Merger Guidelines* material: two competitors, CB&I and PDM were the lowest cost suppliers; they merged, and now prices are free to rise to the level bid by the supplier with the next lowest cost. *Merger Guidelines*, n.21; *see* discussion III.A, *infra*.

Respondents erroneously cite *Baker Hughes* for the proposition that evidence of ***any*** actual entry automatically rebuts the government's *prima facie* case and obviates the need to show evidence of timely, likely and sufficient entry set out in the *Merger Guidelines*. RAB-14. Without citing any authority, Respondents further argue that the *Merger Guidelines* do not require them to offer any evidence on the third of these elements, sufficiency. RAB-33 n.17. Respondents fail to note that *Baker Hughes* was decided prior to the 1992 *Merger Guidelines*, and fail to cite later cases from the D.C. Circuit and the Commission adopting the three-element test that was set out post-*Baker Hughes* and in the 1992 *Merger Guidelines*.[12] *Heinz*, 246 F.3d 715-17 n.13; *Coca-Cola Bottling*, 118 F.T.C. at 586; ID-101 ("the case law developed after *Baker Hughes* illustrates that a 'quick and effective standard' for analyzing entry is no longer novel"); *Merger Guidelines* § 3.2.

Contrary to Respondents' suggestion, RAB-33, Judge Chappell did not hold that an entrant must replicate PDM in all respects, but instead examined whether new entry would be able to restore pre-merger pricing, as is required by the *Guidelines*: "Where the likely and timely entry is not 'sufficient to offset any post-merger pricing practices,' defendants' claim of entry and expansion is 'insufficient to rebut the Government's prima facie case.'" ID-101-02, citing *Cardinal Health*, 12 F. Supp. 2d at 58. *See* ID-102 ("Rather, the inquiry is focused on whether *those firms [the new entrants*] will actually prevent an exercise of market power." (emphasis added)); *Baker Hughes*, 908 F.2d at 989 (The question is whether entry "would likely avert anticompetitive effects from [the] acquisition"); *Merger Guidelines* § 3.2.

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[12] The *Merger Guidelines* "represent the triumph of the economic approach; and the courts have fallen into line with them quite readily." R. Posner, ANTITRUST LAW 132 (2001). Indeed, in *Baker Hughes*, the D.C. Circuit took the Department of Justice to task for failing to adhere to the *Merger Guidelines*. *Id*. at 132 n.31.

As Judge Chappell correctly noted, Respondents' evidence that other firms have bid on recent projects does not, by itself, meet the sufficiency standard. ID-102. Respondents must be able to demonstrate that competition from other firms will be sufficient to restrain the exercise of market power by the merged firm. *See United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025,1033-35 (W.D.Wis. 2000) (rejecting defendants' assertions that the presence of newly established competitor, whose success was "highly uncertain," would maintain the competition that had existed prior to the acquisition); *United States v. United Tote Inc.,* 768 F. Supp. 1064, 1080-82 (D.Del. 1991) (actual entry insufficient to rebut *prima facie* case, unless it would "constrain anticompetitive price increases by incumbents.").

The Courts and the Commission have recognized that the simple presence of some potential new competition is not sufficient to overcome the presumption of anticompetitive effects; those new competitors must restore the lost competition.[13] As the District Court stated in *Cardinal Health*:

> "If the Defendants were to engage in anti-competitive practices after the mergers, these and other smaller distributors would certainly win more business away from the Defendants. However, . . . this Court finds that the likely and timely expansion of entry into the market would not be sufficient to offset any post-merger pricing practices that would result from the lack of competition. ***The record developed at trial is not strong enough for this Court to conclude that the Defendants' claim of entry and expansion is sufficient to rebut the Government's prima facie case***."

12 F. Supp. 2d at 58 (D.D.C. 1998) (emphasis added). *See FTC v. Staples, Inc.,* 970 F. Supp. 2d 1066, 1087-88 (D.D.C. 1997); *Swedish Match*, 131 F. Supp. 2d at 170; *Coca-Cola*, 117 F.T.C. at 960.

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[13] The economic experts for both sides agreed that the mere fact that a merged firm loses some sales does not imply that entry or fringe expansion will restore the pre-acquisition competitive environment. Simpson, Tr.3151-52, Tr.3280-81; Harris, Tr.7792.

Finally, Respondents claim that their evidence of entry is far more compelling than the evidence presented in *Baker Hughes*. As Judge Chappell noted, that is incorrect. Two firms had entered the United States market in *Baker Hughes* and made actual sales of relevant products in the year *prior* to the merger, *at prevailing, pre-merger pricing*. *Baker Hughes,* 908 F.2d at 988-89. No competitor here has had comparable success.

B. The ALJ Correctly Assessed the Facts: Entry Will Not Restore Competition to Pre-Acquisition Levels

Judge Chappell based his conclusion that other firms could not restore the competition lost through CB&I's acquisition of PDM on several different types of evidence. Judge Chappell found that entry barriers were present in all four relevant markets. ID-106-8, IDF-166-76, 250-3, 328-34, 415-8. Judge Chappell analyzed possible entrants into each of the relevant markets and concluded that these possible entrants would not be as competitive as PDM had been. IDF-144-165, 237-249, 313-327, 410-414. Finally, Judge Chappell surveyed the winners, and likely winners, of new and potential projects, and found that entry would not restore the pre-Acquisition competitive environment. ID-102-6, IDF-88-143, 233-236, 292-311.

Judge Chappell's conclusion that entry would not restore the pre-merger competitive environment is consistent with statements made by CB&I's CEO, Gerald Glenn. Mr. Glenn admitted that with the acquisition of PDM, CB&I "now ha[s] unequaled capability." Glenn, Tr.4384; CX1720. He also admitted that CB&I has lower costs than its competitors. Glenn Tr.4381-82; CX1731 at 42. Mr. Glenn said that CB&I can "win the work" whenever they want to, unless someone bids under cost. Glenn, Tr.4380; CX1731 at 44. Mr. Glenn also admitted that reputation and quality work were advantages that CB&I had that were not held by its potential competition. Indeed, CB&I's competitors include those that have financial difficulties, do "shoddy" work, and even if they try to

outbid CB&I, he expects them to eventually "go out of business." Glenn, Tr.4380; CX1731 at 44. Mr. Glenn expressed no fear of new entrants or expansion by existing competitors.

Despite this evidence, Respondents argue that Judge Chappell erred in concluding that entry would not restore the pre-merger competitive environment and claim that the ALJ incorrectly found barriers to entry (RAB-20-26), gave short shrift to price evidence from recent projects (RAB-34-39, 41-47), ignored a critical loss analysis performed by Respondents' expert, Dr. Harris (RAB-47-48), and gave little weight to opinions of customers (RAB-39-41). None of these claims are valid.

1. Entry Barriers Are High

Judge Chappell correctly identified several barriers to entry in the four relevant markets. An entrant would need "sufficient personnel to design, engineer, and construct" the structures, specialized equipment, experience in building the structures, a favorable reputation, and sufficient capital to bond large projects. ID-106-8; IDF-166-76, 250-3, 328-334, 415-8. The only competitors with these features were CB&I and PDM.

LNG, LPG and LIN/LOX tanks hold large quantities of flammable or otherwise dangerous gases; leakage from one of these tanks could lead to fires and death, and liability for losses. IDF-167, 330. TVCs are used to test satellites that typically cost from $50 to $200 million each, and an improperly constructed TVC could damage or destroy a satellite or lead to faulty test results. IDF-40, 417. Consequently, customers of the relevant products strongly prefer to contract with companies that have a long track record in constructing these facilities. IDF-167-69, 252, 328, 331, 415.

Judge Chappell correctly recognized that experience in constructing these facilities also gives a firm lower costs. IDF-170-71. CB&I has a cost advantage over new LNG entrants because of the large number of LNG tanks it has constructed. IDF-172-73. Both Drs. Simpson and Harris agreed

that the knowledge and experience of CB&I versus the competition could be a barrier to entry. Simpson, Tr. 3214; Harris, Tr. 7440.

Regarding LNG tanks, Respondents contend that foreign companies that have built LNG tanks outside the United States have already surmounted the entry barriers and thus can compete with CB&I on an equal footing. RAB-20. This argument is without merit: Most of the barriers that Judge Chappell identified apply to entry into the United States geographic market. Many United States buyers have a strong preference for buying from firms that have previously built these structures in the United States. CPF 379-83; Price, Tr.578, 622, **[** **]**, Outtrim, Tr.716. Experience in building LNG tanks cost-effectively and on time is specific to the country where the tanks are built. Companies that have not built LNG tanks in the United States are at a cost disadvantage relative to those that have, CB&I and PDM. CPF 370-385, 542-554.

CB&I informed its investors, prior to the Acquisition, that its local presence gives it an advantage over foreign competitors. CX1032 at 8 ("The Company believes that it is viewed as a local contractor in a number of the regions it services by virtue of its long-term presence and participation in those markets. This perception may translate into a competitive advantage through knowledge of local vendors and suppliers, as well as of local labor markets and supervisory personnel.").

When MLGW investigated the construction of an LNG tank in Memphis in 2001, it ignored the foreign LNG competitors and said that CB&I was the only company that could provide a reliable estimate. IDF-177. BP reached the same conclusion. IDF-112-13. Jean Pierre Jolly of Technigaz, a French constructor of LNG tanks, testified that **[**

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[ ].

Finally, any firm seeking to build LNG tanks in the United States will need a sizable workforce and specialized equipment to erect the structures. The evidence indicates that the need to acquire these resources is a barrier to entry into the United States market. IDF-582, 593-94; ID-106-07.

The history of awards for LNG tank projects further shows that foreign firms have not surmounted the barriers to entry into the United States. Prior to the Acquisition, these foreign builders also possessed all the attributes cited by Respondents, yet they never built one tank here. IDF-67; CPF-136, 146. In fact, these foreign builders were 40-50% more expensive than CB&I and PDM in the only project for which they bid. IDF-84.

Relying on two anomalous LPG projects, Respondents next contend that entry barriers into the LPG market must be low because two small United States tank builders, AT&V and Morse, each won an LPG tank project in the pre-Acquisition period. At [ ], the project won by AT&V was extremely small. IDF-226; Simpson, Tr.3394-95; [ ]. The project won by Morse was located very close to Morse's base of operations, in the Pacific northwest, and very far from CB&I's base of operations. CPF 179. This gave Morse a substantial competitive advantage for that project. CPF 376-377. And CB&I acquired Morse while this litigation was pending.

As with LPG tanks, Respondents argue that entry barriers into LIN/LOX tanks are low because two United States tank builders, Matrix and AT&V, won LIN/LOX tank projects in the last several years. This argument does not withstand scrutiny. Although Matrix built four LIN/LOX tanks during the 1990s prior to the Acquisition, it never had a comparable reputation, and thus competitive significance, as CB&I or PDM. IDF-320-23. In 2000, Matrix sold its subsidiary that had fabricated

its LIN/LOX tanks, thus it can hardly be considered a serious threat to CB&I. IDF-324. AT&V has completed one LIN/LOX tank project and has been awarded two other LIN/LOX tank projects during the post-merger period. However, as Judge Chappell noted, AT&V lacks the reputation and resources to replace the competition previously provided by PDM. IDF-313-319. Thus, while AT&V and Matrix were each able to win a few projects to build LIN/LOX tanks, neither firm was able to surmount the barriers to competing in the LIN/LOX market at a level comparable to PDM or CB&I.

2. There Is No Evidence of Sufficient Entry in the LNG Market

Respondents argue that CB&I's failure to win the Dynegy LNG project demonstrates sufficient entry. RAB-14. Dynegy requested separate bids for the engineering study, for the overall engineering work for the terminal, and for the LNG tanks. Puckett, Tr.4543- 44, 4570-71; CPF 980, 982-84. But CB&I repeatedly declined to bid for each stage of the project. ID-103; IDF-96; CPF 981-94. Because Dynegy turned to foreign LNG tank builders after CB&I repeatedly refused to bid in response to Dynegy's requests, Respondents infer that CB&I cannot profitably increase price as a result of the Acquisition. CPF 978-1006; RAB-14-15; CRF 3.248.

