NO. 05-60192

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHICAGO BRIDGE & IRON COMPANY N.V.,
CHICAGO BRIDGE & IRON COMPANY,
***Petitioners*,**

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE FEDERAL TRADE COMMISSION

BRIEF OF RESPONDENT
FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.4, the Federal Trade Commission concurs with the petitioners that oral argument may aid in the Court's resolution of this case.

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GLOSSARY

For ease of reference, the following abbreviations and citation forms are used in this brief:

Tr. – Transcript of Trial Testimony before the Administrative Law Judge

CX – Complaint Counsel's Exhibit

RX – Respondents' Exhibit

JX – Joint Exhibit

Op. – The Commission's Opinion

ID – Initial Decision of the ALJ (Page Number)

IDF – Initial Decision of the ALJ (Factual Finding Number)

* – In Camera Material

STATEMENT OF JURISDICTION

This is a petition to review a Final Order of the Federal Trade Commission, entered pursuant to Section 11(b) of the Clayton Act and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 21(b), 45(b). This Court has jurisdiction to review the Order pursuant to 15 U.S.C. §§ 21(c), 45(c). We concur with petitioners' statement that review of the Order is timely.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether review is limited to the record and the arguments CB&I properly advances in its brief.

2. Whether substantial evidence supports the Commission's findings that (a) CB&I's acquisition of its principal rival substantially increased market concentration; (b) high entry barriers characterize each relevant market; (c) post-acquisition entry and potential entry cannot constrain CB&I's market power; and (d) sophisticated customers cannot constrain CB&I's market power.

3. Whether Section 7 of the Clayton Act requires showing actual competitive harm; and whether the Commission properly allocated the evidentiary burdens or imposed too great a burden on CB&I as to the competitive effects of new entry.

4. Whether the Commission's Order is within the bounds of its discretion and whether the Commission properly denied CB&I a separate remedies trial.

STATEMENT OF THE CASE

This is a petition to review a final divestiture order that the Federal Trade Commission ("Commission") issued following an administrative adjudication under Section 5 of the Federal Trade Commission Act ("FTC Act"). 15 U.S.C. § 45. It involves the acquisition of a specialty engineering and construction company by that company's primary – and in some markets, *only* – competitor.

The Commission issued an administrative complaint on October 25, 2001, charging that CB&I's[1] acquisition of certain assets of its principal rival, Pitt-Des Moines, Inc. (PDM), violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint sought to undo the anticompetitive effects of the acquisition through divestiture. An Administrative Law Judge ("ALJ") presided over a nine-week evidentiary hearing, producing a record including 8400 pages of testimony and over 1400 exhibits. The ALJ then issued a 126-page Initial Decision and a divestiture order. After full briefing and argument, and reviewing the record *de novo*, the Commission affirmed the ALJ's holding of liability, and issued a final order containing a modified divestiture order. *See* Final Order of December 21, 2004.

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[1] We refer to petitioners, Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company, collectively as "CB&I."

STATEMENT OF FACTS

A. The Industry and the Challenged Acquisition

Both CB&I and PDM designed, engineered, and constructed industrial storage tanks for liquified natural gas (LNG),[2] liquified petroleum gas (LPG),[3] liquid atmospheric gases such as nitrogen, oxygen, and argon (LIN/LOX),[4] and thermal vacuum chambers (TVCs), used to test satellites for the aerospace industry.[5] Op. 1. As CB&I conceded, the two firms "were the dominant suppliers of the products in these four relevant markets prior to the acquisition." *Id.* at 8. Indeed, before 2001, the two firms had a virtual duopoly in those markets. *Id.* at 20. Between 1990 and 2001, CB&I and PDM were the only firms that built *any*

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[2] LNG tanks are field-erected tanks that store 2.5-42 million gallons of natural gas at cryogenic temperatures of around -260° F, and cost $35-50 million each. Op. 11. They must have inner walls made of 9 percent nickel steel, and therefore require special welding techniques. *Id.* LNG tanks can serve two types of facilities: import terminals that receive LNG from tankers and offload it to storage tanks; and the usually smaller peak-shaving plants, used by utilities to store LNG as emergency reserves. *Id.* at 13.

[3] LPG tanks are field-erected tanks for liquified, petroleum-based gases, but are substantially less expensive than LNG tanks, costing approximately $5 million each, and store the liquified gases at significantly higher temperatures of around -50° F. Op. 13.

[4] LIN/LOX tanks are an essential part of air separation facilities used by major industrial gas firms. Op. 14. They are also designed for cryogenic temperatures, but are much smaller than LNG or LPG tanks, and significantly less expensive, costing $500,000 to $1.5 million each. *Id.*

[5] TVCs simulate outer space temperature and vacuum conditions. Op. 15. The TVC system consists of an inner "shroud," surrounded by a cryogenic tank. *Id.* Typically, one company builds the shroud and another – namely, CB&I or PDM – builds the surrounding tank, such that TVC projects are performed by teams of the two respective constructors. *Id.*

LNG tanks in the United States. *Id.* Between 1975 and the acquisition, CB&I and PDM were the only firms to build LNG tanks for import terminals, *id.* at 20-21 n.110, and they built all but 7 of the 95 peak-shaving LNG tanks built during that period. *Id.; see* CX 125, 1645.

In the LPG tank market, only two of the 11 projects between 1990 and the acquisition were awarded to firms other than CB&I and PDM. Op. 23; Tr. 3046, 3052-54, 3670; *see* CX 26 at CBI-PL069530*, 161 at CBI-PL006114, 824, 1210*, 1212*. Although the LIN/LOX tank market was not historically a CB&I/PDM duopoly, the only other significant competitor, Graver Tank,[6] left the market in 2001, leaving CB&I as the dominant firm in this market. Op. 25; Tr. 1543, 7312-13; *see* CX 1546.

In the TVC market, CB&I's acquisition combined the only two builders of large, field-erected TVCs in the U.S. IDF 363; Tr. 3489; *see* CX 94 at PDM-HOU017583, 264, 272, 857*, 1040 at PDM-HOU010889.[7] CB&I and PDM were the only firms that built any TVCs in the U.S. since 1960. Tr. 1110, 1115, 1267, 1564.

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[6] Of the 109 LIN/LOX tanks built between 1990 and the acquisition, CB&I built 25, PDM 44, and Graver 34. Tr. 2452, 3422, 3429-30; *see* CX 85, 155, 183, 260, 282, 755, 1170, 1458.

[7] Before the acquisition, CB&I and PDM allied with the two dominant constructors of the "shroud" part of the TVC system, XL Technology Systems (XL) and Process Systems International (PSI), respectively. Op. 15; *see* Tr. 1262-64. The TVC market was thus dominated by the CB&I/XL and PDM/PSI alliances.

On February 7, 2001, CB&I acquired all of PDM's assets relating to these four markets. It did so despite receiving notice that the Commission had significant antitrust concerns and was "in the midst of [an] investigation of the acquisition," Op. 1, and before responding to the Commission's pending subpoenas and Civil Investigative Demands.[8] CB&I thereby acquired monopoly status in two product markets and near-monopoly status in two others.

B. The Commission Decision and Order

(1) Market Definition

Section 7 makes illegal any acquisition that may tend to create a monopoly or substantially lessen competition in any line of commerce in any section of the country. 15 U.S.C. § 18. The Commission began by noting that the "relevant product and geographic markets are uncontested" (Op. 8; *see* CB&I Br. 8), and, after reviewing their respective structures and characteristics (Op. 11-17), affirmed the ALJ's determination that the acquisition must be judged for its effects on the

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[8] CB&I asserts that post-acquisition merger challenges are "unusual" (CB&I Br. 2), and implies that this challenge may be inequitably tardy. *Id.* at 4-5. Although pre-merger reporting requirements have lessened the need for post-acquisition challenges, such challenges remain an important enforcement mechanism, *see, e.g., In re Evanston Northwest Healthcare Corp.,* FTC Docket No. 9315; *In re MSC.Software Corp.*, FTC Docket No. 9299, and are entirely appropriate. *See* 15 U.S.C. § 18a(i)(1) ("any failure of the Federal Trade Commission … to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law").

United States markets for LNG tanks, LPG tanks, LIN/LOX tanks, and TVCs. Op. 8.[9]

(2) Market Concentration

The ALJ found that sales of the relevant products are sporadic – i.e., many months or years may lapse between projects. ID 91-93. Accordingly, he rejected the traditional method of measuring market concentration, using the Herfindahl-Hirshman Index ("HHI"), reasoning that sporadic sales made it difficult to use HHIs, which are generally calculated on an annualized basis, to assess the competitive landscape.[10] *Id.* Nonetheless, after examining the bidding history in each market, he found that the acquisition has resulted in an undue accretion of market power in CB&I which could not be constrained by timely entry into the markets. *See* ID 93-98.

The Commission rejected the ALJ's refusal to rely on HHI concentration measures. While the Commission understood "the ALJ's point and agree[d] that in

[9] CB&I's brief blurs the distinctions among the four markets, treating them as if they were one "field-erected cryogenic storage tanks" market, CB&I Br. 5; *see also id.* at 9 n.9. Such an imprecisely defined market is contradicted by the Commission's findings (*see* IDF 19; Op. 8), and by CB&I's own position. *See* CB&I Br. 8. To prevail here, CB&I must show that the Commission's findings are unsupported as to each of those four distinct markets.

