divestiture is

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the motion was moot in light of the judgment against the Respondent. *In the Matter of Capax, Inc., et al.*, 91 F.T.C. 1048 (1978).

divestiture was some kind of extreme, "draconian" remedy. Counsel made it clear to this Tribunal that "the divestiture cases, authority relied on in the Microsoft case are [Clayton Act] Section 7 cases. It's the same." (Leon, Tr. 8314) This is not true.

Microsoft ***was not a merger case,*** and the D.C. Circuit expressly held that it was not applying merger case law, which is different. Ironically, it was the government attorneys in *Microsoft* who tried to equate that monopolization case to a merger case (as Respondents' Counsel has already done here). The D.C. Circuit rejected this analogy and chastised the plaintiffs:

[2] *See, e.g, Olin*, 113 F.T.C. at 619 (Order to divest relevant product as well as a corollary one as well); *Crown Zellerbach Corp.*, 54 F.T.C. 769, 808 (1957) (Order to restore whatever assets "as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition"); *Fruehauf Trailer Co.*, 67 F.T.C. 878, 939 (1965) (Order to divest "all assets of its Strick Trailers Division and such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent"); *Ekco Products Co.*, 65 F.T.C. Corporation TD 0 0 Tc 0.375le6Tc 0 Tw (its) Tj 9.75 0 TD 0 Tc 0.33.75 0.027 Tc 0 T

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hardship and inconvenience." *E.I. Du Pont de Nemours & Co.*

[3] *See* Elzinga, The AntimergerT

the merger,"[4] where a Section 7 violation has been found. In fact, the Commission has extensively studied divestitures[5] and has determined that the most successful divestitures are those that create an ongoing, viable entity:

> "[T]he divestiture of an entire business (that is, an on-going, stand-alone, autonomous business, and which may include assets relating to operations in other markets) . . . is most likely to maintain or restore competition in the relevant market . . . . The divestiture of an intact, on-going business generally assures that the buyer of such a package will be able to operate and compete in the relevant market immediately, thereby remedying the likely anticompetitive effects of the proposed acquisition and minimizing the Commission's risk that it will be unable to obtain effective relief."

Frequently Asked Questions About Merger Consent Order Provisions, at 5, March 15, 2002 (available at http://www.ftc.gov/bc/mergerfaq.htm). *See* Rogowsky at 194 ("[W]hen firms already have combined, *the highest probability of restoring competition comes from full divestiture* of the acquired entity.") (emphasis added); Elzinga at 45-47 ("Whenever an anticompetitive increment in market power is attained by merger, structural relief requires the restoration of the acquired firm through a divestiture order" that requires "the acquired firm [to be] reestablished as an independent entity.").

In *Ford,25 0 TD -0.46 E2bq-Tj 9 0 TB08 3u8Tj ing the Commist0Wo0 TD* [illegible]

[4] Timothy Muris, "Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity," Remarks at the American Bar Association, Antitrust Section Annual Meeting, at 7 (Aug. 7, 2001) (available at http://www.ftc.gov/speeches/muris/murisaba.htm).

[5] In 1999, the Commission released a Divestiture Study, which analyzed all Commission-ordered divestitures over a ten-year period. Based upon its study, the Commission concluded that the preferred relief is "the divestiture of an on-going business with a customer base [rather than] the divestiture of assets that facilitate entry." A Study of the Commission's Divestiture Process, prepared by the staff of the Bureau of Competition, at 42, (1999) (public version available at http://www.ftc.gov/os/1999/9908/divestiture.pdf).

as well as ancillary injunctive relief, was warranted. On appeal, the Supreme Court upheld divestiture as necessary to give the new company "at least a foothold in the lucrative *aftermarket* and [to provide the new company] an incentive to compete aggressively for that market." *Ford Motor Co.*, 405 U.S. at 574. Moreover, the Supreme Court held that the ancillary injunctive relief was necessary and appropriate to the effectiveness of the remedy. "They are designed to give the divested plant an opportunity to establish its competitive position," *Id*. at 575, and "to restore the pre-acquisition competitive structure of the market." *Id*. at 576.