What the Dynegy project shows is that when CB&I refuses to bid, customers will turn to higher-priced, less desirable foreign suppliers. Judge Chappell properly held that the Dynegy project provides a basis for determining "that other manufacturers do not constrain CB&I's exercise of market power." ID-103.

Respondents also point to the activities of foreign LNG competitors such as Skanska Whessoe, TKK, and Technigaz in pursuit of United States LNG projects as evidence of "actual" entry. RAB-15-16. Judge Chappell carefully analyzed the evidence presented by Respondents at trial and held that "[f]or some of these projects, the recent or potential entrants' level of participation rises only to the level of expressing an interest or participating in preliminary meetings." ID-103.

Respondents' factual assertion that the TKK/AT&V alliance is in the process of partnering with a United States based firm to provide LNG process equipment is flatly contradicted by the record. RAB-16. The witness from this firm specifically testified that it would not partner with AT&V on LNG projects because of AT&V's lack of experience in constructing LNG tanks and the high risk associated with LNG projects. Kistenmacher, Tr.903-05. The fact remains, despite the recent activity for new LNG projects, Respondents presented no evidence, outside of the Dynegy project, that foreign suppliers have any likelihood of winning an LNG tank contract in the United States, let alone constraining CB&I's pricing as did PDM.

Respondents next claim that "the ability of new entrants to compete effectively in places near the United States, such as Trinidad and the Bahamas, sheds light on their ability to compete effectively in the U.S." RAB-38. Barriers to entering the United States market, however, make this claim untrue. CPF 370-375, 378-385. Moreover, CB&I only lost the Trinidad project after it bid a price that was substantially higher than the price CB&I had charged the same customer before the Acquisition. JX 11 at ¶ 2. Evidence that CB&I lost a bid in Trinidad after it raised its price dramatically is hardly proof of sufficient entry into the United States. With respect to the LNG tank project in the Bahamas, for which Respondents claim the buyer received competitive pricing, the only evidence in the record comes from the testimony of a former Enron executive, who admitted that he never actually saw the bids. Carling, Tr.4481.

In surveying the evidence, Judge Chappell correctly held that "Respondents have not demonstrated that actual or potential entry is sufficient to challenge CB&I's market power in the LNG market."[14] ID-104.

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[14] Respondents claim that Daewoo/S&B, Tractebel, MHI, and IHI are also potential entrants into the United States LNG market. RAB-27-29. But Respondents offered no evidence of their

3. There Is No Evidence Of Sufficient Entry in the LPG Market

Respondents assert that two new entrants, Matrix and AT&V, have entered the LPG market and won half of the available jobs in the past three years, providing evidence of actual entry. RAB-17. Matrix has never constructed an LPG tank. Newmeister, Tr.1609. Consequently, its competitiveness in this market is questionable. AT&V has constructed only one LPG tank in the United States, but the value of this project was a fraction of the value of the next smallest LPG tank constructed from 1990-2001. IDF-226. Thus, AT&V's success in winning this project cannot constitute evidence that AT&V could constrain CB&I's pricing on more typical, much larger LPG tank projects. AT&V is much smaller than CB&I; it is capacity constrained; and it is limited in its capacity to bond projects in the United States IDF-238-39. Judge Chappell correctly found that in the LPG market "[a]lthough AT&V provides some competition by bidding, the greater weight of the evidence demonstrates that AT&V cannot compete with sufficient force to constrain CB&I's market power." ID-105.

Respondents also argue, based on self-interested testimony of CB&I's division president, that CB&I lowered its price for an LPG tank to ABB/LUMMUS in response to pressure from AT&V and Matrix. RAB-42. Even if this is correct, evidence that CB&I reduced its price from its initial bid does not constitute evidence that pressure from AT&V and Matrix forces CB&I to offer prices comparable to pre-Acquisition prices.

4. There Is No Evidence of Sufficient Entry in the LIN\LOX Market

Respondents assert that three new entrants, AT&V, Matrix, and Chattanooga Boiler & Tank, have entered the LIN/LOX market. RAB-18. Further, Respondents argue that the post-merger prices for recent LIN/LOX tanks sold to Air Liquide, MG Industries, and BOC do not appear to be

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actual entry into the United States LNG market.

significantly out of line with pre-Acquisition prices. RAB-43-7. However, of the three alleged "actual" entrants, only AT&V has won any LIN/LOX projects since the Acquisition, and it was already in the market prior to the Acquisition. Moreover, while AT&V has won three LIN/LOX projects, two for BOC at Midland, North Carolina and Hillsboro, Oregon, and one for Air Liquide at Freeport, Texas (IDF-295, 299, 302), AT&V's performance on these projects has been **[ ]**, and project costs escalated after the bids were awarded. IDF-297; **[ ]**. Fringe firms and new entrants do not provide the demonstrated performance and value necessary to constrain prices at pre-Acquisition levels.

AT&V's performance **[**

]. **[ ]**. Regarding the Midland, North Carolina project, one witness testified that although the price was low in the beginning, because of the many change orders the price ended up higher than CB&I's. IDF-314. In addition, there was a design error and construction error on the project. IDF-314. While AT&V has offered initial prices as low or lower than CB&I, AT&V's poor previous performance along with [

] indicate that it cannot constrain CB&I's pricing over the long-term to the extent that PDM would have done absent the merger. **[ ]**; IDF-317-9. AT&V is much smaller than CB&I, with annual revenues amounting to approximately only 2-3% of CB&I's revenue. IDF-315. AT&V is capacity constrained and recently refused to bid two cryogenic tank projects in the United States because of its limited field capacity. IDF-315. As in the LPG tank

market, Judge Chappell correctly held that "AT&V does not compete on an equal footing with CB&I in the LIN/LOX market." IDF-315.

Similarly, Matrix's high cost structure and limited reputation prevent it from constraining CB&I's pricing for LIN/LOX tanks to the extent that PDM would have done absent the merger. Matrix won and constructed four LIN/LOX projects between 1998 and 2000. IDF-320. However, Matrix sold the fabrication facility it used to fabricate LIN/LOX tanks in 2000. IDF-324. Despite Respondents' assertion to the contrary (RAB-44, n.27), Matrix must subcontract for LIN/LOX fabrication work and consequently is a higher-cost, diminished competitor in this market. IDF-324. Matrix has been a high bidder, and consequently non-competitive, on recent LIN/LOX tank projects. IDF-321.

Chattanooga Boiler & Tank has never built a LIN/LOX tank. IDF-325. On the one occasion that Chattanooga recently bid on a LIN/LOX tank, Chattanooga's price was substantially higher than any other competitor. IDF-326.

Accordingly, in assessing the cumulative impact of these three alleged "actual" entrants, Judge Chappell correctly 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-106.

5. There Is No Evidence of "Actual" Entry in the TVC Market

Industry participants testified that the only manufacturers of large, field-erected TVCs prior to the Acquisition were CB&I and PDM. IDF-380-83, 385. The only company that, post-Acquisition, had been asked to provide pricing on a TVC project other than CB&I (Howard Fabrication) was not considered by the customer to have "the technical competence nor the financial backing" necessary to award it a TVC project. ID-106. Judge Chappell correctly held that "[t]here is no evidence of actual or potential entry in the TVC market." ID-106.

6. Dr. Harris's Critical Loss Analysis Was Badly Flawed

Respondents criticize the ALJ for discounting a critical loss analysis presented by their expert, Dr. Barry Harris. RAB-47. This criticism is without merit for two reasons. First, a critical loss analysis is only one of several methods for assessing whether a firm can profitably increase price. The ALJ used a different method (*see Merger Guidelines* § 2.2; *FTC v. Swedish Match,* 131 F. Supp. 2d at 168-69): He carefully analyzed whether other firms could provide a competitive constraint comparable to PDM and concluded that they could not. ID-101-09.

Second, Dr. Harris's critical loss analysis was badly flawed. His narrow analysis attempted to predict whether CB&I would actually raise its prices and margins, and yet he failed even to consider whether, in the two years following the Acquisition, they had done so or attempted to do so. Nor did he include in his analysis most of the business that CB&I has won since the Acquisition.

A critical loss analysis seeks to determine whether a firm can profitably increase price by comparing the profit that a firm would gain from getting a higher price on the units that it continues to sell with the profit that it would lose because it sells fewer units at the higher price. A critical loss analysis has two basic steps. The first involves calculating the critical loss, which is the largest amount of sales that a firm could afford to lose in response to a given price increase before that price increase becomes unprofitable. Two things determine a firm's critical loss. The first is its variable profit, which is the profit that it earns on the last units that it sells. The second is the size of the prospective price increase.

Dr. Harris testified that CB&I had a variable profit of 33% and could thus only lose about 13% of its sales before a 5% price increase became unprofitable. Harris, Tr.7900; CPF 603-04. Dr. Harris based his estimate of variable profit almost exclusively on statements made by Mr. Scorsone. This approach caused Dr. Harris to make major mistakes. CPF 598-630. In fact, Dr. Harris later conceded

that his approach caused him to incorrectly estimate variable cost in at least one instance. CPF 613-614. In contrast to Dr. Harris, Dr. Simpson, Complaint Counsel's expert, based his estimate of variable profit on multiple sources and concluded that CB&I had a variable profit of 15% and thus could lose roughly 25% (40%) of its sales before a 5% (10%) price increase became unprofitable. CPF 602-12, 625; Simpson, Tr.3019.

The second step in a critical loss analysis involves estimating the amount of sales that a firm would actually lose for various prospective price increases. If this amount of lost sales exceeds the critical loss, then the firm could not profitably increase price. Dr. Harris testified that CB&I's actual loss of sales resulting from a price increase would far exceed its critical loss because CB&I has won only "18% of the dollars at risk post-merger" in the relevant markets. CPF 632. Dr. Harris bases this claim, however, on an inaccurate sample of post-merger projects that includes projects outside the relevant markets and projects sold before the merger, while excluding other projects that are clearly in the relevant markets. CPF 635-41. For example, while including several small projects that CB&I lost to AT&V, he ignored the nearly dozen LNG projects for which CB&I is the only contractor in the running for revenues of hundreds of millions of dollars. In contrast to Dr. Harris, the ALJ carefully surveyed the set of new or potential projects in the four markets and concluded that the evidence does not demonstrate that other firms can "compete with sufficient force to constrain CB&I." ID-104 (LNG), 105 (LPG), 106 (LIN/LOX), 106 (TVC).

Finally, Dr. Harris made at least two other major mistakes in using a critical loss analysis to assess CB&I's market power. Dr. Harris ignored several caveats about using critical loss that have been articulated in recent antitrust articles.[15] CPF 598, 642-53. Dr. Harris also failed to check

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[15] *E.g.*, J. Langenfeld & W. Li, *Critical Loss Analysis in Evaluating Mergers*, The Antitrust Bulletin 299, 313 (Summer 2001); M. Katz & C. Shapiro, *Critical Loss: Let's Tell the Whole Story*,

whether the conclusions from his critical loss analysis were consistent with other evidence, which shows that the Acquisition gave CB&I market power and that CB&I has exercised this market power. *See generally* Harris, Tr.7152-7989.

C. Respondents' Evidence on Customer Sophistication & Customer Opinions Does Not Rebut the *Prima Facie* Case

Respondents' customer sophistication or "power buyer" evidence amounts to nothing more than the unsupported assertion that some customers are big, and thus they can keep CB&I from raising prices. The *Merger Guidelines* explain, however, that "[b]uyer size alone is not the determining characteristic," but that a defense may exist when large buyers tie up the market with "long-term contracting" so that collusion would be difficult. *Merger Guidelines* § 2.12. Since the effects here are principally unilateral and due to a lack of any other market factors that would constrain CB&I, that scenario does not apply here. In any case, over the years, the "power buyer" defense has been given little weight and is generally insufficient to counter evidence of high concentration. *University Health*, 938 F.2d at 1213 n.13 ("[G]iven the FTC's strong showing that the proposed acquisition is likely to lessen competition substantially. . . we think that the existence of these sophisticated purchasers in the relevant market, which may inhibit collusion, is insufficient to overcome the FTC's case"); *see also Cardinal Health*, 12 F. Supp. 2d at 61 (Buyer power "alone cannot rebut the government's *prima facie* case."); *United Tote*, 768 F. Supp. at 1085 (D. Del. 1991) (Rejecting defense because it left smaller buyers "unprotected").