[10] The HHI is calculated by squaring the market share of each firm competing in the market and summing the resulting numbers. The Index takes into account the relative size and distribution of each firm. It approaches zero when there are many firms of relatively equal size and reaches its maximum of 10,000 when there is only one firm in the market.

markets with sporadic sales, finders of fact must treat concentration statistics with care" (Op. 18), it was "unwilling" to "disregard … the concentration statistics" altogether. *Id.* Noting that CB&I did not "contest that [CB&I and PDM] were the dominant suppliers in all four markets prior to the acquisition" (*id.*), and that they were "the only competitors that … made significant sales in each of the four markets for at least the past two decades" (*id.* at 19), the Commission concluded that "an extended time frame is an appropriate period in which to analyze the parties' sales data." *Id.; see also* Tr. 7228. The Commission found that the HHIs for the markets "range from 5,000 to 10,000 post-acquisition, with concentration increases that range from 2,600 to 5,000" – numbers "well above the level needed to establish a prima facie case and entitle Complaint Counsel to a presumption" that the acquisition violates Section 7.[11] Op. 19.

The Commission also found "an independent reason for finding a strong prima facie case of presumptive illegality" in other, "qualitative evidence" showing that "the acquisition left CB&I as the dominant player – indeed the only major player – in all of the markets." Op. 20. The Commission cited, for example, the views of customers with first-hand knowledge that "PDM and CB&I were the only

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[11] For the period 1990-2001, the HHI shows the following post-acquisition concentration data: LNG tanks market – HHI of 10,000 (increase of 4,956); LPG tanks market – HHI of 8,380 (increase of 3,911); LIN/LOX tanks market – HHI of 5,845 (increase of 2,635); TVCs market – HHI of 10,000 (increase of 4,999). Op. 17; *see* Tr. 3055, 3403-05, 3443, 3494.

viable LNG tank suppliers prior to the acquisition and that the acquisition substantially harmed competition." *Id.* at 21-22; *see* Tr. 324, 703*, 1830; *See also* Op. 27-28 (citing Tr. 192-93, 384-87, 1443). It also cited PDM's and CB&I's own documents, which confirmed that the two firms "focused almost exclusively on each other in their assessment of the competitive landscape and paid little or no attention to what other companies were doing." Op. 22 (citing, e.g., CX 68, 94 at PDM-HOU017580; Tr. 4851); *see also* CX 212 at CBI-PL031721; Tr. 1159.[12]

(*3*) ***Entry Conditions***

After concluding that "the acquisition … resulted in a merger to monopoly or near-monopoly in each relevant market," the Commission analyzed entry conditions "to determine if there is any evidence to suggest that the acquisition is less anticompetitive than the concentration levels show." Op. 28. Addressing Complaint Counsel's evidence and considering it "in the context of [the] prima facie case," the Commission noted that "evidence of high entry barriers necessarily strengthens the conclusions to be drawn from … high concentration levels." *Id.*[13]

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[12] The Commission found similar qualitative evidence in the LPG and LIN/LOX tank markets. *See* Op. 23-25 (discussing PDM's and CB&I's internal market assessments and customer views in the LPG tank market); *id.* at 26-27 (discussing both factors in LIN/LOX tank market).

[13] Although entry conditions are not normally considered part of the prima facie case in a merger proceeding, the Commission explained that because that evidence was introduced as part of Complaint Counsel's case, "as a practical matter it would be difficult to consider this evidence elsewhere in our analysis." Op. 28-29 n.171.

The Commission separately considered entry conditions in each market. Op. 33-49. After reviewing the evidence, including customer testimony and behavior in past LNG project awards, *see id*. at 33-41, the Commission found a variety of reasons why entry into this market is exceedingly difficult and cannot be achieved in a timely fashion. It noted, for example, that the nickel-steel composition in LNG tanks requires "a specialized construction skill set."[14] *Id.* at 36; Tr. 881, 1831, 6701-02; CX 1731 at 44, 1792. LNG tanks require sophisticated engineering (Tr. 881, 1566, 1792) and must be built by companies with trained supervisors and a knowledge of local labor markets.[15] Tr. 310, 1598-99, 1641*, 2625-34, 4521, 5906-07, 5917-18, 5952-53, 7017-18. Construction companies develop specialized procedures and employ proprietary techniques to weld and assemble the units. Op. 36-39; Tr. 1601, 2379, 6028-29; CX 109 at PDM-HOU006700. Additionally, the Federal Energy Regulatory Commission (FERC) regulatory and approval process is complicated and potentially time-consuming and builders must master the process to complete projects on time and in accordance with requirements. Op. 40; Tr. 310, 627, 1639-40, 4930, 6287.

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[14] There are "tremendous safety considerations" regarding LNG tanks. Tr. 293-94, 564-65, 1789. Nickel-steel has crack resisting properties at very cold temperatures and is less brittle than carbon steel. Tr. 881-82, 4109-10; CX 1074 at CBI001245-PLA.

[15] While CB&I has told this Court that LNG tanks are beveled steel plates put together by local labor (CB&I Br. 8), the record shows that they are "built out of fairly sophisticated materials [that you] don't just weld up any old way." Tr. 1789, 2379.

Customers require potential suppliers to have significant experience in that market (Op. 33-34), and it takes at least "a few years" of experience to gain proficiency in building LNG tanks. Tr. 1637-38*, 2379-80; CX 392 at 3. Attaining the necessary experience is a function of repeated successful completion of similar projects and is particularly difficult here, where "the LNG tank market is characterized by long-standing dominance by the two merged firms and a reluctance on the part of customers to take a chance on firms with no experience." Op. 35.[16] The Commission found "CB&I's long-standing presence in the U.S. confers on it a virtually insurmountable advantage in many of the attributes [of successful entry], at least for the foreseeable future." *Id.* at 41.

Similar high entry barriers also characterize the LPG and LIN/LOX tank markets. Experience, reputation for reliability, safety records, and specialized skills are critical supplier attributes. Op. 42-43, 44-47; Tr. 467*, 848-49, 852, 1343-44, 1609, 1995, 2289-97, 3323, 6570-71, 7083-84, 7134, 7141-42; *see* JX 27 at 115-16. By way of example, the Commission noted that "Air Products requires that the engineers, field crew, and supervisors all have prior LIN/LOX experience"

[16] The Commission observed that such barriers explain why Asian tank manufacturers historically have built the majority of LNG tanks in Asia, and European-based manufacturers have built the bulk of tanks in Europe – just as PDM and CB&I have built virtually all the tanks in the United States. Op. 41; Tr. 699*, 717-18*; *see* CX 1649; RX 738 at FTC001535*.

to qualify for Air Products' projects. Op. 46-47; Tr. 849, 1357-60, 1388-91, 1994-96; *see* JX 25 at 83-84.[17]

The Commission concluded that "entry and expansion in these markets are not likely to replace the competition lost through the acquisition or to sufficiently constrain CB&I in a timely manner." Op. 49.

(4) CB&I's Rebuttal

CB&I did not contest either the product or geographic markets before the Commission. Nor did it argue that the acquisition would lead to enhanced efficiencies that would benefit competition. Rather, it simply contends that Complaint Counsel's evidence of extraordinarily high market concentration and high entry barriers were rebutted by actual successful recent entry and potential entry into three of the four markets.[18] On examining the record evidence, however, the Commission affirmed the ALJ's conclusion that the purported new entry "is insufficient to constrain CB&I post-acquisition." Op. 81.

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[17] The Commission also examined the evidence relating to the TVC market and found that barriers are extraordinarily high in that market, noting that "[t]he difficulty of entry . . . is not in dispute." Op. 28 n.170; *see* Tr. 206, 1103, 1141-44, 1454, 1734-37, 1920*; JX 27 at 47-48.

[18] CB&I proffered no evidence of attempted entry into the TVC market, and the record shows entry is unlikely. Op. 80; Tr. 1147-49, 1272. CB&I advanced other defenses, arguing that the relevant markets are small, CB&I lacked presence in the TVC market, and its expert's "critical loss analysis" showed that CB&I could not raise prices in the future. The Commission rejected each of these arguments (*see* Op. 49-50 n.309, 50-52, 82-87) and CB&I has abandoned them here.

The Commission analyzed the LNG tank market, considering the qualifications and experience of each alleged new entrant (Op. 52-57), the post-acquisition bidding behavior of CB&I and the entrants together with the bidding outcomes (*id*. at 58-63), and the views of customers regarding the ability of those firms to compete with CB&I. *Id*. at 63-66. The Commission found that the three joint ventures CB&I identified as new entrants – Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V – lacked sufficient experience to compete effectively with CB&I. *Id*. at 57. None had ever built an LNG tank in the United States. *Id*. at 52-53 & nn. 323, 325; Tr. 596, 1402, 1645*, 2336, 2393-95, 4458-59, 4521, 4599-600, 4719*, 6693, 6993; *see* CX 115, 135*, 693 at BP01028. As of the time of trial, none had won an LNG tank bid post-acquisition (Op. 58), while CB&I had won six *sole-source* contracts since the acquisition. *Id*. at 59; Tr. 4399.[19] Moreover, some customers with upcoming LNG projects were not even aware of one or more of the alleged new entrants. Op. 54; Tr. 1326, 1846-53. The Commission concluded that, although these new entrants may "have taken a necessary step toward competing in the United States by partnering with U.S.