The only relief that Respondents have proposed to this court as an alternative to divestiture is a technical assistance agreement that falls woefully short of the Supreme Court's standard in *Ford*. Respondents' proposed relief allows Respondents to retain the assets and benefits of an anticompetitive acquisition.[6] *See Diamond Alkali Co.*, 72 FTC 1 Tj 2.25 0 TD -0.043 Tc (F.T.C.) Tj 30D 0 Tc ( ) Tj1e 6at a Tj1

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[6] Respondents' proposed relief does not even address all the relevant products. Even within the one market it does address – thermal vacuum chambers – the record shows that it requires more than technical assistance to restore competition in this market. As Mr. Gill of Howard Fabrication testified, he has received technical assistance from experienced people in the TVC industry and it has not helped him overcome the "hurdle" of being able to compete in the field-erected TVC market. (Gill, Tr. 202)("It would take more than mentoring").

Relief for a Violation of Section 7

As explained above, the Respondents' reliance on *Microsoft* is without basis. Under *Microsoft*, the direction this Tribunal should take is clear: divestiture is required.

To provide guidance to the district court on remand, the *Microsoft* appellate court distinguished divestiture as a well-established and appropriate remedy to an unlawful acquisition from divestiture to address unlawful conduct by a firm that has grown by internal expansion. Indeed, it explained that in contrast to the *Microsoft* case – a non-merger case, "complete divestiture is ***particularly appropriate where asset or stock acquisitions violate the antitrust laws.***" *Microsoft*, 253 F.3d at 105 (emphasis added; citations omitted). The D.C. Circuit also explained that it was much easier to order divestiture in a merger case, where "at least the identifiable entities preexisted to create a template for such division as the court might later decree." *Id.* at 106.

Under the circumstances of this case, the law mandates divestiture, and the extensive evidence in the record regarding the organization, personnel and tangible and intangible assets possessed by PDM's EC and Water Divisions prior to their acquisition by CB&I provides a template for reestablishing the competitive entity that was eliminated by the acquisition.

Respondents also fail to point out other differences between this case and *Microsoft*. For example, in *Microsoft*, the appellate court vacated the district court's remedies decree, because it had refused to allow Microsoft to present evidence on an appropriate remedy and for a lack of findings in the record.[7] *Id.*

[7] In two separate offers of proof before the district court, Microsoft had offered to produce 23 witnesses to testify regarding relief. *Microsoft*, 253 F.3d at 101. The district court denied defendant the opportunity to present this evidence. In vacating the district court's decree, the appellate court observed that "a trial on liability–does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability." *Id.* at 101. The appellate court pointed to "the company's basic procedural right

> deny to the defendant the fruits of its statutory violation, and ensure that there remains no practices likely to result in monopolization in the future."

Microsoft, 253 F.3d at 103 (citations omitted). The appellate court in *Microsoft* instructed that "[i]n devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive

16 of the Clayton Act, 15 U.S.C. § 26, for an alleged violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2. *Blue Cross v. Marshfield*, 65 F.3d at 1408. The district court in *Blue Cross v. Marshfield* questioned "whether divestiture of a long completed transaction is an appropriate remedy in a private action under the Sherman Act." *Blue Cross v. Marshfield*, 883 F. Supp. at 1264. The court noted that the plaintiffs "did not cite to a single case in which retroactive divestiture was awarded in a private section 1 or 2 case," and distinguished the case before it from actions brought by the government under Section 7: "Divestiture has been awarded in Section 7 cases in the context of proposed mergers and in cases brought by the government." *Id*.