As Judge Chappell correctly held, even though many of the customers are large, pricing is not transparent to customers because sales are infrequent and confidentiality provisions prevent disclosure of contractual terms. ID-109; *see*, *e.g.*, IDF-204-07. Consequently, customers are at an information

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Antitrust 49, 53-54 (Spring 2003).

disadvantage to CB&I and do not possess significant bargaining power. ID-109. There is no evidence that most customers have any idea that CB&I is raising prices and margins. Nor could they, since PDM, the most relevant pre-Acquisition cost comparison to CB&I, is gone.

Probably the best example of the customer's information disadvantage is CMS's selection of CB&I as its LNG contractor for the expansion of its LNG import terminal in Lake Charles, Louisiana. IDF-105. Respondents cite to CMS's belief that it received a competitive price because it obtained information from CB&I relating to the costs and margins for the construction of the overall terminal facility. RAB-31, 36. However, as explained, *infra*, CMS had access neither to the cost and margin for the LNG tank itself nor to other LNG tank costs and margins, which show that CB&I has increased its post-Acquisition LNG tank price from pre-Acquisition levels. *See* Section IV.B.

Respondents falsely assert that even Complaint Counsel's witnesses believe that the Acquisition will have no effect on competition. RAB-40. In fact, numerous witnesses, all of whom experienced the head-to-head competition between CB&I and PDM, expressed concern that other companies could not restore the level of competition that had existed between CB&I and PDM, and that the Acquisition would reduce competition and lead to higher prices. Blaumueller, Tr.323-24; Fontenot, Tr.2030-31; Gill, Tr. 249-50; Hall, Tr.1830-31; Kamrath, Tr.1990-91; Kistenmacher, Tr.878; Neary, Tr.1456-57; Newmeister, Tr.2165-67; **[** **]**; Price, Tr.589-91, 622. Respondents' characterization of Mr. Hall's testimony is just flat wrong. RAB-40. Mr. Hall stated that MLGW is "concerned about where we're going to get competition for our bids in the next few years . . . because we don't see anyone out there with experience that could come into the market and compete with CB&I/PDM." IDF-183.

Respondents presented testimony from third parties who said that they believed there were "sufficient" competitors to maintain competition in some of the markets. *See, e.g.,* CRF 3.381. None

CB&I Prices for CMS Lake Charles LNG Tank and Cove Point LNG Tank Compared to CB&I, PDM and Whessoe Price Quotations for Single Containment LNG Tanks

of these witnesses had any experience with the pre-Acquisition competition between CB&I and PDM in the United States. Respondents' argument that the ALJ ignored testimony from these "sophisticated customers" is incorrect. RAB-39-40. The ALJ gave proper weight to the testimony of these witnesses and rejected it. For example, the ALJ noted that Mr. Eyermann, from Freeport LNG, and Mr. Izzo, from Calpine, lacked foundation to testify about new entrants and their impact, if any, on CB&I because they have not received any bids for their United States LNG projects. IDF-134, 142. Mr. Izzo admitted any view he might have as to the competitiveness of the prices of the foreign firms would be "speculation." IDF-142; Izzo, Tr.6526.

Respondents also cite to the opinions of Mr. Bryngelson of El Paso Natural Gas, Mr. Sawchuck of BP, and Mr. Rapp of Bechtel that there is sufficient competition in the United States LNG market to prevent CB&I from increasing prices. RAB-40. The ALJ correctly ignored these opinions because they also lacked foundation. Mr. Bryngelson testified that El Paso had not purchased an LNG tank since the late 1970's or the early 1980's and that past pricing for LNG tanks is "not something that is well known." IDF-204, 206. Respondents attach great importance to the fact that customers such as El Paso employ consultants to help them to evaluate CB&I's pricing. RAB-31. However, Mr. Bryngelson conceded that "experienced engineering firms . . . can provide a rough benchmark, but that's about the best we can do" and that El Paso is "in the dark in terms of knowing what the costs are for LNG tank suppliers." IDF-206-07.

Respondents cite to **[ ]** sophisticated pricing model for assessing LNG tank pricing as reason why Mr. Sawchuck's opinion relating to the Acquisition should be accorded deference. RAB-31. Yet this very same pricing model showed that **[**

] [ ]. BP subsequently decided to negotiate for sole-source agreements with CB&I for its three pending LNG import terminal projects in the United States. IDF-109-10. BP also concluded that "[s]ince their acquisition of PDM, CB&I now dominate the US market." IDF-112.

As for Bechtel's Mr. Rapp, he testified that the only two United States LNG competitors he is currently aware of are CB&I and Technigaz/Zachry, a firm that [ ], [ ], and he does not know whether Technigaz/Zachry could be as competitive as PDM had been in the past. Rapp, Tr.1290, 1294.

D. Respondents Have Not Rebutted the *Prima Facie* Case in the TVC Market

Respondents suggest that CB&I was not an active participant in the TVC market. RAB-48. Again, the record is to the contrary. As Judge Chappell correctly noted, a wide range of industry participants and the parties' contemporaneous documents attest to the fact that CB&I and PDM were the only viable competitors in the TVC market, and that each was similarly situated. IDF-376-77, 380-85. CB&I and PDM competed against each other in the two TVC bidding contests after 1990. CB&I and PDM competed vigorously for the TVC project for [ ] in 1996, which was won by PDM after competition from CB&I forced PDM to lower its price. [ ]; CPF 1181-1206. Prior to signing the Acquisition letter of intent, CB&I and PDM competed vigorously for the TVC project for Spectrum Astro. IDF-368.

III. POST-ACQUISITION EVIDENCE DEMONSTRATES THAT ENTRY IS NOT SUFFICIENT TO RESTORE COMPETITION TO PRE-ACQUISITION LEVELS

The law is clear that Complaint Counsel is not required to demonstrate that the Acquisition has led to actual anticompetitive conduct or post-Acquisition price increases. *Hospital Corp.*, 807 F.2d at 1389. However, where there is such evidence that Respondents have increased price, it "cements" Complaint Counsel's case. Von Kalinowski at § 4.03[4] (citations omitted). In this case, Complaint Counsel introduced evidence of numerous examples of anticompetitive effects, including cooperative behavior between CB&I and PDM before they consummated the Acquisition, post-Acquisition attempted collusion by CB&I with a potential competitor on a TVC project (an effect that appears to have been interrupted by Complaint Counsel's interviews and examination of witnesses), and price increases as well as increases in margins, on relevant products, following the Acquisition as well as following the signing of the Acquisition letter of intent.

Under the law, proof of actual anticompetitive effects is sufficient to establish that the Acquisition is likely to lessen competition. *General Dynamics*, 415 U.S. at 505, n.13 ("[P]ost merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit . . . ."); *Merger Guidelines* § 2.2; *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1267 (E.D. Pa. 1987) ("The most recent evidence of defendants' monopoly power is found in defendants' post-acquisition pricing decisions."); *Libbey,* 211 F. Supp. 2d at 49 ("'Proof of actual detrimental effects'" can "'obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.''") (citations omitted); *FTC v. Toys "R" Us*, 221 F. 3d 928, 937 (7th Cir. 2000); *Consolidated Foods*, 380 U.S. at 598.

The ALJ agreed that there was evidence that CB&I and PDM were each other's closest competitor and that this was a reason to condemn the Acquisition, yet he disregarded other evidence of anticompetitive effects, as discussed *infra*.

A. By Eliminating Its Only Significant Competitor, the Acquisition Increases CB&I's Market Power

As Judge Chappell properly recognized, CB&I and PDM were each other's closest competitor, driving each other's prices and margins down. IDF-483-490; IDF-72-87 (LNG); IDF-227-232 (LPG); IDF-277-291 (LIN/LOX); IDF-376-406 (TVC). Respondents do not dispute this evidence. Prior to the Acquisition, each company determined that it would be better off if it eliminated the other as a competitor (*see Statement of Facts* ¶4).[16] The resulting elimination of PDM as a "substantial independent competitor" is evidence of anticompetitive effect. *Heinz*, 246 F.3d at 717 (When two competitors competed for the lower price position, it is simply "an indisputable fact that the merger will eliminate competition between" them, and it would seem obvious that prices would rise); *Swedish Match*, 131 F. Supp. 2d at 169 (A "unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."); *Staples*, 970 F. Supp. at 1083 ("The merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the superstore market"); *Merger Guidelines* § 2.21; *R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 193-201 (1995) (combination of the two closest substitutes as evidence of ability to unilaterally increase price after the acquisition (citing *Merger Guidelines* §

[16] CB&I's pre-Acquisition intent is highly probative of the likely effects of the Acquisition. *See United States v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1287-88 (W.D. Pa. 1977) ("evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effect of the merger") (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918)).

2.21)). This finding is, as the *Merger Guidelines* explain, especially appropriate where a merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller. *Id.* at n.21.

The elimination of PDM, CB&I's closest competitor, was part of a well-developed strategy employed by CB&I. The plan all along was to get rid of their nemesis, PDM, and make higher margins, as is revealed in numerous internal documents.[17] IDF-491-496; *see Statement of Facts* ¶5. CB&I considered solving its competition problem by buying PDM even though it recognized that they could **[**

] **[** **]**; CX1627 at 138 ("Antitrust Issues"). Before closing on the deal, Mr. Scorsone "brainstorm[ed]" with his staff and decided on a strategy to "[c]reate barriers to entry," "[d]efend an expanding market share," prevent "smaller competitors to take share." IDF-495; Scorsone, Tr.5204-5205. Indeed, their plan was to achieve "***premiums***" for their products and ***"Improve pricing to achieve margin growth,"*** which is of course what CB&I actually did. IDF-495 (emphasis added). Respondents had no expectation of losing market share from any alleged entry. Scorsone, Tr.5208.

In the end, Respondents created what CB&I's management called, the "900 pound gorilla," a "powerhouse" with "execution capabilities unmatched by competitors." CX1681 at 1; IDF-494; CX1720 at 1; CX1532 at 1. There is no evidence of anything post-Acquisition that might possibly disturb CB&I's vision of "margin improvement and accelerating earnings growth." CX1527 at 2.

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[17] The Commission, courts and the *Merger Guidelines* allow consideration of such pre-acquisition industry evidence. *E.g., Merger Guidelines* §2.211, n.22 ("normal course of business documents from industry participants"); *Coca-Cola*, 117 F.T.C. 795, 945 (1994) (using Coca-Cola's "own documents" as corroboration of market dynamics); *Heinz*, 246 F.3d at 717 ("Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it").

B. Actual Evidence of Anticompetitive Conduct Independently Requires a Finding of Liability against Respondents in this Case

The record is replete with extensive evidence of anticompetitive behavior by CB&I. None of this evidence would exist if there were any genuine threat of entry at the same level as PDM. Thus, it is no surprise that CB&I failed to offer any post-Acquisition company documents even mentioning alleged entry as any kind of a threat. Nor did any CB&I witnesses (*e.g.,* Lacey, Steimer, Miles, etc.) come in and counter any of the evidence of illegal conduct. *See UAW v. NRLB*, 459 F. 2d 1329, 1336 (D.C. Cir. 1972) (Failure to bring in documents and witnesses creates "the most natural inference, that the party fears to do so," and that the evidence "would have exposed facts unfavorable to the party.") (citation omitted)). Instead, CB&I's true view is best summed up by Mr. Glenn's statement that the only change in competition is that CB&I can now "win the work" whenever it wants. Glenn, Tr.4379-80; CX1731 at 44.