[19] For several post-acquisition projects, "CB&I has insisted that it do the work on a turnkey basis – even after customers have expressed a strong preference to bid parts of the project competitively." Op. 64. Indeed, CB&I refused even to bid on the Dynegy project (Op. 59; Tr. 4576-77; CX 139, 140, 1528); and, by refusing to separate the initial FERC work from the rest of the project, CB&I forced British Petroleum ("BP") to award it sole-source contracts for three LNG tanks. Op. 60-61; Tr. 6069-71.

construction firms," there has been no new meaningful entry because "even entrants with the technical wherewithal to build LNG tanks have not restored the competition lost from the acquisition and likely cannot do so in the foreseeable future." Op. 56, 57.

The LPG tank market "has been characterized more by exit than by entry," and the actual or potential entrants proffered by CB&I "appear vastly overmatched by CB&I." Op. 66. The Commission found, for example, that AT&V, the one remaining "competitor" in the market at the time of the trial, suffers from lack of experience, equipment, personnel, and financial standing needed to compete meaningfully with CB&I. *Id.*; Tr. 2365-66, 2375, 2385, 2421-22, 3292-3315, 7088-89, 7129-34; *see* CX 107 at PDM-HOU005015. None of the other firms identified by CB&I as "would-be LPG tank suppliers" has ever won an LPG tank bid in the U.S. Op. 67; Tr. 1609, 3750-51; JX 27 at 71-72; CX 660 at HOU005015. Morse – the last domestic firm identified by CB&I as an entrant – built a single LPG tank in 1994 and did not thereafter make another bid in the U.S. Op. 68; Tr. 7297. The Commission also concluded that the participation of other bidders for the single post-acquisition LPG tank project cited by CB&I – which CB&I won – did not evince an ability to constrain CB&I's conduct in that market (Op. 69-70), and that CB&I's assertion that foreign suppliers "theoretically might

enter" the LPG market is only a "speculative possibility." *Id.* at 69; *see* Tr. 2431, 4708*, 7778-79.

The LIN/LOX tank market is similarly devoid of meaningful post-acquisition entry. New entry was attempted by the French company BSL, but it "never won a bid" and "has since gone out of business." Op. 77; Tr. 955, 1351, 1380, 2001. Similarly, post-acquisition expansion attempts by AT&V, Matrix, and Chattanooga (*see* Op. at 71-77) have been "insufficient to replace the competition that was lost from the acquisition." *Id*. at 77. Chattanooga "still has not won a bid" (Op. 76; Tr. 6413-15; JX 2 at 2); "increased costs have made Matrix non-competitive" (Op. 75; Tr. 457*, 2159-61); and AT&V suffers from capacity shortage (Tr. 2375-76, 3315), and recent problems have made its competitive viability doubtful. Op. 79-80; Tr. 931-32, 1369, 2235-36*, 2241*, 2251-55*, 2355-56, 5036, 5269, 5273-74.

Last, the Commission addressed CB&I's argument that sophisticated customers can constrain CB&I. The Commission noted, however, that even sophisticated customers "must have alternative suppliers in order to have any real bargaining power" and the variability and infrequent nature of transactions makes it unlikely that customers can get accurate pricing information. Op. 87, 88; Tr. 705*, 6060-61, 6207-08, 6290*, 7033. As one customer testified, it had to

"operat[e] a little bit in the dark in terms of knowing … the costs … for LNG tank suppliers." Op. 88; Tr. 6238. The Commission also found that, although consultants may give some assistance, they cannot ensure that customers receive sufficient pricing information, citing CB&I's own evidence "that it is difficult, if not impossible, to compare prices of various tanks because the specifications vary so widely from project to project." Op. 89; Tr. 6239.

(5) The Commission's Final Order

In the light of "a strong prima facie case," the Commission found CB&I's rebuttal evidence "establishes neither that entry or expansion into these markets is easy nor that it has actually occurred at a level that will meaningfully constrain CB&I post-acquisition." Op. 90. It concluded that "customers in these markets will likely be harmed post-acquisition." *Id.* Having determined that CB&I's acquisition of PDM's assets violates Section 7, the Commission fashioned a remedy that would "pry open to competition the markets that have been closed." *Id*. at 93 (citation and internal brackets omitted).

The Commission rejected CB&I's arguments that divestiture is unwarranted and that CB&I lacked sufficient notice that the remedy might be imposed here. The Commission noted that the administrative complaint sought divestiture as a remedy, that the very language of the Clayton Act, 15 U.S.C. § 21(b), contemplates

divestiture, and that the Supreme Court has instructed that "divestiture 'should always be in the forefront of a court's mind when a violation of § 7 has been found.'" Op. 93 (quoting *U.S. v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961) ("*DuPont*")). The Commission concluded that the record confirms that "divestiture is the most appropriate remedy to effectuate" the goal of restoring competition to the markets. Op. 93.

Addressing CB&I's objection that it should not be required to divest assets not directly involved in building LPG, LNG, and LIN/LOX tanks or TVCs, the Commission observed that "the Supreme Court has recognized that '[t]he relief which can be afforded' from an illegal acquisition 'is not limited to the restoration of the status quo ante'" but rather "must be directed to that which is 'necessary and appropriate in the public interest to *eliminate the effects* of the acquisition.'" Op. 94-95 (quoting *Ford Motor Co. v. U.S.*, 405 U.S. 562, 573 n.8 (1972)). Noting that PDM's Water Division produced the relevant products and that the acquired assets operated as a cohesive unit before the acquisition, the Commission stated that it is "impossible to know whether a new entrant must have the assets similar to those of PDM's Water Division in order to compete in the relevant markets." Op. 95. The Commission therefore kept that division within the scope of the divestiture Order, but included a provision that "allows the exclusion" of those assets should they be

found unnecessary upon the approval of a prospective buyer. *Id.* The Commission's Order directs CB&I "to reorganize its Industrial Division (and, to the extent necessary, its water tank unit) into two separate, stand-alone divisions (New PDM and New CB&I) and to divest New PDM within six months" of its Order becoming final. *Id.* at 94.

C. CB&I's Petition for Reconsideration and Its Petition for Review

On February 1, 2005, CB&I asked the Commission to reconsider its Order on the basis of purportedly new evidence of market entry following the close of the administrative record. On March 11, 2005, while its petition for reconsideration was pending, CB&I filed in this Court a petition for review of the Commission's Final Order. On April 4, 2005, to allow the Commission to consider CB&I's petition, this Court dismissed the petition for review pursuant to Circuit Rule 42.4, without prejudice to reinstatement.

CB&I's petition for reconsideration dealt only with the LNG tank market, and alleged that since the record's close, demand had increased, four LNG tank projects had been awarded to new firms, and such post-acquisition entry renders divestiture unnecessary. *See* Decision and Order Partially Denying Respondents' Petition for Reconsideration (May 10, 2005) ("R.O."), at 2.[20]

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[20] The four projects proffered by CB&I as "new evidence" were: (1) Dynegy's LNG tank award to Skanska; (2) Sempra's award to Kvaerner/IHI of an engineering, procurement, and

The Commission denied CB&I's petition, finding the proffered evidence neither new nor convincing. The Commission noted that CB&I's petition raised no new issues – CB&I argued both to the ALJ and to the Commission that increased demand for LNG tanks had triggered new entry that constrains CB&I post-acquisition – and that much of the purportedly new evidence had been available to CB&I long before the Commission issued its Final Order. R.O. 4-6. Moreover, that CB&I has not won every post-acquisition bid was not conclusive, reasoned the Commission, on the relevant question of whether new entrants effectively replaced the competition lost through the acquisition. *Id*. at 9. Even considering the newly proffered *extra-record* materials, the Commission concluded that CB&I still had "not shown that the competition lost from CB&I's acquisition of the PDM assets has been restored." *Id*.

CB&I neither filed a separate petition for review of the May 10, 2005, reconsideration order, nor amended its original petition for review to include that order.

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construction ("EPC") contract; (3) Freeport LNG's award of an LNG tank contract to Technigaz/Zachry; and (4) Cheniere's LNG tank award to MHI/Matrix. R.O. 2.

In this regard, EPC contracts are "turnkey" contracts, for the design and construction of the *entire* LNG facility. Op. 16. An EPC contractor is essentially a general manager who engineers the project, procures the equipment and material, and constructs (or manages the construction of) the facility. *Id.* at 16, 58. The EPC contractor may subcontract portions of the project (such as the LNG tanks) to others. *Id.* at 16. *See infra*, at 40-41.

D. The Reinstated Petition for Review

At CB&I's request, this Court reinstated this petition for review on October 14, 2005. In its request for reinstatement, CB&I made no reference to the Commission's May 10, 2005, order denying its petition for reconsideration. On December 15, 2005, however, CB&I filed in this Court a "Motion to Adduce Additional Evidence," seeking to remand the case to the Commission to re-open the administrative record and adduce "additional evidence" – the same evidence the Commission had rejected in denying the petition for reconsideration. This Court denied CB&I's motion on April 13, 2006.

STANDARD OF REVIEW

"The findings of the Commission … as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 21(c); *Jim Walter Corp. v. FTC*, 625 F.2d 676, 681 (5th Cir. 1980). "Substantial evidence is evidence that provides 'a substantial basis of fact from which the fact in issue can be reasonably inferred.'" *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1006 (5th Cir. 1978) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939)). Reviewing courts may not "make [their] own appraisal of the [evidence], picking and choosing … among uncertain and conflicting inferences." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (quoting *FTC v. Algoma*

Lumber Co., 291 U.S. 67, 73 (1934)); *accord Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 676 (5th Cir. 1965) ("it is not our function to weigh the evidence or consider the credibility of witness[es]. Furthermore, reasonable inferences drawn from the facts by the Commission are not to be disturbed"). This deferential standard also applies to the Commission's findings regarding the economic effects of particular conduct. *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986).