Finally, Respondents cite *Ocean State v. Blue Cross & Blue Shield of R.I.*, also a case brought by a private plaintiff alleging a violation of Sections 1 and 2 of the Sherman Act -- not under Sections 7 or 11(b) of the Clayton Act. *Ocean State Physician Health Plan, Inc. v. Blue Cross*

Verdict at 1-2. As explained above, and as expressed by Section 11(b) of the Clayton Act, Complaint Counsel has no such burden. Nevertheless, Respondents are wrong on the factual record as well. There is ample evidence in the record establishing the need for complete divestiture to remedy the effects of the acquisition and how that divestiture must be implemented in order to reestablish two independent, viable and competitive entities and to assure that relief is effective in restoring competition.

A. Complete Divestiture Is Necessary and Appropriate

Several witnesses testified as to the desirability of Complaint Counsel's proposed remedy. For example, Patrick Neary of TRW, a thermal vacuum chamber customer, gave the following testimony during his court appearance relating to the issue of remedy:

> Q. . . . If we went back to day one before the transaction occurred here in February of 2001 and we have a separate PDM and a separate Chicago Bridge, would that be give you the competition you're looking for?
>
> A. Yes.

(Neary, Tr. 1489, 1502). Likewise, Mr. Britton of Fairbanks Natural Gas testified, when asked whether he had an opinion as to the effects of the acquisition, "[m]y only opinion is that it's always nice when you have more than one company to get quotes from." CX 370 at 89 (Britton Dep.).

Witnesses also testified as to the inadequacy of Respondents' proposed remedy:

> Q. Do you think that if Chicago Bridge gave them a little mentoring, taught them some classes and stuff like that, do you think that would

proposed remedy in the thermal vacuum chamber market:

> Q. Mr. Leon mentioned at the end of his opening about remedies, a proposal that they have made, and do you think that a little mentoring by Chicago Bridge would give you the ability to go out and compete in the large thermal vacuum chamber business?
>
> A. It would take more than mentoring.

(Gill, Tr. 202).

Dr. Simpson testified that complete divestiture is necessary and appropriate relief:

Q.

***Camera*)]**). Several customers have already suffered anticompetitive price increases as a result of the acquisition, or have received pricing for prospective projects suggestive of future anticompetitive pricing.[10] The evidence clearly supports the need for Complaint Counsel's proposed remedy to restore competition in the relevant markets.

B. Complete Divestiture Will Restore Competition

Dr. Simpson testified that divestiture to an appropriate acquirer of the reconstituted assets of PDM EC and PDM Water would be effective in restoring competition:

> "I believe that if Chicago Bridge & Iron is required to reconstitute the assets of PDM EC and PDM Water and then sell this to another buyer that that would restore the competition that existed prior to the acquisition." (Simpson, Tr. 3608-09)

The record in this proceeding gives substantial support for an effective divestiture remedy in this matter. There is substantial evidence in the record as to the structure, composition, and competitive viability of PDM and CB&I premerger, the precise PDM assets and personnel acquired by CB&I, and the disposition of those assets and personnel. *See* CX 385 at 25 (listing PDM EC's salaried and hourly employee headcount); CX 385 at 21-23 (listing PDM EC's facilities and equipment); CX 134 (organization chart for PDM EC); CX 133 (organization chart for PDM Water); and CX 328-339 (Asset purchase agreement, listing all assets of the PDM EC and Water Divisions purchased by CB&I, including all owned real property, tangible personal property, inventories, contract rights, accounts receivables, and intellectual

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[10] (Fan, Tr. 1003-05)(describing his belief that CB&I's pricing on a recent LIN/LOX project for Linde was 8% higher than it should have been); [**(**)] *(In Camera*)(describing how a budgetary estimate on a thermal vacuum chamber submitted in 2001 was 30% higher than the pricing submitted in 1999 for the same project); (Scorsone, Tr. 5048, 5119-20)(describing how he increased the price for Spectrum Astro's thermal vacuum chamber after CB&I's acquisition of PDM); (CX 370 at 42-45, 70-71 (Britton, Dep.))(describing how CB&I submitted an $18 million bid for a turnkey LNG peak shaving plant that Fairbanks Natural Gas estimated would cost $5 million).

property). This Tribunal, the Commission, and ultimately the Compliance Division can use this evidence as a guide for recreating by divestiture as closely as possible the pre-merger competitive environment.