The ALJ disregarded this extensive evidence of actual anticompetitive effect for four reasons. First, the ALJ accepted Respondents' unsupported and self-serving argument that only lower level employees were responsible for the collusive acts and proposals. Second, the ALJ improperly disregarded contemporaneous documents only because Respondents' officers and employees were not examined about them at the hearing. Third, the ALJ improperly excluded the deposition testimony of Respondents' designated expert witness – who stated that margins can appropriately be compared between budget estimates and firm bids – because Respondents elected not to call him at trial. Fourth, the ALJ improperly disregarded Complaint Counsel's graphical presentations comparing admitted evidence of prices and margins prior to and following the Acquisition. These cumulative errors prevented the ALJ from recognizing the increase in Respondents' prices and margins resulting from

the Acquisition. We ask that the Commission consider this evidence and consider Respondents' failure to rebut the evidence.

1. Respondents Engaged in Collusive Conduct through the Business Managers Responsible for the Affected Customer Accounts

The ALJ accepted Respondents' argument that they should not be held accountable for collusion on the Spectrum Astro bid because the incriminating memorandum was written by a "low-level salesman (Dave Lacey)." ID-113-14. Similarly, although CB&I attempted to coordinate with Howard Fabrication, another bidder on the TVC project for TRW, with a competing bidder, Howard Fabrication, the ALJ accepted Respondents' argument because "[t]he evidence presented does not demonstrate that anyone in CB&I's management was aware of or approved such a proposal." ID-114.

The record clearly shows that Messrs. Lacey and Miles of CB&I were each entrusted with large projects or even entire product lines. CB&I had such confidence in Mr. Lacey that prior to the Acquisition, he was assigned responsibility for all TVC accounts. CPF 1127. Mr. Scully of Excel Systems, who recently worked at CB&I, considered Mr. Lacey as a member of middle management. CRF 6.147-6.148. Mr. Lacey conceived the idea to acquire Excel Systems, and CB&I followed the recommendation. CRF 6.152. Currently, Mr. Miles is CB&I's Business Development Manager for LNG and TVC, and was entrusted to represent CB&I before Dynegy on its $700 million Hackberry LNG project. CPF 1173, CRF 6.127, 6.132.

Moreover, CB&I's self serving characterization of its bad actors as "low-level salesmen" is beside the point. Competition is diminished regardless of whether an officer admits to the wrongdoing on the witness stand. The issue in this case is whether the Acquisition may substantially lessen competition. Evidence that supports an inference of anticompetitive behavior is relevant to that

inquiry. The Commission need not decide in this case whether collusion has actually occurred; whether CB&I has engaged in criminal conduct is left for another forum.[18]

2. *Respondents Failed to Rebut Evidence, Contained in their Contemporaneous Documents, that Respondents Increased Prices in the Relevant Markets after Entering into the Acquisition Agreement*

There is extensive documentary evidence that Respondents increased price and margins after entering into the Acquisition agreement. CPF 777-1220. However, the ALJ declined to infer collusion or anticompetitive price increases based on Respondents' contemporaneous business documents because Respondents' officers and employees did not testify regarding the contents of the documents. ID-110 ("Complaint Counsel asked no witnesses at trial about this document."); ID-111 ("No witnesses at trial were asked about this document.") (rejecting "Complaint Counsel's arguments pertaining to RX323, a document not used at trial"); ID-112 ("CX791 . . . was not used at trial with any fact witness"); ID-113 ("The documents Complaint Counsel relies upon, CX448 and **[ ]**, while admitted into evidence, were never used at trial with any witness"). This was error and ignores the purpose of *Lenox, Inc.*, 73 F.T.C. 578, 603-04 (1968) and Rule 3.43(2), which place on Respondents the burden of rebutting whether such documents are "authentic" and "kept in the regular course of business." This is especially true here, where Respondents jointly offered all the documents at issue, which were then admitted by the ALJ.

Respondents had the opportunity to present documents and testimony in an effort to rebut the plain meaning of their contemporaneous documents, but Respondents failed to do so. The

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[18] The Commission may take judicial notice that CB&I announced on July 25, 2003, that it "was served with a subpoena for documents on July 23, 2003, by the Philadelphia office of the United States Department of Justice, Antitrust Division" for documents "that were the subject of testimony in the FTC administrative law trial that concluded on January 17, 2003." CB&I To Respond To Department Of Justice Subpoena, http://www.CB&Iepc.com/cgi-bin.

Commission's Rules recognize that "respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files." 16 C.F.R. 3.43(b)(2). Complaint Counsel's documentary evidence should not be discounted simply because Respondents chose not to call their employees who authored the documents.

Moreover, Mr. Scorsone's and Mr. Glenn's unsupported claims that competition remains intense following the Acquisition are at odds with their own contemporaneous business documents and public communications, and are simply not credible. Little weight can be given to testimony that is in conflict with contemporaneous documents, particularly when the crucial issues involve mixed questions of law and fact. *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948); *Toys "R" Us, Inc.*, 126 F.T.C. 415, 567 n.39 (1998); *Adolph Coors Co.*, 83 F.T.C. 32, 185 (1973).

3. Contemporaneous Documents and Other Evidence Reveal that Respondents Increased Prices and Margins after Entering Into the Acquisition Agreement

The Commission recently ruled that the post-trial illustration, in graphic form, of evidence in the record compiled by the ALJ "may be an effective aid to the presentation and understanding of the evidence adduced" at trial. September 27, 2002, Order re Upsher-Smith's Motion to Strike Demonstrative Exhibits that Are Not in the Record, *Schering-Plough Corp., et al.*, Dkt 9297, at 2. However, notwithstanding the Commission's endorsement in *Schering-Plough* of the use of charts and graphs as pedagogical aids to explain record evidence, Judge Chappell disregarded the charts and graphs contained in Complaint Counsel's proposed findings. Order Granting Respondents' Motion to Strike, June 12, 2003, at 2. While he could have examined the underlying evidence that shows exactly the same data as the explanatory charts, he nonetheless disregarded the charts and the underlying data, which had already been independently admitted. We thus ask the Commission to consider these pedagogical-device summaries, their underlying exhibits, and the proposed findings

based thereon: CPF 801, 825, 826, 827, 828, 829, 830, 869, 882-896, 902-911, 912-928, 935, 1043-1052, and CRF 7.106.

4. The Acquisition Has Already Had Substantial Actual Anticompetitive Effects

Although the ALJ correctly found that Respondents failed to rebut Complaint Counsel's *prima facie* case, the ALJ disregarded substantial, reliable and probative evidence of actual anticompetitive effects of the Acquisition. Complaint Counsel urge the Commission to consider and adopt Complaint Counsel's findings relating to those anticompetitive effects: CPF 1119-1164 (Spectrum Astro); CPF 1165-1180 (TRW); CPF 1181-1220 ([ ]); CPF 1053-1086 (Praxair/Linde); CPF 929-954 (Memphis LNG); CPF 831-928 (BP Projects); CPF 777-788 (Cove Point Phase I); CPF 789-811 (Cove Point Phase II); CPF 812-815 (Cove Point Phase III); CPF 816-830 (Cove Point - What Could Have Been); CRF 7.106 (CMS). Notably, none of the examples of attempted or actual collusion or increased margins have anything to do with Respondents' claim that "budget" and "firm" prices should not be compared. Agreements not to compete and increased margins (when prices also go up) are evidence of diminished competition.

Spectrum Astro: Prior to the closing of the Acquisition, CB&I and PDM management discussed a pending TVC bid that each was making to Spectrum Astro. Scorsone Tr.5111-14; CX1489 at 3; [ ]; CX1705. Soon thereafter, a memo was circulated at CB&I suggesting that both PDM and CB&I [ ] or submit [ ] [

]. Then, for the first time CB&I and PDM did not have "fractious competition" between them, and quoted high prices, as suggested in CB&I's plan.[19] Scully, Tr.1193-94. Moreover, after the merger, CB&I raised the price of the TVC even further, by about $1.2 million or 11.7%, from $10,760,800 to $12,019,000, and increased the margin from 7.77% to 11.97%. IDF-424-25, 431-32, 434. The customer, Mr. Thompson, was extremely unhappy. Thompson, Tr.2111, 2057, 2065, 2072-75; CX566 at 2.

There is simply no lawful reason why these two competitors were discussing a pending bid. The fact that they saw nothing wrong with it, and indeed laughed about the fact that the customer was going to suffer as a result of their collusion, is hardly exculpatory. Moreover, the undisputed fact that Mr. Scorsone then authorized a significant increase in both price and margin after the merger was an exercise by CB&I of market power created by the Acquisition. This evidence together with the admission by Mr. Scorsone that CB&I lied to Mr. Thompson about the cost increases (Scorsone, Tr.5123-25) show the ability and incentive of CB&I to behave anticompetitively. Respondents' counsel made the same point himself when he asked Mr. Thompson, "And if you have an opportunity later. . . to stuff some extra profit into the work, don't you try to take it?" Thompson, Tr.2119-20. Of course, the purpose and effect of the Acquisition was to afford CB&I precisely this opportunity.

TRW: In 2002, during the pendency of this litigation, CB&I attempted to collude with Howard Fabrication, a company it claimed at trial was a potential competitor. When TRW asked both CB&I and Howard for TVC prices, CB&I's Sales Manager, Mike Miles immediately asked Howard Fabrication if it would agree to "coordinate on making a bid or a price quote" to TRW, even after Mr.

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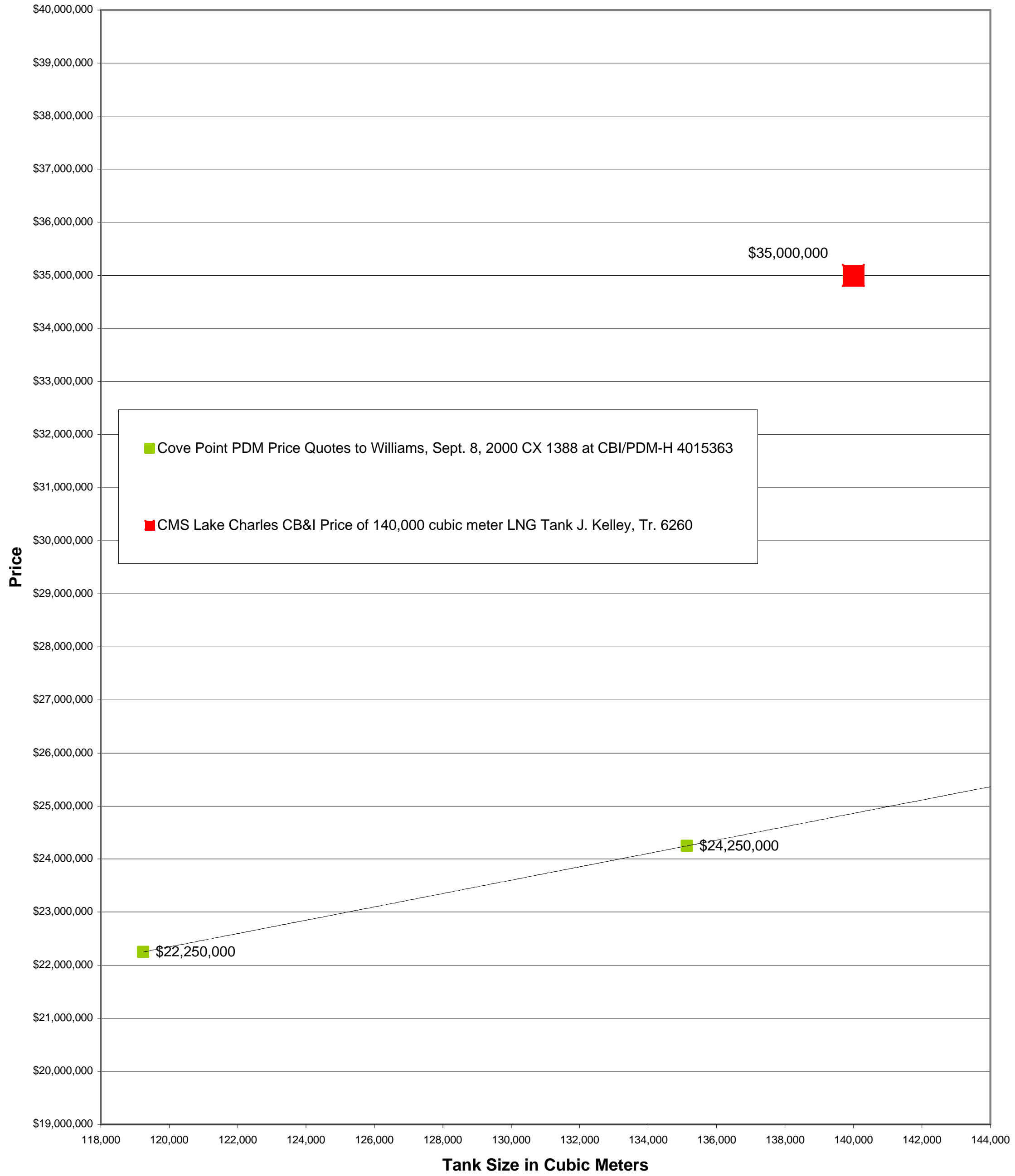
[19] A plan to merge in the future does not authorize CB&I and PDM to collude. *See United States v. Computer Associates International, Inc.*, 2002-2 Trade Cas. (CCH) ¶ 73,883 at 95255 (D.D.C. 2002) ("The pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently").