Review of the Commission's legal analysis and conclusions is *de novo*, "although even in considering such issues the courts are to give some deference to the Commission's informed judgment." *Ind. Fed'n of Dentists*, 476 U.S. at 454; *accord Colonial Stores, Inc. v. FTC*, 450 F.2d 733, 740 n.14 (5th Cir. 1971) ("even when the Commission's findings are framed in terms of legal conclusions, their presumptive validity is considerable").

Remedial provisions are subject to an abuse of discretion standard, because "the Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). As "the expert body to determine what remedy is necessary," the Commission "has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable

relation to the unlawful practices found to exist." *Id*. (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)); *see also FTC v. Cement Inst.*, 333 U.S. 683, 726 (1948). Particularly where the remedy seeks to undo a violation of Section 7, "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 in its favor*." *DuPont*, 366 U.S. at 334 (emphasis added) (citations omitted).

SUMMARY OF ARGUMENT

Substantial evidence supports the Commission's determination that each of the four markets at issue is highly concentrated, and that CB&I's acquisition of its principal rival created a monopoly in two markets and a near-monopoly in two others. (Indeed, CB&I has challenged the record evidence with respect to only one of those markets, the LNG tank market). Substantial evidence also supports the Commission's determination that entry barriers in these markets are high and future entry is unlikely to restore the competition lost as a result of this transaction or constrain CB&I's market power for the foreseeable future. In these circumstances, the Commission properly concluded that this acquisition violated Section 7 of the Clayton Act.

CB&I relies considerably on its argument that there is evidence of post-acquisition competition by new or potential entrants in the LNG tank market. There are two main problems with this argument. First, this evidence *does not show* any effective competition for LNG tank contracts, and CB&I ignores clear evidence of the greatly enhanced power it enjoys in that market. Also, because CB&I failed to appeal the Commission's denial of its motion for reconsideration and this Court denied CB&I's motion to remand for the taking of additional evidence, much of the material CB&I relies on in its brief is not part of the record and is not before the Court. The Commission properly found that none of the new or potential entrants identified by CB&I is able to constrain the merged entity's conduct or offset the lessening of competition occasioned by the merger. This analysis does not change even if CB&I's extra-record materials are considered.

CB&I also misstates the law and the record in urging that, by producing "some" evidence, it eliminated any presumption of illegality that is created by the increase in concentration arising from this merger. Contrary to CB&I's contention, the probative weight of a defendant's evidence is clearly important in considering whether the presumption of illegality is warranted in a particular case, and "the more compelling the prima facie case, the more evidence a defendant must present to rebut it successfully." *U.S. v. Baker Hughes Inc.,* 908 F.2d 981, 991 (D.C. Cir.

1990). This record shows overwhelming evidence of an increase in market power as a result of this merger, and a failure by CB&I to show that timely entry will restore the competition lost in the transaction.

Finally, the Commission's order of divestiture follows textbook Section 7 principles, is fully supported by the record, and is well within the bounds of the Commission's discretion. The Commission was not required to hold a second trial to consider the form of remedy. CB&I was on notice of the proposed remedy from the very beginning of the case, presented evidence on the issue, and never asked for a bifurcated proceeding.

ARGUMENT

I. REVIEW IS LIMITED TO THE RECORD BELOW AND THE ARGUMENTS CB&I HAS PROPERLY ADVANCED IN ITS BRIEF

A. CB&I'S Petition Must Be Rejected To The Extent It Relies On Extra-Record Evidence That Is Not Properly Before This Court

Although CB&I did not appeal from, and does not challenge, the Commission's rejection of its post-record evidentiary materials, it nonetheless relies heavily on those materials. *See, e.g.*, CB&I Br. 7 n.6 (citing CB&I's petition for reconsideration before the Commission); *id*. at 12 (same); *id*. at 13 (citing declarations appended to CB&I's petition); *id*. at 14, 15, 16, 41 (same); *id*. at 28, 30, 32 (citing Commission's order on CB&I's petition for reconsideration). These

materials did not provide the basis for the Commission's Final Order, they are not part of the record, and this Court should not consider them. References to them should be stricken from CB&I's brief.[21]

The Commission rejected CB&I's "new" evidence, finding that the evidence had been available to CB&I long before the Commission issued its Final Order and was not material to the outcome. CB&I has never argued that the Commission erred in denying its petition. It did not amend its February 1, 2005, petition for review, which sought review in this Court of only "the Order and Opinion of the Federal Trade Commission entered … on December 21, 2004," *see* CB&I's "Petition for Review." CB&I also did not file a separate petition for review of the Commission's May 10th order rejecting CB&I's post-trial evidence. Needless to say, any review of such a discretionary administrative ruling would have been subject to a highly deferential standard of review. *See Singh v. Gonzales*, 436 F.3d

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21 *See Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) ("review of [an] administrative decision[] is to be confined to … the evidence *on which it was based*'") (quoting *U.S. v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963)) (emphasis added); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence"); *Harris v. U.S.*, 19 F.3d 1090, 1096 n.7 (5th Cir. 1994) ("we may not consider evidence outside the administrative record when determining whether to uphold agency action"); *State of Louisiana v. Verity*, 853 F.2d 322, 327 n.8 (5th Cir. 1988) ("Nor are courts permitted to consider evidence outside the administrative record").

The reasons for such a rule are important: consideration by the reviewing court of extra-record evidence distorts the administrative record that formed the basis of the decision on review, and the judicial process itself, for such evidence was not subjected to the rigors of trial and the reviewing court cannot be assured of its reliability. *See, e.g.*, *U.S. v. Menting*, 166 F.3d 923, 928 (7th Cir. 1999).

484, 487 (5th Cir. 2006) ("We review the [agency's] denial of both a motion to reopen and a motion for reconsideration under a highly deferential abuse-of-discretion standard").

In an analogous context, this Court has held that "an issue initially raised in a post-judgment motion" in a federal district court proceeding "cannot be considered by this court unless the judgment or order disposing of it is properly noticed for appeal." *Fiess v. State Farm Lloyds*, 392 F.3d 802, 806 (5th Cir. 2004). As this Court explained in *Fiess*, even this Circuit's "forgiving approach" to construing notices of appeal will not cure a party's failure to amend its notice to cover a subsequent denial of a motion for reconsideration. *Id.* at 806-07.

Although CB&I asserts that its "proffered evidence … was accepted into the record by the Commission" (CB&I Br. 7 n.6), CB&I cannot support that assertion.[22] After failing to seek judicial review of the Commission's rejection of its post-record evidence, CB&I filed in this Court a motion to have the administrative record reopened to include that same evidence, upon which CB&I relies here. *See* CB&I's Motion to Adduce Additional Evidence. This Court

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[22] In support, CB&I cites only its petition for reconsideration. *See* CB&I Br. 7 n.6; *but see* R.O. 6 (CB&I "have not met their burden under our rules for either reopening the record or reconsideration of an issued decision"); *id.* at 9 (even if the proffered "new" evidence were to be credited, CB&I still "have not shown that the competition lost from CB&I's acquisition of the PDM assets has been restored").

denied that motion on April 13, 2006. Thus, CB&I's post-record materials have never been admitted in evidence. Had the Commission indeed "accepted" such evidence into the record, CB&I would have had no reason to file its motion to adduce with this Court.

Because the rejected evidence is not part of the record, this Court cannot properly consider it and should order it stricken from CB&I's brief. *See* Fed. R. App. P. 28(a)(7) (appellate brief must contain "a statement of facts … with *appropriate* references *to the record*") (emphasis added); *see also, e.g.*, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1015 n.4 (8th Cir. 1999) (affidavits that were not part of the record on review stricken).[23]

B. CB&I's Challenge To The Commission's Factual Findings Must Be Limited To the LNG Tank Market

As CB&I acknowledges, the focus of its brief is "on the LNG tank business" (CB&I Br. 9) and its sole statement regarding the remaining three markets is in a footnote in which CB&I asserts that "many of the issues presented in this brief regarding the LNG tanks also exist with regard to the other relevant products in

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[23] Nor does the inclusion of the post-judgment materials in the package sent to this Court (*see* Fed. R. App. P. 17), somehow render the proffered evidence "accepted into the record by the Commission." *See CB&I's Response to the FTC's Motion to Extend the Deadline to File Its Brief,* at 3. CB&I cites no authority to support such a proposition. Indeed, CB&I's argument would mean that the mere proffer of post-decision evidence would render the proffered evidence part of the record for purposes of appellate review. This Court has rejected any such notion. *See Fiess, supra.*

this case." *Id.* at 9 n.9. Such generalized statements are insufficient designations of error with regard to the LPG and LIN/LOX tank markets and the TVC market. *See supra*, at 6 n.9. It is settled law that a petitioner abandons arguments by failing to argue them in its appellate brief. *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); *Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980); *see also Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1339 (Fed. Cir. 2005); *Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3rd Cir. 1993); *Hospital Corp. of Am.*, 807 F.2d at 1392. The mere reference in an opening brief to an argument is insufficient to preserve it for judicial review, and any subsequent attempt to raise it in a reply brief is untimely. *Town of Norwood v. FERC*, 962 F.2d 20, 25 (D.C. Cir. 1992). By not discussing Commission's findings as to those markets in its brief, CB&I has abandoned those issues on appeal.

II. SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS OF FACT

Substantial record evidence supports each of the four key factual conclusions made by the Commission: (1) each of the four product markets is highly concentrated and CB&I has acquired a dominant share of each market; (2) barriers to entry are extraordinarily high in each market, making it unlikely that timely entry will undo any harm to competition caused by CB&I's acquisition; (3)

the new and potential entrants identified by CB&I cannot constrain CB&I's market power; and (4) sophisticated customers cannot constrain CB&I's market power.

A. Substantial Record Evidence Supports The Commission's Finding That The Acquisition Has Increased CB&I's Market Power In Highly Concentrated Markets

Section 7 is "designed to arrest in its incipiency … the substantial lessening of competition from the acquisition by one corporation" of the stock or assets of a competing corporation. *U.S. v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 589 (1957). The Section is aimed at preventing firms or groups of firms from gaining so large a share of the market that they are able to exercise market power either through unilateral conduct or tacit collusion. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717-19 (D.C. Cir. 2001). As Judge Posner has observed, "all that is necessary is that the merger create an appreciable danger of [anticompetitive] consequences in the future." *Hospital Corp. of Am.*, 807 F.2d at 1389. Once relevant product and geographic markets are delineated, the very first question in any merger analysis concerns the ability of firms to exercise market power. *Id.*; *H.J. Heinz Co.*, 246 F.3d at 717; *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

The Commission properly found that each of the four product markets is highly concentrated, and that the acquisition enables CB&I to exercise market

power in each market. CB&I has acquired its only competitor in the LNG and TVC markets, thereby acquiring monopoly status, and its only significant competitor in the LPG and LIN/LOX markets, thereby acquiring near-monopoly status. CB&I did not contest the high market concentration resulting from its acquisition, conceding that "CB&I and PDM were the dominant suppliers of the products in these four relevant markets prior to the acquisition." Op. 8. Customers with first-hand knowledge also testified that "PDM and CB&I were the only viable LNG tank suppliers prior to the acquisition and that the acquisition substantially harmed competition." *Id*. at 21-22; *see* Tr. 324, 703*, 1830. Similarly, PDM's and CB&I's internal documents confirmed that the two firms "focused almost exclusively on each other in their assessment of the competitive landscape and paid little or no attention to what other companies were doing." Op. 22; *see* Tr. 4851; CX 68, 94 at PDM-HOU017580.[24]

The record also shows that CB&I has been able to exercise market power. In the post-acquisition world, CB&I has forced customers into dealing on CB&I's terms. *See supra*, at 12 n.19. It has refused to enter into bidding contests for new

[24] *See also* Op. 23-25 (discussing PDM's and CB&I's internal market assessments and customer views in the LPG tank market); *id*. at 26-27 (discussing both factors in the LIN/LOX tank market); *id*. at 27-28 (discussing same factors in the TVC market).

projects, insisting instead on lucrative sole-source contracts.[25] *See* Op. 63-64. In the less than two years between the acquisition and the close of the evidentiary record, CB&I successfully negotiated sole-source contracts for five LNG tanks, and was negotiating a sixth. *Id*. at 59.

Given the indisputable record evidence about the actual structure of the markets and CB&I's monopoly or near-monopoly position in each market, there is no room for CB&I's objection that the Commission relied too greatly on "historic HHIs." CB&I Br. 33-37. No matter how the markets are examined, CB&I has acquired its only significant competitor. Except for a few fringe firms, no one is left in any of the markets.

Equally important, CB&I's argument misstates the Commission's analysis of market concentration. Even as the Commission rejected the ALJ's refusal to rely on HHI data, it acknowledged the care with which HHI data must be generated and analyzed. The Commission explained its disagreement with the ALJ on that issue,[26] noting, for example, that the sporadic nature of sales in the markets can be adjusted for by analyzing "an extended period of time." *See* Op. 18, 20-21 n.110

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[25] "Sole-source" contracts refer to negotiated contracts awarded to a single supplier, as opposed to contracts awarded through an open competitive bidding process. A sole-source contract is typically more expensive than a competitively bid contract. ID 110.

[26] The Supreme Court has made clear that the standard of review "is not modified in any way when the [agency] and its [ALJ] disagree." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

(since 1975, PDM & CB&I were the only companies that constructed LNG tanks for import terminals, and constructed all but 7 of the 95 LNG tanks for peak-shaving facilities); CX 125, 1645. The Commission reasoned that when "the probative value of the concentration data" is considered "*in light of* all other evidence" of market concentration in the record – which alone established a strong prima facie case – the ALJ's "total disregard" for the corroborative HHI data could not be justified. Op. 18 (emphasis added).

The authorities CB&I relies upon to challenge the Commission's use of HHIs do not support its argument. While CB&I argues that the Commission acted contrary to the *Merger Guidelines*, the *Guidelines* expressly provide that where "sales are large and infrequent so that annual data may be unrepresentative," the antitrust agencies "may measure sales over a longer period of time." *Merger Guidelines* § 1.41. That is exactly what the Commission did. The record also does not support CB&I's claim (CB&I Br. 38) that under the *Guidelines*, the Commission should "have assigned each competitor a share based upon the number of bidders" who participated in bidding contests. Such an approach is only appropriate in bidding markets where "all firms have on a forward looking basis, an equal likelihood of securing sales." *Id*. § 1.41 n.15. But as we will show (*see*

infra, at 39-45), the marginal or fringe firms that CB&I has identified do not have anything approaching "an equal likelihood of securing sales."

CB&I also misreads the cases it cites. In *Baker Hughes*, the court noted that sales in the market were "volatile and shifting" and "easily skewed," 908 F.2d at 986, and "entry was likely." *Id*. at 987. In those circumstances, high market shares were not an accurate predictor of future competition, and low entry barriers made it unlikely that the merged entity could ever exercise market power to harm competition. While the only similarity between *Baker Hughes* and this case is the sporadic nature of sales, the dispositive differences are the presence here of the same two major competitors, PDM and CB&I, year after year for more than three decades, and – as we show in Parts II.B and II.C, *infra* – the high barriers to entry into the relevant markets.

Likewise, CB&I misleadingly quotes Judge Bork's comment in *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986), that the lower court there was "unable to calculate an HHI" for a supposedly similar market. CB&I Br. 36 n.42. In fact, the *PPG* court upheld the Commission's right to an injunction because, regardless of potential difficulties with a precise HHI calculation, the merger left the market with "only three fully capable firms," and therefore highly concentrated even if entry were possible. 798 F.2d at 1505. The present acquisition, which

leaves *one* capable firm and only speculative prospects for future entry, makes for a more compelling case.

CB&I also misstates the holding in *U.S. v. General Dynamics,* 415 U.S. 486, 501 (1974), and its reliance on it to support its claim that the Commission improperly relied on HHIs (CB&I Br. 38) overstates the Commission's carefully delimited reliance on them. In that case, the Supreme Court held that market share statistics were insufficient to sustain a Section 7 case because, by failing to take into account the acquired firm's long-term contracts to sell most of its reserves, the statistics overstated that firm's ability to compete in the future. 415 U.S. at 500-504. As the Eleventh Circuit aptly noted, *General Dynamics* stands for the "unremarkable proposition" that "a defendant may rebut the government's prima facie case by showing that the government's market share statistics overstate the acquired firm's ability to compete in the future." *University Health*, 938 F.2d at 1221 (citing *Hospital Corp. of Am.*, 807 F.2d at 1385; 4 P. Areeda & D. Turner, Antitrust Law ¶935b, at 140-41 (1980)). CB&I made no such showing here. Nothing in this record suggests that either PDM's or CB&I's future competitive strengths were in any way diminished at the time of the acquisition.

B. Substantial Evidence Supports the Commission's Finding That Each of the Relevant Markets Is Characterized by High Entry Barriers

As the D.C. Circuit has noted, high entry barriers "largely eliminate[] the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthen[]" a strong statistical case. *H.J. Heinz Co.*, 246 F.3d at 717. Here, substantial record evidence supports the Commission's finding that high entry barriers will likely shield CB&I "from the threat of new entry," making its acquired market power "more secure." Op. 29.

1. The Commission's Findings of High Entry Barriers Are Supported by Substantial Record Evidence

Substantial evidence supports the Commission's findings that solid reputation for safety and reliability, substantial prior experience in the U.S., high technical skills, and specialized regulatory know-how are necessary to achieve meaningful entry into each of the relevant markets. In the LNG tank market, customers and industry participants testified, for example, that "fairly sophisticated materials" are used in LNG tanks, requiring sophisticated engineering, specialized techniques, and skilled labor to construct. Tr. 2379. Safety considerations dictate stringent building criteria to maintain extreme cryogenic temperatures and avoid catastrophic leaks. Tr. 6234-35. Skilled engineers must convert generalized FERC regulations for vapor dispersion and thermal radiation into project-specific

construction specifications. Tr. 533-34, 6969-71. Specialized construction procedures, including proprietary welding techniques, must be employed on each project. Tr. 1601, 2379, 6028-29. Customers do not consider even a successful history of building petroleum tanks as sufficient experience to build LNG tanks. Tr. 6701-02. Customers also look for builders who can deliver LNG tanks on time and who have significant bonding and liquidated damages capacity. Tr. 6154-55, 6385, 6485-86. Overall cost competitiveness may require "years" of experience to achieve. CX 392 at 3; CX 629 at CBI-PL033069*. *See* Op. 11-13, 33-42; ID 6-7, 27-29.