In Order for Divestiture to Be Effective, CB&I Must Assign Contracts to the Divested Entity.

The record is clear that CB&I must be ordered to secure customer consent to assign customer contracts to the divested entity. As Respondents' counsel told the court during the closing, "the evidence is, there's nonassignment clauses in these contracts." (Leon, Tr. 8317). Likewise, Mr. Izzo testified that:

> "Other factors that could be considered with a potential split in the company from a customer perspective would be many of our contracts, we have, you know, assignment clause, which requires the agreement of the owner before a contractor would assign the work to another contractor." (Izzo, Tr. 6508)

However, Mr. Byers conceded that PDM was fully prepared to go out and gain consents from its customers to allow the sale of its contract backlog to third parties for completion, should PDM have decided to liquidate the EC division. (Byers, Tr. 6804-05). CB&I was obviously successful in convincing customers to assign PDM contracts to itsen8fvc 0.23/nn8fv TD 0 Tc ( ) T ( ) Tj 0 T8 Tc T ( ) Tj 0 T8 Tc T ( ) Tj 0 T8 Tc

[11] Moreover, Mr. Glenn testified that his company is gaining over $ 1.5 billion per year in new business, CX 1731 at 16, and it appears that CB&I has cornered six new LNG projects. (Glenn, Tr. 4148, 4234, 4396-99). Considering that there were only nine projects during the past decade, there appears to be enough to help PDM become competitive again.

Complaint Counsel has not even suggested cutting anything in half, as the former PDM is about 10-20% of CB&I's entire business. Nevertheless, prior to divestiture CB&I must restore sufficient personnel levels to staff two viable and competing businesses. In order to have the capacity to handle several projects at once, like CB&I and PDM prior to the acquisition, the divested entity must have sufficient personnel.[12] Obviously, all the management, engineers and other employees that were originally with PDM must return. Since Respondents have reduced the number of personnel in the combined company following the acquisition, CB&I must be ordered to hire sufficient personnel, including management, sales personnel, engineers, draftsmen, estimators, and field personnel to assure that both the retained business and the divested entity are viable and competitive.[13]

Divestiture Must Assure that Both CB&I and the Acquirer of the Divested Entity Have a Sufficient Revenue Base and Scale to Compete for Large Projects.

The Commission must approve both the manner of the divestiture and the acquirer of the divested entity to assure that it will have a sufficient revenue base and scale of operations to compete for large projects. The record shows that an adequate revenue base is a critical component to competing,

[12] Respondents noted that AT&V's experience reveals that a lack of sufficient field personnel constrains a company's capacity. "[T]he reason [AT&V] said they were capacity-constrained was because they didn't have enough experienced field people, and that's a remedy, for CBI to give up a few field people." (Leon, Tr. 8328). Mr. Cutts of AT&V testified that he would need additional personnel in order to effectively replace the competition lost by CB&I's acquisition of PDM. He testified that he would need a "[k]ey marketing person in cryogenics and a key technical person in cryogenics. And then I'd probably also want the foremen and pushers and all the gear for about four more crews." (Cutts, Tr. 2372-73).

[13] Respondents have repeatedly argued that personnel with experience in the relevant markets are readily available. Mr. Stetzler of Chattanooga Boiler & Tank testified that approximately 30-40% of his personnel formerly worked with CB&I (Stetzler, Tr. 6322).

particularly in the LNG tank and LNG terminal markets.[14] (Izzo Tr., 6511-12). LNG facility contracts often impose large liquidated damage provisions on the constructor if the project is completed late, because LNG facility owners may be liable to LNG exo d Tj 11.grdy e tregaiv LNwh4uo7G ei 6.75 0 35.25 0 TD 0 Tc ( ) T provisions project if

[14] Having sufficient size to provide bonding is also a factor affecting viability in the thermal vacuum chamber market. Mr. Gill testified that his company, Howard Fabrication, could not effectively compete in the thermal vacuum chamber market because it was not large enough to purchase bonds for thermal vacuum chamber projects. (Gill, Tr. 200-01, 234).