CB&I Prices for CMS Lake Charles LNG Tank and Cove Point LNG Tank Compared to CB&I, PDM and Whessoe Price Quotations for Single Containment LNG Tanks
$40,000,000
$39,000,000
$38,000,000
$37,000,000
$36,000,000
$35,000,000
$34,000,000
$33,000,000
$32,000,000
$31,000,000
$30,000,000
$29,000,000
$28,000,000
$27,000,000
$26,000,000
$25,000,000
$24,000,000
$23,000,000
$22,000,000
$21,000,000
$20,000,000
$19,000,000
Price
$35,000,000
Cove Point PDM Price Quotes to Williams, Sept. 8, 2000 CX 1388 at CBI/PDM-H 4015363
CMS Lake Charles CB&I Price of 140,000 cubic meter LNG Tank J. Kelley, Tr. 6260
$24,250,000
$22,250,000
118,000
120,000
122,000
124,000
126,000
128,000
130,000
132,000
134,000
136,000
138,000
140,000
142,000
144,000
Tank Size in Cubic Meters

Miles became aware that both CB&I and Howard were bidding on the same project. IDF-450. The customer testified that CB&I's conduct had ruined the prospects for competition. IDF-452.

Cove Point I: The margin increases at the Cove Point LNG project from 4-7%, pre-Acquisition, to over 22%, post-Acquisition, are undisputed. RX127 at 5; Scorsone, Tr.5263. The ALJ concluded, based solely on the self-serving testimony of Mr. Scorsone, that CB&I was able to dramatically increase its profits on Cove Point due to **[**

] [**]**. If true, the release should have been a cost saving and the tank price should not have changed. But CB&I increased the price by **[** **]** above its own pre-Acquisition estimate of what it would have bid. **[** **]**.

CMS and Southern LNG: CMS has chosen CB&I to construct an LNG import terminal facility that will include, among other infrastructure, an LNG tank. Respondents assert that CMS Energy and Southern LNG used their clout to force CB&I to cut its prices and to provide an "open book" arrangement. RAB-31. However, the "open book" pricing covered the cost of the overall facility, a separate breakdown of the costs for the LNG tank was not provided. CRF 3.472; **[** **]** ("**[**

]")

Respondents further assert **[**

] [ ]. This mischaracterizes the evidence. The figure cited by Respondents for the CMS project is [ ] and is over

and above the price quoted by CB&I for the LNG tank. [ ]. The project includes, as a cost element, the price of $35 million quoted by CB&I for the LNG tank. CRF 7.106; J. Kelley, Tr. 6260, [ ]. The $35 million price CB&I quoted to CMS for the LNG tank is [ ] higher than the price CB&I quoted to [ ], prior to the Acquisition, for the same size tank, and is consistent with CB&I's inflated, final price for the Cove Point LNG tank, which includes a margin of [ ]. [ ], CPF-913, CPF-1049. The document cited by Respondents for the Southern LNG project shows an [ ] margin over and above an "Admin" charge, including technical service fee, of [ ] [ ] CB&I's total margin on the Southern LNG tank is [ ] [ ].

CMS may think that the price of $35 million quoted by CB&I for the LNG tank was within range of a competitive price. J. Kelley, Tr. 6260, [ ]. CMS agreed to CB&I's LNG tank price only [

] [

]; *see* graph (opposite page). [ ] quoted to CMS a price of

approximately [ ], or about **[ ]** than CB&I's price. **[**

]; *see* graph (opposite page). Thus, in comparison with **[**

] and the **[** **]**, CB&I's price to CMS of $35 million looked better.

But CMS, of course, doesn't know that prior to the Acquisition, CB&I had quoted to [ ] a price of [ ] for basically the same kind of tank. CRF 7.106; **[** **]**. In fact, as shown in the preceding graph, CB&I's price to CMS for the tank is [ ] than the price CB&I quoted for that size tank prior to the Acquisition (($35 million/**[** **]**. [

] CB&I is getting nearly three times the profit on [ ] job as it would have when PDM was competing. *See* CRF 7.106; **[** **]**. (Using [ ] as a benchmark); CPF 814; Scorsone, Tr.5263 (Gross profit margin on [ ] went from about 4-7% with competition to over 22% without).

The Memphis LNG Projects: In 1995, with an **[** **]**, CB&I beat PDM for an LNG peak shaving plant in Memphis. **[** **].** Both their bids were well below any other competitor's. IDF-84. For example, Whessoe was nearly 50% higher than CB&I on its bid for the LNG tank. IDF-84. After the Acquisition, CB&I bid more than a [ ] margin for a similar tank in Memphis. **[** **]**. CB&I based this [ ] on the **[**

] **[** **]**. Even though CB&I has now been able to increase its proposed margin by [ ] the customer believes that it is stuck and cannot get a better deal from any of the alleged foreign competitors. CX1157 at 1.

The BP Projects: Post-Acquisition, CB&I has secured a sole-source relationship with British Petroleum ("BP") for several current LNG projects. BP chose CB&I because, based on actual prices it obtained from [ ]; BP knew that with the elimination of PDM, CB&I dominated the United States market; without PDM to turn to, BP has no choice but to acquiesce to CB&I's demand that BP work exclusively with CB&I. In 2001 BP analyzed the competitive environment post-Acquisition, and concluded that since the Acquisition of PDM, "CB&I now *dominate[s]* the US market." IDF-112. Using a pricing model that is, in Mr. Scorsone's words, "very, very accurate," BP determined that [ ] CB&I's and PDM's pre-Acquisition prices. [ ]; Scorsone, Tr.4996. Now, after the Acquisition, despite the fact that CB&I could raise its prices more than [ ], [ ], BP has decided to negotiate for sole-source agreements with CB&I for its LNG projects in the United States. IDF-110.

Thus, two current customers, BP and Memphis Gas, both of which know about the alleged entrants and the lower costs of CB&I and PDM before the Acquisition, today have chosen to stick with CB&I, despite knowledge that CB&I's current price is higher than they would have received when PDM was around.

Linde/Praxair: In 2002, Chung Fan, a Linde manager with 20 years of experience reviewing pricing information from LIN/LOX tank suppliers (Fan, Tr.946-48, 952-53), determined that after the Acquisition, CB&I has raised prices approximately 8.7% to Linde on a LIN/LOX tank to be built in New Mexico. IDF-336, 341-42. Mr. Fan based his conclusion on a pricing model that Linde routinely uses to distinguish between reasonable and unreasonable quotes from vendors. IDF-

342. Linde's model is able to accurately estimate the total price of a LIN/LOX tank within 2% of the actual firm-fixed price. CX1584 at 1.

Separately, in 2002, CB&I submitted a bid to Praxair for a similar LIN/LOX tank, also to be located in New Mexico. [ ] CB&I submitted virtually the same price to Praxair for this tank as it had previously submitted to Linde. CPF 1075. Consequently, CB&I implemented the [ ] as it did to Linde. [ ].

In 2002, CB&I submitted pricing to Praxair for another LIN/LOX tank, also to be located in New Mexico. IDF-349. CB&I submitted "tight budget pricing" of [ ] for this tank. [ ] CB&I based this price on the estimate for an equivalently-sized LIN/LOX tank to built in Colorado Springs, Colorado in 2000 prior to the Acquisition; the budget price for the Colorado Springs, Colorado tank was [ ]. [ ]. The increase in price from [ ] to [ ] is precisely [ ], the same price increase observed by Mr. Fan and incurred by Praxair on its first New Mexico LIN/LOX project. [ ].

The fact that all these prices had increased exactly [ ] from pre-Acquisition prices confirms Mr. Fan's detailed conclusion that his price from CB&I had indeed increased by that amount. These price increases were not the result of changes in cost, which had actually decreased (CX1605 at 2), but rather attempts to improve upon pre-Acquisition margins, which for PDM were approximately 1%, and CB&I's were even lower. CX243; CX764 at CBI-PL069333.

The ALJ's rejection of these price increases ignores both the evidence that Mr. Fan's pricing model had been highly accurate in the past and the remarkable coincidence that on three separate LIN/LOX tank projects, CB&I's pricing has increased [ ] over pre-merger bids. CPF-1068, 1086.

[ ]*:* Respondents' TVC pricing to [ ] demonstrates both how competition between CB&I and PDM drove TVC prices down prior to the Acquisition and how, following the Acquisition, CB&I has increased price. In [ ], [ ], which is now owned by [ ], procured a TVC that [ ] now calls the [ ]. **[ ]**. [ ] used a competitive bidding process to procure the [ ]. **[ ]**. Prior to the Acquisition, faced with competition from CB&I, [

] to approximately [ ] million less than its original bid. **[ ]**; **[ ]**. In the end, [ ] was able to use the close competition between CB&I and PDM to lower the price from CB&I's initial high estimate of [ ] million down to PDM's final price of approximately [ ] million, to obtain additional items, and to benefit from CB&I and PDM's cost-saving, design innovations. **[ ]**.

On a different project, at **[ ]**, pre-Acquisition, PDM quoted a price of [ ] in 1999 in its proposal to [ ], but the customer chose to postpone the project. **[ ]**. After the Acquisition, **[ ]** asked CB&I for a firm fixed price renewal of PDM's earlier bid for the TVC at **[ ]**. **[ ]**. **[ ]** was disappointed to receive CB&I's post-Acquisition price of [ ], an **[ ]**, or over [ ] for the project from CB&I. **[**

].

5. CB&I's Margins May Appropriately Be Measured by Examination of CB&I's Firm Bids and Budget Estimates

Respondents cite, as proof of actual entry, the prices provided by Skanska/Whessoe to Yankee Gas and [ ] (RAB-15), yet fault the ALJ for recognizing that **[**

] than CB&I's price. **[ ]**; RAB-36 n.18. However, this same price comparison was, in fact, made by **[ ]** before accepting CB&I's price **[**

] and is the very comparison Respondents have themselves cited as the means by which [ ] verified the competitiveness of CB&I's price. [ ] ("[

]")

A budget price is an initial price quote that can provide the basis for selecting a supplier and negotiating a final price. IDF-474. Judge Chappell relied on budget prices to correctly find that Skanska/Whessoe was not competitive with CB&I in the United States LNG market. Later, however, Judge Chappell incorrectly held that Complaint Counsel presented insufficient evidence of actual anticompetitive price increases and margin increases because the evidence included firm fixed prices and budget prices, which, in the ALJ's view, amounted to "comparing apples and oranges." ID-110. This holding ignores reliable and probative evidence from CB&I's own expert witness, John Vaughn. Mr. Vaughn testified at his deposition that margins used in budget pricing are generally equivalent to margins used in firm fixed pricing bids:

> Q: So the margin estimates that are in a - the margins that are in these budget estimates, are they irrelevant, since the budget prices are very soft?
>
> A: No, I wouldn't say they're irrelevant, but what you try to do is use basically the same philosophy . . . when you're putting in a . . . budget type job or a fixed price job, it's fairly common practice to use pretty much the same general range of margin levels.