Customers and industry participants testified in similar specificity to equally difficult hurdles facing entrants in the LPG tank, LIN/LOX tank, and TVC markets. *See* Op. 13-15, 28 n.170, 42-48; ID 8-10, 38-39, 50-51, 61.

These obstacles to timely entry have persisted for a long time in each market, and together have kept entrants out of the markets in the years and decades prior to the acquisition. As CB&I concedes, it and PDM dominated each of the four markets for many years, despite numerous attempts at entry by other firms. *See supra*, at 6-8. Courts have recognized that the absence of new entry in a concentrated market for a prolonged period is highly probative of the existence of high barriers, and the likelihood that a merger resulting in a sharp increase in

concentration will have substantial anticompetitive effects. *E.g., H.J. Heinz Co.*, 246 F.3d at 717 ("that there had been no significant entries in the [relevant] market in decades … largely eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition"); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 56 (D.D.C. 1998) ("the history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future").

Substantial evidence and established case law thus support the Commission's findings of high entry barriers in each market.

2. CB&I's Objections to the Commission's Factual Findings Are Without Merit

Limiting its objections to the LNG tank market, CB&I advances two arguments. First, it argues that some of the entry barriers the Commission found are not barriers at all. Second, it argues that new and potential entrants into that market effectively constrain CB&I's conduct, thereby showing that entry is easy and rebutting the evidence the Commission cites. We discuss CB&I's first argument in this Part II.B.2, and its second argument in Part II.C, *infra.*

CB&I asserts that reputation and experience are not really entry barriers and instead merely reflect customers' generalized preferences for dealing with familiar suppliers. CB&I Br. 45-46 (citing *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999); *Advo, Inc. v. Phila. Newspapers, Inc.,* 51 F.3d 1191

(3rd Cir. 1995)). But as the *Philadelphia Newspapers* court so well stated, prior case law is not particularly helpful in this area because "the importance of know-how can be determined only in the context of a particular business." 51 F.3d at 1201. The specific holdings of those two cases, where the plaintiffs failed to show any substantial entry barriers, do not apply here, where experience and reputation are demanded by customers, are critical to every project, and are effectively mandated by the catastrophic consequences of product failure.

CB&I's cavalier attitude toward regulatory and technical expertise is similarly belied by the record facts. CB&I argues that "it is the *owner*, not the tank builder, who is required to file an application with FERC to obtain an approval" (CB&I Br. 47), and notes that "expert consultants" are available to customers who seek assistance. *Id*. at 46. However, the record shows that BP awarded CB&I three contracts because CB&I refused to do the FERC work on those projects unless BP awarded it contracts for the entire LNG projects. *See supra*, at n.19. Plainly, FERC experience plays a substantial role in selecting a builder, even when sophisticated customers make the selection.

Finally, CB&I asserts that access to local labor and trained supervisors is not an entry barrier because potential foreign entrants can form "teaming alliances" with "U.S.-based construction firms [who] obviously have access to local labor and

supervisory employees." CB&I Br. 48. However, CB&I has not identified any domestic construction firm, other than itself, that has had any experience building LNG tanks. Op. 53. The record does not even suggest that the "alliances" that CB&I speaks of are enduring. The ability of any foreign firm to compete depends on its ability to find a "teaming alliance" for each project that it wishes to bid on. *See id.* at 52-54. Finally, CB&I's argument confuses the ability of U.S. construction firms to supervise the projects they work on with the requirement that LNG tank builders supply the supervisors who will oversee the work of their domestic partners. The ability of LNG tank builders to build tanks outside their domestic markets is constrained by the necessity of their providing supervisors who can interface with local labor markets. Op. 54. The record is devoid of evidence showing that a foreign tank builder can do that in the U.S., except perhaps on an episodic basis.

CB&I's criticism is merely a disagreement with the *factual conclusions* reached by the Commission after a thorough review of the evidence. But, as this Court has "consistently reiterated," the Commission's findings may not be set aside "if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more

reasonable and persuasive." *Colonial Stores,* 450 F.2d at 739; *accord Foremost Dairies*, 348 F.2d at 676.

C. Post-Acquisition Entry Into the Relevant Markets Has Been Insufficient to Constrain CB&I's Market Power

"The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future." *Cardinal Health*, 12 F. Supp. 2d at 56. "[T]he only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions." 2A Phillip E. Areeda, Herbert Hovenkamp & John Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶420b, at 60 (2d ed. 2002) (hereinafter, "*Areeda, Hovenkamp & Solow*").

CB&I argues that it "produced rebuttal evidence showing actual entry, *without* price increases," and that such evidence "negates a finding of 'high' entry barriers." CB&I Br. 44. However, even in the LNG tank market, which purportedly experienced a growth in demand (*see* CB&I Br. 12), in the nearly two years between the acquisition and the end of the trial, *no firm* other than CB&I won a project. Op. 58. The three joint ventures identified by CB&I as "new entrants" only managed to submit bids for LNG tanks, but could not pry away market share from CB&I as of the time of the trial. The Commission found that CB&I's rebuttal evidence establishes at most a desire by some firms to compete, or limited attempts

at expansion by existing firms, but falls woefully short of showing entry or expansion that replaces the competition lost through CB&I's merger-to-monopoly, or that can effectively constrain CB&I's post-acquisition conduct. *Id*. at 56-57.

CB&I proffers Dynegy's award to Skanska of an *EPC* contract[27] on the "Hackberry" project – and that same project's *extra-record* re-award to IHI/Aker Kvaerner after Dynegy sold the project to Sempra – as evidencing competition in the LNG tank market. *See* CB&I Br. 14-15, 41. But both the award reflected in the trial record and the extra-record EPC award concern LNG tanks *only indirectly*. As the Commission explained (Op. 58-59), EPC contracts are awarded for *entire* LNG import terminals or peak-shaving facilities, only one part of which pertains to the LNG tanks. Competition for EPC contracts is not indicative of competition in any relevant market here. Indeed, to save costs, Dynegy had bid the EPC engineering work separately from the LNG tank portion of the project, and the award of the EPC contract to Skanska *did not include* the LNG tank work. Tr. 4568-71. After Dynegy awarded the EPC contract to Skanska, CB&I *refused to bid* on the LNG tank work, continuing to push for a turnkey contract for the entire facility. Tr. 4571-72, 4576-77; CX 138, 139, 140. Ultimately, CB&I relented, but Dynegy declined CB&I's LNG tank offer as late. Tr. 4572.

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[27] *See supra*, at n.20.

While CB&I claims that new entrants have flocked to the LNG tank market since the acquisition, in that period, CB&I has secured lucrative, non-competitive, *sole-source* contracts for six LNG tanks.[28] Tr. 4399. That Dynegy ultimately found an alternative to CB&I, or that other fringe firms have managed to bid on LNG contracts does not show that CB&I's market power is constrained by new competition.

The economic theory underlying the Commission's case predicted that entrants might be able to win some contracts, but CB&I, as the lowest-cost supplier, would still profit if it lost some business to them. *See* R.O. 10-11. Such "entry" would not restore the competition to pre-merger levels, however, because these firms historically have higher costs than CB&I or PDM. *See U.S. v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1469 (W.D.N.Y. 1994) ("[a]t a high enough price, even poor substitutes look good to the consumer"); *see also Merger Guidelines*, n.21. Increased sales by fringe firms can actually indicate anticompetitive conduct where dominant firms yield some market share to maximize profits while allowing fringe firms "to expand to the extent of their ability." 4 *Areeda, Hovenkamp & Solow* ¶932e2, at 184. In *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995), for example, the court found that "[t]he fact that entry

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[28] *See supra*, at 30 n.25.

has occurred does not necessarily preclude the existence of 'significant' entry barriers." Similarly, in *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988), the court rejected a claim of low entry barriers where the new entrants remained relatively small. *See also U.S. v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) (entry by one firm insufficient to constrain anticompetitive pricing, despite firm's ability to bid regularly and despite winning two bids).

Nor does this analysis change if this Court considers CB&I's extra-record evidence, most of which relates to either EPC contracts that do not directly concern the LNG tank market or to situations where CB&I refused to bid.[29]

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[29] On reconsideration, the Commission noted that, even if CB&I's *post-record* evidence were fully credited, it would "fail to demonstrate that CB&I is constrained to the pricing that prevailed before the acquisition." R.O. 11. Indeed, CB&I's often-successful insistence on sole-source, turnkey contracts after the close of the record evidences the insufficient competitive forces in the post-record LNG tank market. *Id*. at 9.

As with the bidding of the Hackberry project when Dynegy owned it, *supra,* Sempra apparently re-solicited bids and awarded an EPC contract for the entire facility, not just the LNG-tank part of it. As the Commission noted, "winning an EPC contract for the entire LNG project does not necessarily show an ability to compete for building an LNG tank." R.O. 12.

Similarly, in the Freeport LNG project, the owner apparently turned to Zachry (in association with the EPC contractor, Technip) for the preliminary "FEED" work on the project, but *only after* CB&I refused to do such work absent a commitment that it be awarded a contract for the entire facility on a turnkey basis. R.O. 15. CB&I refused to perform the preliminary FEED work although that would have given it a distinct advantage in gaining the subsequent LNG tank work. *See* Miles Declaration, attached to CB&I's petition for reconsideration, at ¶15. CB&I's purported loss of that contract was apparently not the result of competition, but the result of CB&I's attempt to leverage its market power to force a lucrative contract for the entire facility.