[15] CB&I did win a contract over PDM in Dabhol, India because CB&I was willing to provide greater financial guarantees than PDM. However, this likely had nothing to do with CB&I's size relative to PDM's size. (Carling, Tr. 4529).

between $600 to $800 million in the years between 1997 and 2000. (CX 891 at 41 (Glenn, Dep.); CX 892). CB&I was large enough to win large LNG projects between the time it was spun off from Praxair and the time it acquired the two PDM divisions. (CX 891 at 47-48 (Glenn, Dep.).

A Successful Divestiture Must Include the Assets of both the PDM EC and PDM Water Divisions.

The divestiture order must include all of the former PDM EC and Water assets and personnel. The same personnel, equipment, and fabrication facilities are used in the construction of the products of both groups. (Rano, Tr. 5894, 5898). Respondents concede that an effective divestiture would need to include assets necessary to other types of industrial storage tanks outside of the relevant market:

> "[I]f 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. You would have to give it enough personnel so that everybody would have the expertise to do every kind of tank." (Leon, Tr. 8311-12)

There is substantial evidence in the record as to the close interrelationship between PDM EC and PDM Water, and the necessity of divesting enough assets to re-create the combined divisions for the resulting entity to be competitively viable. PDM EC and PDM Water routinely shared field erection personnel, fabrication facilities, and field erection equipment. (Scorsone, Tr. 4779-80; CX 552 at 45-48 (Braden Dep.)). The sharing of resources between PDM EC and PDM Water was beneficial to the company because, among other things, it allowed for a more consistent flow of work through the company's fabrication facilities. (CX 552 at 52-53 (Braden Dep.)). Mr. Byers, PDM's vice president of finance and administration, testified that because the two divisions shared human resources, services, and

physical plant, he believed that "[i]t was not practical to split them and sell them separately." (Byers, Tr. 6780). A Tanner & Company analysis, based on conversations with PDM executives, concluded that "due to the historical connection between the Divisions and their sharing of facilities, the cost of separating the two businesses may be as high as $5 to $10 million." (Scheman, Tr. 6922-23; CX 525 at 1000406).

Dr. Simpson testified that in order to replace the competition that was eliminated by the acquisition, the divested entity would need the economies of scope that PDM obtained from the shared operations of its EC and Water divisions:

> Q. And what would the divested entity need to provide to buyers in order to replace the competition that was eliminated?
>
> A. PDM EC and PDM Water shared fabrication plants and shared construction crews, so an entity that would be divested in to obtained

Pennsylvania. Possessing multiple fabrication facilities is advantageous because it allows a competitor to rationalize its freight costs.

category.

(Cutts, Tr. 2372-73). Mr. Cutts also testified as to the advantage that CB&I possesses in established goodwill and reputation competing in the relevant markets:

> A. . . . We don't have the marketing. We looked recently at CB&I's marketing as far as advertising and just manpower. And we would have to spend, in a three-year time frame, we would have to spend almost one and a half million dollars just to equal what they're doing. More than what we do now. And we can't –
>
> Q. And that's just for advertising and marketing?
>
> A. Right. And we can't do it. We know we can't do it.

(Cutts, Tr. 2382). The PDM name will allow the new competitor created by the divestiture order to more effectively compete in the relevant markets.

Following complete divestiture, CB&I will nevertheless continue to benefit from the trade secrets and other intellectual property it has absorbed from PDM. Dr. Simpson testified that in order to assure that the acquirer will be able to compete on an equal footing with CB&I, the combined intellectual property of CB&I and PDM must be shared with the divested entity:

> Q. Prior to Chicago Bridge & Iron's acquisition of PDM EC and PDM Water, both CB&I and PDM possessed proprietary information about bidding strategies and construction techniques. . . . How should that proprietary information be treated in formulating relief in this proceeding?
>
> A. In order to have two firms that would -- that could compete on an equal footing, both firms should have access to that proprietary information.