CX1578 at 32 (rejected exhibit). *See* CX1578 at 30 (Q: "So you're comparing firm fixed prices to budget prices?" A: "I think all we're doing here is looking at margin levels. I don't think it matters which type of estimate you're looking at."). This testimony confirmed that, consistent with Mr. Fan's analysis based on price and costs, Respondents' margins prior to the Acquisition could properly be

compared to their margins following the Acquisition to determine whether margins had increased and whether cost adjusted prices had increased.

Four weeks before the start of trial, the ALJ granted Respondents' motion to add Mr. Vaughn as a witness to analyze and testify about CB&I's prices. Mr. Vaughn worked for CB&I for 34 years, including 16 years as an estimating manager. CX1577 at 63 (rejected exhibit). Complaint Counsel then deposed Mr. Vaughn. CX1577, CX1578. Five weeks after the trial started, Respondents withdrew Mr. Vaughn from their witness list.

Complaint Counsel sought to introduce Mr. Vaughn's margin testimony, but Judge Chappell improperly excluded these deposition transcripts. It is undisputed that at the time of his deposition, CB&I had designated Mr. Vaughn as a testifying expert witness. Under the plain language of Commission Rule 3.33(g)(1)(II), these deposition transcripts from a person designated to testify on behalf of CB&I are clearly admissible. 16 C.F.R. 3.33(g)(1)(II); *see also Glendale Federal Bank, FSB v. the United States*, 39 Fed. Cl. 422, 424-425 (Ct. Fed. Cl. 1997) ("By the time the trial begins, we may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them. . . . [T]he prior deposition testimony of that expert in the same case is an admission against the party that retained him.").

Thus, Judge Chappell's rejection of Mr. Vaughn's testimony was incorrect. In doing so, the ALJ overlooked the testimony of CB&I's own witness that fixed and budget margins are equivalent and not "apples and oranges." And the margins data gleaned from CB&I's fixed prices and budget prices to customers, as reflected in ordinary course of business documents, show that CB&I's post-Acquisition margins have increased substantially from pre-Acquisition levels. There have been actual anticompetitive effects as a result of the Acquisition.

IV. RESPONDENTS' "EXITING ASSETS" DEFENSE FAILS AS A MATTER OF FACT AND LAW

Respondents' last straw is their so-called "exiting asset" defense, which Judge Chappell rejected in a thoughtful analysis. ID-114-118. Respondents claim, without evidence, that absent the Acquisition, PDM's EC Division may have ceased operating in the relevant markets, and thus the Commission should ignore all the other evidence in the case. This defense is not based on any accepted law but rather upon a 1986 article: Kwoka, J. & Warren-Boulton, R., *Efficiencies, Failing Firms and Alternatives to Merger: a Policy Synthesis*, 31 Antitrust Bull. 431 (1986).

But the Commission has rejected this defense. *Olin*, 986 F.2d at 1307; *Olin Corp.*, 113 F.T.C. 400, 618 (1991), *aff'd*, 986 F.2d 1295 (9th Cir. 1993). "In short, the facts would not support the description of the proposed defense, even if we adopted the defense, and we decline to do so in this case." *Olin*, 113 F.T.C. at 618; *see also FTC v. Warner Communications,* 742 F.2d 1156, 1164 (9th Cir. 1984) (The court "reject[ed] the argument" that Polygram "intends to leave the distribution market due to economic necessity").

There is no reason for the Commission to depart from *Olin* here[20] – especially when, as in *Olin*, Respondents cannot establish either of Kwoka's two proposed requirements for such a defense: (i) that the company made an exhaustive effort to sell the assets to others in the market; and (ii) absent the acquisition, the assets would actually exit the relevant market.[21] ID-116.

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[20] Although the *Merger Guidelines* have been revised three times - in 1987, 1992 and 1997 - since the "exiting assets" defense was proposed, the concept of an exiting assets defense has not been incorporated into the *Merger Guidelines*.

[21] The only defense recognized by any court or the *Merger Guidelines* resembling this one is the "failing firm" or "failing division" defense. That defense requires that the entity is (i) actually failing; (ii) cannot be reorganized in bankruptcy; (iii) the respondent has made "unsuccessful, good-faith efforts to" find other buyers; and (iv) otherwise, the assets would actually "exit the relevant market." *Merger Guidelines* § 5.1. As Judge Chappell recognized, Respondents did not meet any

A. The Evidence Does Not Show that CB&I Was the Only Available Purchaser

Respondents never demonstrated that PDM conducted an "exhaustive" search for alternative buyers. *See Olin*, 986 F.2d at 1307 (FMC failed to show "evidence that FMC's management had conducted an ***exhaustive*** effort to sell" the assets) (emphasis added); *Citizen Pub. Co. v. United States*, 394 U.S. 131, 138 (1969). Respondents try to overcome this problem by urging the Commission to adopt a standard not even proposed by Kwoka that "Respondents need only show that it is more likely than not that another purchaser of the PDM assets did not exist." RAB-60. Respondents craft this standard from thin air, citing the recitation in *Baker Hughes,* 908 F.2d at 987, of the general burden of proof in establishing Section 7 liability, rather than the defendant's special burden in proving a failing firm defense (or a variant). Respondents' proposed evidentiary standard conflicts with all existing precedent, all of which require a "clear showing" that a thorough search has been conducted and there are no alternative buyers. *United States v. Pabst Brewing Co.*, 296 F. Supp. 994, 1002 (E.D. Wis. 1969); *Warner Communications*, 742 F.2d at 1164; *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971).

But Respondents even fail to meet their own proposed standard. As Judge Chappell pointed out, PDM identified numerous potential buyers but decided to take the "preemptive" offer from CB&I and not "go down the route of calling other people." Scheman, Tr. 2931, 2939-40; IDF-520; ID-117-18. Respondents simply offered no evidence that CB&I was the "only available purchaser" or that PDM conducted an "exhaustive" search for alternative purchasers. IDF-520; ID-117-18.

Respondents' argument that "PDM engaged in a reasonable marketing effort" to sell PDM EC by sending a press release to the *Wall Street Journal* – a document that was never offered at trial and

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of these elements. ID-114, 115 n.3.

which has never been disclosed to Complaint Counsel – is simply insufficient as a matter of law.[22] RAB-60-61. As Judge Chappell properly held, PDM has not made a "clear showing" that it "undertook a well conceived and thorough canvas of the industry such as to ferret out viable alternative partners." ID-117, quoting *Pabst Brewing Co.*, 296 F. Supp. at 1002, *see also* Areeda at ¶ 954d ("Failure even to inquire of such obvious candidates as competitors. . . presumptively indicates that the search has not been diligent").

Respondents also make the wholly speculative claim that "PDM EC would have been sold, if at all, to a purchaser with a substantially smaller revenue base" which would mean that the company "would not have been able to exert the same competitive influence as it did pre-Acquisition." RAB-50. Respondents do not explain why they should therefore be excused to eliminate competition altogether by selling PDM EC to its closest competitor.

B. The Evidence Does Not Show that Absent the Acquisition PDM EC Would Have Exited the Market

The second requirement for Kwoka's novel defense is that the assets would actually exit the market. Courts and the Commission have made it quite clear, however, that simply wanting to exit is not enough to trigger this requirement, and that is all Respondents claim here. *See, e.g., Greater Buffalo Press*, 402 U.S. at 555 ("owners wished to sell," but defendant still had to prove that "there was no other prospective purchaser for it"); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1260 (C.D. Cal. 1973) (management's desire to exit the business held insufficient); *United States v. Blue Bell, Inc.,* 395 F. Supp. 538 (M.D. Tenn. 1975) (company's intention to divest itself held immaterial).

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[22] *FTC v. Harbour Group Investments, L.P.,* 1990-2 Trade Cas. (CCH) ¶ 69,247 at 64915-16 (D.D.C. 1990) (Merely sending "offering materials" and "brochures" and "exploratory phone calls" was insufficient to establish the defense).

Judge Chappell properly concluded, "[t]he evidence does not establish that PDM had made the decision to close the business in the near future." ID-117. Moreover, even if PDM liquidated the EC Division, PDM would have sold the current contracts and all its assets to another company that would carry out the current business in the relevant markets. Byers, Tr.6802-04. If CB&I had not purchased PDM, under PDM management's own plans, some company other than CB&I even now would be building Cove Point's LNG tank. Byers, Tr.6802-04. In other words, the assets would ***not*** "exit" the market. *Olin,* 986 F.2d at 1307 (Commission was correct in rejecting defense because "assets would not be exiting the relevant market").

There can be no doubt, therefore, that the sale of PDM's EC division to some other competitor would have been far preferable, from a competitive standpoint, than a transaction that solidifies CB&I's market leadership and puts them in the position to be the single dominant firm which can "win" every job it wants. CX1731 at 44; *see* Areeda at ¶ 952b ("[E]xit might be preferable on competitive grounds to acquisition by an already dominant firm because without such acquisition small rivals may have a better opportunity to pick up the failing firm's customers or resources"). Accordingly, the Commission should reject Respondents' attempted defense, which is not supported by law or by fact.

V. COMPLETE DIVESTITURE, THROUGH A MORE EFFECTIVE ORDER, IS REQUIRED TO RESTORE THE COMPETITION ELIMINATED BY THE ACQUISITION

The ALJ appropriately ordered complete divestiture to restore competition as it existed prior to the Acquisition. However, the ALJ Order falls short of accomplishing that result because it fails to transfer any business, except what little is left of PDM's ongoing contracts as of February 7, 2001. Complaint Counsel respectfully suggests that this Commission should not hesitate to use its equitable powers to require CB&I to use its best efforts to reconvey to an acquirer PDM's fair share of business

that it would have had but for this illegal Acquisition. The ALJ Order also omitted certain provisions that are normally included in an FTC-ordered divestiture, such as requirements to encourage the movement of employees to the acquirer.

A. The Commission Has the Authority, under the Clayton Act and the FTC Act, to Order Effective and Viable Divestiture Relief to Restore the Competition Lost as a Result of the Illegal Acquisition

It is undisputed that divestiture is the appropriate remedy for an acquisition found to be illegal under Section 7 of the Clayton Act.[23] ID-118-119. The Clayton Act states that upon a finding of a Section 7 violation, "the Commission. . . *shall*. . . order. . . such person to cease and desist from such violations, and *divest* itself of the. . . assets, held." 15 U.S.C. § 21(b) (Emphasis added).

Divestiture relief must be *effective* to fully restore pre-Acquisition competition, for anything less would be a "Pyrrhic victory."[24] As the Supreme Court observed, "if the Government proves a violation but fails to secure a remedy adequate to redress it," it has "won a lawsuit and lost a cause." *United States v. E. I. du Pont de Nemours and Co.*, 366 U.S. 316, 323-24 (1961) (citations omitted). Moreover, the Supreme Court made clear that the government's choice of remedy should prevail: "We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. *For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved*

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[23] Respondents acknowledged that "[n]o one disputes that the FTC has the power. . . to enter an order breaking up CBI." (J. Leon, Tr.8311).

[24] *See* Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. Law & Econ. 43 at 45 (1969) ("Along with reestablishing the acquired firm, it is also necessary that this 'new' firm be made *viable*; a mere shadow of its former self is not acceptable. Indeed, reestablishing 'new' firms that are unable to stand on their own would make any relief efforts farcical.").

in its favor." *Id.* at 334 (emphasis added). Finally, the interest of the violator is not to be weighed against the public interest, even if that means the violator would suffer some loss as a result.[25]

Thus, under the Clayton Act and the FTC Act, the Commission has ample authority to order effective and viable divestiture and ancillary relief,[26] including the division of commingled assets to reconstitute a competitor.[27] As an expert body responsible for determining what remedy is necessary to eliminate the unlawful conduct it has found, the Commission has wide latitude, and a reviewing court will not set aside or modify the FTC's remedial provisions so long as there is a "reasonable relationship" between the remedy and the unlawful conduct at issue.[28] As Judge Posner made clear in affirming the Commission's decision and divestiture order in *HCA*, "the Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of

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[25] "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *Id.* at 326-27 (citations omitted).