The purported award of the LNG tank work in the Sabine Pass project to a firm other than CB&I can also be attributed to CB&I's attempt to secure a sole-source, turnkey contract for the

Similarly, CB&I's argument regarding the constraining effects of potential entry (CB&I Br. 42-43), ignores that "ease of entry … is a central premise of the potential-competition doctrine." *U.S. v. Marine Bancorp., Inc.*, 418 U.S. 602, 628 (1974). As the Commission explained, "for a potential entrant or the threat of a potential entrant to act as a competitive constraint on incumbent firms, entry – at least for that firm – must be easy." Op. 82 (citing *Marine Bancorp.*; *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 581 (1967)). Because CB&I has failed to overcome the Commission's findings of high entry barriers (*see supra*, at 36-39), its potential entry argument fails.

Finally, the record establishes virtually impenetrable market power by CB&I in the LPG and LIN/LOX tank markets. In the LPG tank market, the one other existing firm suffers serious difficulties (Tr. 2365-66, 2421-22; CX 107), and the "potential entrants" identified by CB&I are "vastly overmatched." *See* Op. 66-69. The LIN/LOX tank market is even more secure for CB&I, with the record reflecting one failed attempt at entry by a firm that has since gone out of business,

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whole facility. R.O. 16. But even if Sabina Pass were lost by CB&I "on the merits" to a new entrant, that incident of post-record entry still falls far short of "restoring the competition lost from the merger." *H.J. Heinz Co.*, 246 F.3d at 717.

As the Commission pointed out, when the analysis takes into account the number of LNG tank projects awarded after the acquisition – both before and after the close of the record – it is clear that CB&I has won many more contracts than it has lost, and most of those wins were "sole-source" contracts, where no competitive bidding took place. R.O. 9.

and ineffective expansion efforts by the three existing small firms. Tr. 955, 1351, 1380, 2001.

Although actual post-acquisition entry can be probative of entry barriers, ineffective entry – which is what CB&I's proffered evidence at best shows – is insufficient to negate a finding of high entry barriers.[30] Before the acquisition, each relevant market exhibited the characteristics of a market with high entry barriers. CB&I conceded that it and PDM dominated each one, despite numerous entry attempts by other bidders, and despite the occasional project being awarded to a firm other than CB&I or PDM. *See* Op. 20-28. CB&I has not explained how nominal post-acquisition entry in the LNG tank market reflects any change from the dynamic that prevailed before the acquisition, when high entry barriers ensured that CB&I and PDM remained the dominant firms despite their occasional loss of a project to a third firm. If anything, the record demonstrates CB&I's increased market power after the acquisition – as would be expected after having acquired its principal competitor.

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[30] *In re Grand Union Co.*, 102 F.T.C. 812 (1983), 1983 FTC LEXIS 61 – the only authority CB&I cites to support its proposition – is *not* to the contrary. The Commission there found that "the record establishes *substantial* recent entry in at least 10 of the 13 markets" under consideration, and concluded that "*this degree* of actual recent entry" shows that "barriers to entering these 10 markets are sufficiently low." 102 F.T.C. at 1086, 1983 FTC LEXIS 61 at *581 (emphasis added).

D. The Commission Correctly Rejected CB&I's "Sophisticated Customer" Defense

CB&I criticizes the Commission's rejection of its evidence of customer sophistication. CB&I Br. 49-50. The ability of customers to exert bargaining power is tied closely to the availability of meaningful alternatives. *See* Op. 87-88. For this reason, the "customer sophistication" defense has generally succeeded only in cases where entry barriers are low. *See, e.g., Baker Hughes*, 908 F.2d at 987; *Phila. Newspapers*, 51 F.3d at 1200-1202.

Moreover, CB&I's customers lack information that would enable them to detect price increases. *See* Op. 88-89. In markets characterized by large purchases and project-specific negotiations, such as those here, "final prices … are not typically known to non-participants in the agreement." 4 *Areeda, Hovenkamp & Solow* ¶943a, at 223. Even if some customers can protect themselves from attempts to exercise market power, it does not follow that most customers can do so. Where customers have varying degrees of knowledge – as the Commission noted is the case here (*see* Op. 88-89) – a "common consequence … is likely to be recurrent and more or less systematic price discrimination," where the adverse effects fall on the less knowledgeable customers. 4 *Areeda, Hovenkamp & Solow* ¶943b, at 224.

Alternatives to CB&I are at best weak and speculative in the LNG, LPG, and LIN/LOX tank markets, and non-existent in the TVC market. Even with a purported growth in demand for LNG tanks, CB&I has repeatedly and successfully insisted post-acquisition on negotiating sole-source contracts for LNG tank projects – even *over the objections* of its customers. *See supra*, at nn.19, 29; *see also* Op. 59, 63-64; Tr. 4399. CB&I's claim that sophisticated customers can sufficiently constrain its power is contradicted by CB&I's own conduct.

III. THE COMMISSION PROPERLY FOUND A SECTION 7 VIOLATION IN EACH RELEVANT MARKET

A. Section 7 Does Not Require Proof of Actual Anticompetitive Effects

Although CB&I claims that "there is no basis for the Commission's finding of anticompetitive effects," and "Complaint Counsel failed to meet its burden to prove any such effects" (CB&I Br. 52), its argument misconstrues both the Commission's decision and the legal standards for proving Section 7 violations. The Commission's findings correctly related to the likely – not actual – anticompetitive effects of CB&I's acquisition. *See* Op. 89 ("we find that … CB&I's acquisition of PDM *is likely to* lessen competition substantially"), 90 ("we find that customers in these markets *will likely* be harmed post-acquisition") (emphasis added).

As the Supreme Court has consistently held, "[i]f the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *Proctor & Gamble*, 386 U.S. at 577. More recently, in *California v. American Stores Co.*, 495 U.S. 271, 284 (1990), the high Court noted that the anticompetitive effects of a challenged acquisition need not be proven with certainty.[31] *See also Hospital Corp. of Am.*, 807 F.2d at 1389.

B. CB&I's Argument That the Commission Improperly Shifted The Burden of Persuasion Lacks Any Support in Section 7 Case Law

CB&I argues that a Section 7 defendant satisfies its burden of rebutting a prima facie case if it "come[s] forward with some evidence challenging the presumed fact, at which point the prima facie presumption 'simply disappears'." CB&I Br. 23 (citing *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1137 (5th Cir. 1986)).[32] This argument contradicts Section 7 jurisprudence and misconstrues *Pennzoil*.

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[31] CB&I's claim that the Commission's finding of anticompetitive effects was "cursory" and "rests entirely on Complaint Counsel's prima facie case," CB&I Br. 51, is spurious. As discussed above, Section 7 does not require the Commission to make findings as to actual anticompetitive effects, and its findings of *likely* effects were supported by an extensive discussion constituting the majority of its 104-page opinion – including a 40-page analysis of CB&I's rebuttal case. Op. 49-89.

[32] *See also* CB&I Br. 23 ("CB&I 'need not [disprove the challenged fact], but only produce *some evidence* to the contrary'") (citing *Pennzoil*, 789 F.2d at 1136) (emphasis and brackets CB&I's own). Elsewhere, however, CB&I contradicts its own argument. *See* CB&I Br. 25 n.37 ("The strength of Complaint Counsel's prima facie case affects the weight of the defendant's burden of production on rebuttal").

The probative weight of a defendant's evidence is clearly important in considering whether the presumption of illegality is warranted in a particular case, and "the more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991; *see also PPG*, 798 F.2d at 1503; *H.J. Heinz Co.*, 246 F.3d at 717. The D.C. Circuit's *Baker Hughes* holding is consistent with the decisions of other Circuit Courts that have passed on the question. *See University Health*, 938 F.2d at 1218; *Hospital Corp. of Am.*, 807 F.2d at 1389-92; *FTC v. Warner Comms.*, 742 F.2d 1156, 1164 (9th Cir. 1984); *see also* 4 *Areeda, Hovenkamp & Solow* ¶941e, at 195 (when concentration numbers are extremely high, doubts about the case "should ordinarily be resolved against the defendants"). CB&I's argument that Section 7's presumption of illegality "disappears" once a defendant presents "some" evidence has no basis in Section 7 jurisprudence.

Nor does *Pennzoil* support CB&I's argument. In that case, FERC refused to give any evidentiary weight to the evidence supporting a prima facie case in the face of evidence tending to rebut a key presumption in the prima facie case. This Court reversed, holding that "[t]he base fact … which established the presumed fact … simply is not negated by the rebuttal evidence.… Granted, the presumption is dispelled, but the underlying evidence remains in the case." 789 F.2d at 1137.