(Simpson, Tr. 3609).

The Divested Entity Will Need a Track Record in Order to Be Successful.

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point during their closing argument: "In order for this company, new company, to work, is 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." (Leon, Tr. 8316-17). For this reason, it is also imperative that the experienced management, engineers and field workers return to the new PDM. Mr. Scully of XL Systems testified that a track record is vital to a company's success. According to Mr. Scully, a divested entity would benefit from the wisdom of experienced people from CB&I and PDM by obtaining:

> "the history, the successful history, knowing the technology and all of the issues that have caused problems in the past that people know and won't make mistakes – make the same mistakes again. Conversely, if people were starting from scratch, they would have to make the mistakes that we've experienced over the years and correct them and thus know not to make them again." (Scully, Tr. 1240).

Further, competitors have testified that they would need experienced people with a track record to replace PDM. (Cutts, Tr. 2385) (Track record and reputation are important); (Blaumueller, Tr. 301-02)(experience is important).

(Vetal, Tr. 427-28). Thus, to make sure that the new entity has the reputation, experience and sufficient business base to be a viable competitor, CB&I's existing backlog of work at the time of the divestiture must be apportioned between CB&I and the divested entity.

In Order to Be Effective, the Divestiture Will Need a Trustee and the Enforcement Efforts of the Compliance Division.

The divestiture will require the appointment of a monitor trustee to oversee its effective implementation, as recognized by Respondents. (Simpson, Tr. 5715). The appointment of a trustee is a normal part of the divestiture process. *See* Casey Triggs, FTC Divestiture Policy, 17 Antitrust 75, 76 (Fall 2002).

There are additional institutional safeguards that will insure an effective remedy.[16] The Commission maintains a specialized Compliance Division, whose purpose is to oversee and implement Commission divestiture orders. The Compliance Division will work with the trustee in implementing an effective order. The Compliance Division has substantial experience in structuring and implementing Commission divestiture orders to insure that the goal of restoring competition is achieved. The Commission ultimately must approve any purchaser of the divested entity, insuring that the parent will have sufficient financing to operate the

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[16] Reestablishing two viable and competitive entities cannot be left to Respondents to accomplish as they see fit. It requires the skill and expertise of the Commission's Compliance Division aided by a monitor trustee. Jeffrey Sawchuck (BP), cited in the Motion for Directed Verdict, testified that any concerns regarding implementation of relief depends on how the two restored competitors are set up:

> Q. Would you have any concerns as a customer if the FTC tried to split up CBI's Engineered Construction Division, their Tank Building Division, into two separate companies, one continued to be owned and operated by CBI and another that is owned and operated on its own?
>
> A. I think we would have to see the final outcome and how it was -- how it finally was set up.

Sawchuck, Tr. 6066. Mr. Sawchuck's concern can be dealt with by proper monitoring of the divestiture.

divested assets and maintain their competitive viability in the markets at issue.

Finally, divesting assets in a consummated transaction is not a novel exercise. The Commission has ordered,

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Federal Trade Commission
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Dated: January 23, 2003

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

ORDER

On January 14, 2003, Respondents filed a Motion for Directed Verdict on the Issue of Remedy. On January 23, 2003 Complaint Counsel filed an Opposition to Respondents' Motion for Directed Verdict. Having fully considered Respondents' Motion and Complaint Counsel's Opposition thereto, the Court finds that there is substantial evidence in the record supporting granting of appropriate relief in this matter if a violation is found following post-trial briefing and submission of proposed findings and conclusions of law. The Court further finds that Respondents are not entitled to a directed verdict on this issue. Accordingly,

IT IS HEREBY ORDERED that Respondents' motion is denied in its entirety.

ORDERED

D. Michael Chappell
Administrative Law Judge

Date: January , 2003

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Complaint Counsel's Opposition to Respondents' Motion