[26] In *Ford Motor Co. v. United States*, the Supreme Court endorsed additional ancillary relief to ensure the viability of the assets being divested. 405 U.S. 562, 575 (1972); *see also Hospital Corp.*, 807 F.2d at 1393; *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1380 (9th Cir. 1978); *L. G. Balfour Co v. FTC*, 442 F.2d 1, 23 (7th Cir. 1971); *Olin,* 113 F.T.C. at 618-619; *Crown Zellerbach Corp.*, 54 F.T.C. 769, 807 (1957) (ordering divestiture, to ensure "the substantial restoration of the competitive entity destroyed").

[27] In two related cases the Supreme Court ordered that gas reserves be given by the defendant to the newly divested company "no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company." *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-37 (1967). The Court explained: "The purpose of our mandate was to restore competition" by placing the "New Company in the same relative competitive position vis-a-vis El Paso in the California market as that which Pacific Northwest enjoyed immediately prior to the illegal merger." *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969).

[28] *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 377 (1965); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

law and ensure against its repetition." *Hospital Corp.,* 807 F.2d at 1393 (7th Cir. 1986); *see also RSR Corp.,* 88 F.T.C. 800, 892-97 (1976) (Divestiture of plants that were not part of the original acquisition); *Diamond Alkali*, 72 F.T.C. 700, 742 (1967) (Divestiture of acquiring company's plant, when it had already shut down the acquired company's factory).

B. The Commission Has Authority to Unscramble the Merged Firm's Assets and Business

The Commission has a long history of ordering, implementing and enforcing divestiture of integrated assets in consummated merger cases. Where respondents have commingled or dissipated acquired assets, the Commission has employed its broad remedial authority to order divestiture not only of the acquired assets but also of assets necessary to reconstitute a competitor. For example, in *Ekco Products Co.* the Commission ordered the divestiture not only of the acquired assets, but also ***contracts*** and other assets necessary to reconstitute the acquired business as a going concern and effective competitor:

> Respondent . . . shall divest . . . assets acquired . . . together with all additions thereto and replacements thereof which have been made since the acquisition: . . . distribution agreements, supply and requirements contracts, . . . and . . . all other assets as may be necessary to reconstitute . . . a going concern and effective competitor . . . .

Ekco Products Co., 65 F.T.C. 1163, 1228-29 (1964).

In *Olin Corp.*, 113 F.T.C. at 619-20, as the Initial Decision notes, the FTC ordered divestiture of a cyanuric acid (CA) plant even though the threatened loss of competition involved different chemicals, because it believed the CA plant was necessary "to ensure the viability of the divested entity" as a producer of the chemicals at issue. ID-121. The Ninth Circuit found such an order "within the range of properly exercised discretion." *Olin Corp. v. FTC*, 986 F.2d at 1307. Other

examples abound.[29] The Commission has ordered respondents, *inter alia*, (1) to assign current contracts, as well as customer records and files, to the acquirer to restore competition;[30] (2) to divest post-merger improvements;[31] (3) to divest or license respondents' technology;[32] and (4) to provide technical assistance to the acquirer of the divested assets to enable the acquirer to compete in the production and sale of the relevant product(s).[33]

C. The ALJ Order Is Insufficient to Achieve Effective Relief; Complaint Counsel's Order Should Be Accepted

The Initial Decision acknowledges that "[t]he Commission has ordered divestiture of integrated assets in consummated merger cases numerous times where violations of the Clayton Act have been found," citing *Olin*, *Crown Zellerbach* and *Ecko Products*, in which the Commission ordered divestiture of after-acquired assets as necessary to restore effective competition to the relevant market. ID-120. However, the ALJ incorrectly limited the the Commission's remedial authority to

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[29] In *Fruehauf* the Commission ordered divestiture ten years after the acquisition, including divestiture of any other assets necessary to restore the acquired companies as effective competitors. *Fruehauf Trailer Co.*, 67 F.T.C. 878, 939 (1965). In *Crown Zellerbach* the Commission stated "clearly, the broad purpose of the statute cannot be thwarted merely because respondent has commingled its own assets with those of the acquired firm." *Crown Zellerbach Corp.*, 54 F.T.C.at 807 (1957).

[30] *Goodrich*, 110 F.T.C. at 364; *Occidental Petroleum Corp.* , 115 F.T.C. 1010, 1292 (1992); *Hospital Corp. of America*, 106 F.T.C. 361, 521 (1985).

[31] *Goodrich*, 110 F.T.C. at 363; *Olin*, 113 F.T.C. at 620; *Occidental*, 115 F.T.C. at 1291; *HCA*, 106 F.T.C. at 521; *American Medical International, Inc.*, 104 F.T.C. 1, 239 (1984); *Reichhold Chemicals*, 91 F.T.C. 246, 291 (1978).

[32] *Goodrich*, 110 F.T.C. at 363; *Occidental*, 115 F.T.C. at 1292.

[33] *Idem*.

divesting whatever is left of assets acquired by CB&I from PDM on February 7, 2001.[34] ID-120-121. Thus, Complaint Counsel's Proposed Final Order requires CB&I to restore or assist in restoring assets and business that no longer exist. CCPFO ¶ II.D. Further, for the reasons discussed below, the ALJ Order falls short of restoring two competitive and viable businesses.

1. CB&I Must Assign a Portion of Its Work-in-progress and Contractual Business

The Acquisition combined two thriving, and intensely competitive, ongoing businesses. Since the Acquisition the merged firm has continued to thrive, completing work under old contracts, securing contracts for new work, and bidding and generating estimates, designs, engineering details, and sole-source agreements with customers for prospective new work. The ALJ Order would limit divestiture to whatever is left of the contracts held by PDM prior to the Acquisition and leave to CB&I the entirety of the merged firm's current business portfolio. This will neither restore competition completely nor assure the viability and competitiveness of the divested business.

If CB&I and PDM, or its successor(s), had continued to compete, each would have won a portion of contracts and business opportunities that have instead been garnered by the merged firm. The ALJ Order, however, inexplicably treats all contracts captured by the merged firm as the exclusive property of CB&I and omits language that makes clear that intellectual property to be transferred to the acquirer includes customer lists, customer records and files, bidding and estimating documents and

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[34] The Initial Decision relies on *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 230-31 (D.C. Cir. 1962) and *Luria Bros. & Co. v. FTC*, 389 F.2d 847, 865 (3d Cir. 1968), but neither case supports this proposition. The court in *Reynolds Metal* found that there was no record support for divestiture of assets beyond what was acquired in the unlawful acquisition, but indicated that on a sufficient showing of necessity, such divestiture might be sustained. The Third Circuit in *Luria Bros.* distinguished *Reynolds Metals* by observing that, unlike in that case, the Commission's order against Luria Bros. was directed at assets obtained in the illegal acquisition; nowhere in *Luria Bros.* does the court state that "[a]n order can only be directed at assets obtained by the buyer 'as a result of the illegal acquisition,'" as indicated in the Initial Decision. ID-120-21.

other confidential material relating to business opportunities.

The Initial Decision finds,[35] Respondents concede,[36] and the Commission's experience instructs[37] that divestiture of an ongoing business, including a customer base, is needed to assure the viability and effectiveness of relief in this case. Several witnesses testified as to the desirability of Complaint Counsel's proposed remedy.[38] Neary, Tr.1489, 1502 (Reestablishing PDM would give his company the "competition" they're "looking for"); Simpson, Tr.3606-09 ("PDM EC was as strong a competitor as it was because it possessed certain tangible and intangible assets. For a reconstituted firm to be as strong a competitor, it, too, would have to possess these tangible and intangible assets. . . . Things such as the fabrication plant PDM EC had, its work force, its engineering staff and its intangible assets, such as its learning by doing, enabled it to compete as a very strong competitor in this marketplace.").

As shown in Table 2, below, the record demonstrates that, prior to the illegal Acquisition,

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[35] *See, e.g.*, IDF 586-90 (a large revenue base is necessary to be a viable competitor).

[36] Respondents concede that effective relief must include much more than what is required in the ALJ order. J. Leon, Tr. 8312 (personnel); J. Leon, Tr. 8316-17 (divested business must have work in the pipeline).

[37] The Commission's institutional experience with merger remedies, including negotiated consent settlements and their aftermath (*e.g.,* order enforcement and civil penalty actions), serves to inform the Commission's judgment as to what relief may effectively restore the competition lost from a particular illegal acquisition. *See, e.g.*, *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* (2003) [hereinafter "*Merger Remedies Statement*"], http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm; *Frequently Asked Questions About Merger Consent Order Provisions*, http://www.ftc.gov/bc/mergerfaq.htm; Federal Trade Commission, *A Study of the Commission's Divestiture Process*, prepared by the staff of the Bureau of Competition (1999), http://www.ftc.gov/os/1999/08/divestiture.pdf.

[38] Complaint Counsel's Proposed Final Order eliminates the requirement that Respondents transfer a portion of CB&I's employees to the Acquirer and specifies Respondents' obligation to provide incentives to customers to consent to transfer or assignment of contracts and to provide incentives to employees to move to the new company.

PDM's EC and Water Divisions accounted for about 48% of the merged firm's 1999 United States revenues, and about one-third of world revenues, from tanks and specialty structures:

TABLE 2
CB&I and PDM 1999 Tank and Specialty Structure Revenues
($ Millions)

	World	United States
PDM EC & Water	$280.9	$188.0
CB&I	$558.6	$201.8
CB&I/PDM Combined Revenues	$839.4	$389.9
PDM % of Combined Revenues	33.5%	48.2%
CB&I % of Combined Revenues	66.5%	51.8%

Excludes repairs, modifications and turnarounds.

Source: PDM: CX 522 at TAN 1003382 (PDM EC Division 1999 revenue $185,659,000); CX 522 at TAN 1003388 (breakdown of PDM EC Division sales by region 1997-1999 ("Domestic 50%"); CX 525 at TAN 1000383 (PDM Water Division 1999 revenue $95.2 million); CX 554 at 2 (PDM Water "WHAT WE DO" "DESIGN, FABRICATE & CONSTRUCT WATER STORAGE TANK PROJECTS THROUGHOUT THE U.S.A."), 10.

CB&I: CX 1032 at 51 of 56 (CB&I 1999 revenue $295,697,000 flat bottom tanks; $82,147,000 low temperature/cryogenic tanks & systems; $65,646,000 specialty & other structures; $63,443,000 pressure vessels; $51,648,000 elevated tanks); CX 1032 at 50 of 56 (CB&I 1999 United States revenues 36.1% of world revenues).

The ALJ found that prior to the Acquisition, PDM and CB&I were each other's closest competitors.[39] The record is replete with examples of the aggressive manner in which PDM and CB&I bid against each other to win contracts.[40] Absent the merger, if PDM (or its successor) and CB&I had continued to compete for new contracts and business opportunities, CB&I and PDM each would have

[39] *See, e.g.*, IDF-74, 79-82, 228-232, 269, 277-291, 363, 376-406, 483-487.

[40] *See, e.g.*, IDF-483: PDM is the "single largest" reason CB&I lost business in the United States; competition from PDM accounted for 33% of CB&I's lost business.

won some of the contracts now held by the merged firm. In order to restore competition to its pre-Acquisition state,[41] effective divestiture relief must reestablish CB&I and the new PDM to their respective pre-Acquisition competitive positions in today's market.