Pennzoil does not help CB&I here, where the fact of a merger to monopoly and near-monopoly is clear, and ample additional evidence bolsters the inferences that can be drawn from the market share data. CB&I's introduction of "some" evidence does not negate the fact that CB&I has acquired its only competitor in two markets and its principal competitor in two others. More important, here the Commission carefully and systematically weighed all the evidence – market share data (the fact that creates the Section 7 presumption), qualitative evidence relating to market structure and behavior, and entry barriers, as well as CB&I's rebuttal arguments concerning the effect of recent and potential entry. Nothing in the Commission's opinion suggests it did not give due weight to all of the evidence.[33]

C. There Is No Merit In CB&I's Arguments That The Commission Imposed Too High a Standard on CB&I In Considering the Entry Issues

CB&I raises two legal issues concerning entry, arguing, first, that the Commission should have asked whether there would be sufficient entry "*if*" CB&I charged supracompetitive prices (CB&I Br. 29-31), and, second, that the

[33] CB&I mischaracterizes the Commission's decision when it asserts that "[a]lthough the Commission acknowledged that the correct burden-shifting framework should apply to this case …, it explained that 'as a practical matter it would be difficult' to apply"). CB&I Br. 21. The words "as a practical matter it would be difficult," did *not* refer to the burden-shifting framework at all, but rather to consideration of Complaint Counsel's evidence of high entry barriers as part of the prima facie case. In context, the Commission merely noted "as a practical matter it would be difficult to consider this evidence elsewhere in our analysis, because Complaint Counsel introduced this evidence as part of their prima facie case." Op. 28-29 n.171; *see supra*, at n.13.

Commission somehow imposed too great a burden on CB&I by requiring it to show that new entrants would have replaced the competition lost through the acquisition. *Id*. at 31-33. While CB&I's brief does not make clear exactly what CB&I would have had the Commission do in this case, it is clear that the Commission's analysis fully comports with Section 7 jurisprudence.

As discussed above, the Commission properly found that entry into the relevant markets is subject to significant barriers, which bolsters CB&I's acquired market power and contributes significantly to the inability of new entrants to constrain CB&I post-acquisition.[34] The Commission considered all of the record evidence relating to every actual, would-be, or potential entrant that CB&I identified and found that none can challenge CB&I competitively – *and* none will be in a position to do so for the foreseeable future.

CB&I's argument that the Commission erred by considering only entry that had "already" taken place, rather than entry that would likely take place "*if*" CB&I exercises market power through higher prices (CB&I Br. 30) ignores the

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[34] In the cases and *Merger Guidelines* section that CB&I cites, the reference to "sufficient entry" when supracompetitive prices are charged is premised on the existence of *low* entry barriers. *See FMC Corp.*, 170 F.3d at 530 ("no evidence of special industry conditions … that would block such an entry"); *Baker Hughes*, 908 F.2d at 987 ("compelling evidence on ease of entry into this market"); *U.S. v. Syufy Enters.*, 903 F.2d 659, 664-65 (9th Cir. 1990) ("no barriers to entry in the Las Vegas movie market"); *Merger Guidelines* § 3.0 ("A merger is not likely to create or enhance market power … *if entry into the market is so easy* that market participants after the merger … could not profitably maintain a price increase above premerger levels") (emphasis added).

Commission's painstaking analysis. While the Commission properly rejected CB&I's arguments based on entry that had supposedly already taken place (e.g., Op. 52-53), it also considered and rejected CB&I's contention that effective potential entrants "can be expected to enter the market in the event of anticompetitive price increases by CB&I." Op. 82.[35] The Commission reached this conclusion – which, like the entirety of its Section 7 analysis, was forward-looking – based on its prior (and unrebutted) analysis of entry barriers and conclusion that they were sufficiently high to render effective new entry unlikely. *See id.* at 82 n.512 (referring to Op. 33-44).

As to CB&I's argument that the Commission imposed "too high an entry standard" by inquiring whether purported new entrants would be "on par" with CB&I (CB&I Br. 31-33), the Commission properly considered CB&I's post-acquisition evidence to determine whether it would be sufficient to "replace the competition lost" from the acquisition. *See supra*, at 39-41; *see also DuPont*, 366 U.S. at 326; *H.J. Heinz Co.*, 246 F.3d at 717. Before the acquisition, PDM was the principal competitor of CB&I in each of the relevant markets, and had garnered sufficient market share in each market to be "on par" with CB&I. The

[35] While it is correct that supracompetitive prices may enable new firms to enter or fringe firms to expand (*see* 4 Areeda, Hovenkamp & Solow ¶932e2, at 184), it does not follow that such entry or expansion will be effective. *See supra*, at 41-42.

Commission considered whether the "new entrants" will be able to constrain CB&I's conduct, as PDM had done – i.e., whether they would replace the competition that had been lost. It concluded that the substantial loss of competition resulting from the acquisition likely would not be replaced by the insubstantial entrants that CB&I had identified.

IV. THE COMMISSION'S FINAL ORDER OF DIVESTITURE IS PROPER AND SHOULD BE ENFORCED

Divestiture is the "natural remedy" for a Section 7 violation, intended "to pry open to competition" the markets that have been closed by the illegal acquisition. *DuPont*, 366 U.S. at 329, 323. Moreover, "[t]he relief which can be afforded" from an illegal acquisition "is not limited to the restoration of the status quo ante," but must include whatever terms are "necessary and appropriate in the public interest to *eliminate the effects* of the acquisition." *Ford Motor Co.*, 405 U.S. at 573 n.8. Even after-acquired assets may be included in the divestiture order. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-37 (1967). Here, CB&I has acquired monopoly or near-monopoly market power in four markets. Because entry barriers are high in each market, and new entry or expansion efforts have been woefully ineffective in curbing CB&I's market power, the Commission found it "highly unlikely that the relevant markets will return to their pre-acquisition state absent divestiture." Op. 93.

The manner and scope of divestiture orders are subject to the Commission's discretion. *See* 15 U.S.C. § 21(b) (granting the Commission the power to order divestiture "in the manner and within the time fixed by said order"); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 376 (1965) (Commission has "wide discretion in its choice of a remedy"). To "restore the competition lost through CB&I's acquisition," Op. 93, the Commission properly exercised its broad discretion and ordered CB&I to reorganize its Industrial Division into two separate, reasonably equivalent stand-alone businesses and to divest one of them to an approved buyer. The Order terms are flexible, designed to restore competition without imposing excessive or unnecessary conditions on CB&I. *See* Final Order of December 21, 2004. The divestiture requirement is adaptable to ensure that the prospective buyer gets only what it needs to compete effectively. *E.g.*, Op. 95 ("we have included a provision that allows the exclusion of the water assets if the acquirer and monitor trustee both find them unnecessary").

CB&I objects to the scope of the Order, and to the manner in which the Commission reached its remedy conclusions (CB&I Br. 52-59), but neither objection withstands scrutiny. CB&I objects that the Order is punitive and overbroad because it sought "to divest assets beyond those acquired from PDM," CB&I Br. 52. But as we have shown, that argument is contrary to the facts, the

terms of the Order, and well-settled authorities. Without adequate divestiture, CB&I has the power to harm competition in each relevant market.

Moreover, CB&I raised these objections with the Commission in its petition for reconsideration. *See* R.O. 6-8. Responding to the overbreadth argument, the Commission directed CB&I to file a brief and "include an alternative suggestion for a divestiture package" consistent with the Commission's findings on the relief necessary to ensure the divested business's ability to compete effectively. *Id*. at 22-25. Contrary to CB&I's representations to this Court (CB&I Br. 53-55), the Commission fully considered the remedy issues and found that CB&I's showing was insufficient to support its claims that the Order's scope was unnecessarily overbroad and that a narrower set of assets, or CB&I's suggested alternative to the Order, would restore an effective competitor to the relevant markets. *See* Order Granting in Part and Denying in Part Respondents' Petition for Reconsideration of the Final Order (August 30, 2005).[36] CB&I has not sought review of that ruling.

CB&I's remaining objection – that it was not granted a separate evidentiary hearing on the remedy issue – is also without merit. Incorrectly citing *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), as authority for a "fundamental

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[36] The Commission did modify the Order to clarify that CB&I's foreign assets are available for divestiture only if necessary to enable the acquirer to compete in the relevant United States markets. *Id.*

right to a remedy-specific evidentiary hearing" (CB&I Br. 55-56), CB&I ignores the fact that the *Microsoft* court itself distinguished that case – which concerned single-firm conduct – from a merger case, where "the Supreme Court has clarified that … 'complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.'" 253 F.3d at 105 (quoting *Ford Motor Co.*, 405 U.S. at 573).[37] The other cases cited by CB&I are similarly inapposite. The Supreme Court in *DuPont* remanded that case because the record there bore on tax and other investor issues having nothing to do with "the competition-restoring effect of the several [remedy] proposals" at issue. 366 U.S. at 320-21. In *Ford Motor Co.*, the Court remanded on the remedy issue because the record lacked the evidence – abundantly available here – relating to the structure and competitive conditions of the relevant market, necessary to craft a proper divestiture remedy. *See* 405 U.S. at 572-77.

CB&I had a full opportunity to submit evidence on the appropriateness and scope of any divestiture order and availed itself of this opportunity. *See generally* Op. 93-104, ID 77-83. As the Commission explained, CB&I never proffered any

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[37] CB&I asserts that the Commission "concedes in its Opinion" that it has such a right, but fails to identify where the Commission allegedly made such a concession. CB&I Br. 55. The Commission, in fact, expressly rejected that claim. Op. 103 ("We also decline to remand this case to receive evidence on remedy. Although [CB&I] assert[s] that the appellate court's decision in *Microsoft* requires a remand, *we do not agree*") (emphasis added).

evidence at trial or on appeal that might have warranted a separate evidentiary hearing on remedy. Op. 103-04; R.O. 22-23. CB&I's objections to the remedy must therefore fail.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's Order affirmed and enforced.

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I certify that on August 21, 2006, I caused two copies of the foregoing brief to be delivered by overnight courier to each of the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B), and with 5TH CIR. R. 32.3, because it contains 13,804 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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