However, the ALJ Order "does not require CB&I to divest a portion of its backlog of work or customer contracts entered into by CB&I post-Acquisition," even though the PDM contracts acquired by CB&I have been completed or are nearing completion and have been succeeded by new contracts and business opportunities, at least some of which PDM likely would have won if it had not been acquired by CB&I.[42] ID-122. Limiting divestiture to only what remains of the contracts acquired from PDM would render any remedy "a divestiture in name only" and would leave the new company with almost no ongoing business. *Olin*, 113 F.T.C. at 585; *see also Ekco Products,* 65 F.T.C. at 1217 (the Commission may order the divestiture of additional assets to take into account a firm's probable growth that would have occurred, absent the merger). As CB&I's counsel put it plainly:

> In order for this company, new company, to work, it has to have work in the system. You can't just create it and then say, go out and find work, because it takes sometimes six months to a year for a job once you find an opportunity for it to come in. Everybody recognizes that.

(J. Leon, Tr.8316-17). Thus, to effectively restore pre-Acquisition competition, the Commission should require CB&I to restore PDM's pre-Acquisition share of business by assigning to the acquirer rights in customer contracts and work-in-progress currently held by the merged firm proportional to that held by PDM prior to the Acquisition.[43]

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[41] *See, e.g.,* IDF-177-203, 335-52, 419-470.

[42] There is continual turn-over of the merged firm's projects. "CBI has 300 projects going on at any given time, in various stages." J. Leon, Tr.8318.

[43] *See Utah Pub. Serv. Comm'n* , 395 U.S. at 470, and *Cascade Natural Gas Corp.*, 386 U.S. at 138. The Commission has ordered the assignment of customer contracts in past administrative

In order to restore a current pipeline of work, the proposed Final Order requires CB&I to assign a portion of its customer contracts, pursuant to a process whereby the acquirer nominates contracts in consultation with the Respondents, Commission staff and a monitor. CCPFO ¶ II.C. In accordance with the respective revenues of CB&I and PDM prior to the Acquisition, *see* Table 2, *supra*, the proposed Final Order requires that the contracts assigned to the acquirer shall, in aggregate, have a monetary value of no less than 33% of CB&I's Tank Business Customer Contracts and no less than 48% of CB&I's United States Tank Business Customer Contracts. CCPFO ¶ II.C.4.(a). The proposed Final Order further requires that the assigned contracts be equitably distributed among the relevant products and among the various types of products that CB&I (and, prior to the Acquisition, PDM) manufacture. CCPFO ¶ II.C.4.(b),(c). The proposed Final Order requires Respondents to secure the customer approval necessary to transfer such contracts and business opportunities.[44] CCPFO ¶ II.C.3. By obtaining a portion of the merged firm's current business, the acquirer will inherit, and be in a position to build upon, a track record immediately upon divestiture and will have sufficient work-in-progress to sustain the acquirer's operations.

2. CB&I Must Take Affirmative Steps to Assure the Acquirer Has Sufficient Experienced Employees

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litigations involving consummated mergers*, see, e.g., supra* note 30, and in consent orders resolving such litigations, *see, e.g.*, *Automatic Data Processing, Inc.*, 124 F.T.C. 456 (1997) (Order ¶ ¶ I.E., II.A., V., VII.).

[44] Many of the contracts currently held by CB&I contain non-assignability clauses and key employee provisions that require the customer to approve the assignment of the contract or the replacement of key employees on a project. IDF 580. *See also* IDF 581. At the time of the Acquisition, Respondents obtained consent from PDM's customers to transfer their contracts to CB&I. J. Leon, Tr.8317.

The ALJ found that "educated, experienced, and knowledgeable employees are required to build the relevant products." ID-122. Respondents' counsel admitted that "You would have to give [the acquiring company] enough personnel so that everybody would have the expertise to do every kind of tank." J. Leon, Tr.8311-12. The ALJ also found that "[m]any of the contracts presently held by CB&I contain non-assignability clauses and *key employee provisions that require the customer to approve the assignment of the contract or the replacement of key employees on a project.*" IDF-580 (emphasis added). Thus, the transfer of key employees may be critical to securing the customer approvals necessary to transfer business from CB&I. Indeed, CB&I's own success in convincing customers to assign PDM contracts to itself is likely attributable to the fact that key personnel working on those projects also transferred to CB&I.[45]

The ALJ Order precludes CB&I from taking steps to prevent or discourage employees from accepting employment with an acquirer (*see* ALJ Order ¶ IV.), but fails to require CB&I to take necessary *affirmative* steps to encourage key employees to transfer to, and continue to work for, an acquirer of the PDM assets.[46]

The record shows that the know-how and expertise of the former-PDM personnel contributed to PDM's competitive track record and reputation in the industry. *See, e.g.*, IDF-168, 170-71, 252, 323, 328-31, 334, 415-16, 578-79. Restoring pre-Acquisition competition means assuring the acquirer

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[45] "Now, it was pretty easy to get people to assign their contracts to CBI in the PDM transaction." J. Leon, Tr.8317.

[46] ID-123. Complaint Counsel agree with the ALJ that "employees are not owned by the company for which they work." *Id.* We do <u>not</u> contend that "at-will employees are assets that may be divested." *Id.* However, the Commission has the authority to order Respondents to take affirmative actions to facilitate the acquirer's ability to hire employees of the now-merged entity and to induce them to accept such employment. *(See, e.g., MSC Software Corp.*, Docket 9299, Decision and Order ¶ V., November 1, 2002, http://www.ftc.gov/os/2002/11/mscdo.pdf) .

will have the necessary experienced personnel in all aspects of ongoing operations to secure and complete the assigned contracts and to bid independently and competitively on new business. Recognizing the total integration of PDM's former workforce with CB&I's, Paragraph II.F. of CCPFO requires CB&I to take actions necessary to encourage the transfer of sufficient personnel to the acquirer, including the payment of financial incentives. CCPFO ¶ II.F. These requirements are similar to those in numerous past Commission merger orders.[47]

3. CB&I Must Provide the Acquirer with Needed Transitional Assistance

The ALJ declined to order CB&I to provide transitional technical assistance and administrative services to the acquirer because this "may provide an opportunity for anticompetitive behavior," "Complaint Counsel did not demonstrate that [these transitional services] are not available from a source other than CB&I," and "these assets were not expressly acquired by CB&I in the Acquisition." ID-123. This misses the point that PDM's entire body of relevant experience and know-how was absorbed by CB&I in the Acquisition.

Respondents alone are uniquely able to provide the kind of short-term technical and administrative assistance that would help an acquirer assume Respondents' assigned business and assimilate Respondents' transferred employees. Complaint Counsel therefore propose that CB&I be ordered to provide transitional technical assistance and administrative services at the request of the acquirer.[48] CCPFO ¶ ¶ II.G.,H.

4. A Monitor Is Necessary

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[47] *See, e.g.*, *MSC Software*, *id*; *ADP*, 124 FTC at 475-76 (Order ¶ VI).

[48] *See, e.g.*, *Monier Lifetile LLC*, 127 F.T.C. 751, 758-89 (1999).

The ALJ Order also eliminated the provision for appointment of a Monitor. ID-123. When the Commission orders respondents to provide an acquirer with needed short-term assistance, the Commission frequently also provides for the appointment of an independent third party to oversee Respondents' compliance with their order obligations.[49] The need for a Monitor, whose presence would also deter collusion, is particularly great in this case given the commingled assets and operations Respondents must divest and the difficulty of assuring that CB&I provides to the acquirer all intellectual property to which it is entitled. We therefore propose that the Final Order provide for the appointment of a Monitor whose responsibility would be to ensure that Respondents comply with the terms of the Order. CCPFO ¶ V.

5. *The Form of Complaint Counsel's Proposed Order Addresses Vagueness and Ambiguities in the ALJ Order to Foster Order Compliance and Enforceability*

The ALJ Order also omitted the definitions, requirements and standard language that were in the order proposed by Complaint Counsel. For example, the record establishes that an effective divestiture must include the merged company's intangible assets, including technology, know-how, and customer information.[50] The ALJ Order, however, eliminates the definition for such included intellectual property proposed by Complaint Counsel.[51] The absence of a definition creates ambiguity about the scope of Respondents' obligation to divest intellectual property and may lead to compliance issues, enforcement problems and a less effective divestiture. Moreover, Respondents have

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[49] *See Merger Remedies Statement*, regarding appointment of monitors; Casey Triggs, *FTC Divestiture Policy*, 17 Antitrust 75, 76 (Fall 2002).

[50] IDF-576-77.

[51] Compare ALJ Order ¶ I. with CCPFO ¶ I.S., which defines intellectual property.

inextricably commingled CB&I's and PDM's intellectual property into the merged firm. It is not feasible to purge CB&I of intellectual property, including know-how and trade secrets, it acquired through the Acquisition, since PDM's intellectual property, in the form of know-how and trade secrets, resides in employees who may continue to work for CB&I. Accordingly, the proposed Order requires CB&I to grant to the acquirer an unrestricted, irrevocable, nonexclusive license, with right to sublicense, all intellectual property of the merged firm, excluding trademarks and trade names, with a corresponding grant back to CB&I of PDM technology. The licenses place CB&I and the acquirer on an equal footing to compete for business opportunities now held by the merged firm as well as for new business. In addition, it can more practicably be implemented and more readily enforced than the attempted disentanglement of PDM and CB&I intellectual property, required in the ALJ Order.[52]

The Commission's order enforcement experience teaches that a successful divestiture remedy can be best achieved when order requirements are clearly defined and delineated, and order language and provisions that the Commission has experience in interpreting and enforcing are used. Clarity, certainty and enforceability in Commission orders is critical. Language and requirements that have become standard in Commission merger orders have proven themselves, over time, to be effective in achieving the Commission's remedial objectives. Complaint Counsel's Proposed Final Order is therefore presented in the form used for Commission merger orders, and the requirements are the same as, or similar to, those used in numerous past orders where their effectiveness has been established in the course of repeated use over time.

Finally, Respondents' other arguments make no sense and are internally inconsistent. On the

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[52] Compare CCPFO ¶ II.E. and ALJ Order ¶¶ II.A.2, A.3., & A.4. *See MSC Software Corp.*, Docket 9299, Decision and Order ¶ I.L.1.a., November 1, 2002.

one hand, they claim that this Commission should not order the divestiture of the entire PDM assets acquired because it would be punitive. RAB-56-57. But in the same brief, they argue that a divestiture would not give the new company enough assets to be a strong competitor. RAB-52-56, 54 n.33. Which is it? We prefer to believe the uncontroverted evidence on this point as well as the admission of Respondents' counsel who told the ALJ:

> Here, the companies have been fully integrated at the management level, at the engineering level, at the fabrication level, at the field erection level, every level . . . and if you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business. So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff.

J. Leon, Tr.8311-8312; *see also* Tr.8330 ("There's no evidence to contradict" that the EC and Water Divisions must be sold together). As was the case in *Olin*, the record supports inclusion of the Water Division with all the other tank assets given the close pre-Acquisition interrelationship between the PDM EC and PDM Water Divisions, and the necessity of divesting sufficient assets to re-create the combined divisions for the resulting entity to be competitively viable. 113 F.T.C. at 619-20; IDF-503, 566-72; ID-121. In short, what is required here is a complete divestiture of what was illegally acquired and a replacement of the assets and business that PDM would have had but for the Acquisition.[53]

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[53] Respondents miscite numerous testimony to imply that customers do not want PDM to be restored. This assertion is untrue. *See*, e.g., Hilgar, Tr.1540 (Would be "bad" only if there was "nothing left o[f] either of two companies after any FTC action"); Bryngelson, Tr.6156 (He would be interested in giving "one or two jobs" to the new PDM); Sawchuck, Tr.6066 ("I think we would have to see the final outcome and how it was. . . finally set up").

VI. CONCLUSION

Knowing about the antitrust risk, Respondents took a chance that, by closing their deal and telling the FTC staff later, the dominance they sought would be CB&I's to keep. Complaint Counsel respectfully requests that, for the foregoing reasons, the Commission order CB&I to divest all of the assets it acquired from PDM, and take other steps necessary to reestablish an independent, viable and effectively competitive business in the relevant markets.

Dated: September 16, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Dated: September 16, 2003

APPENDIX A

PROPOSED FINAL ORDER