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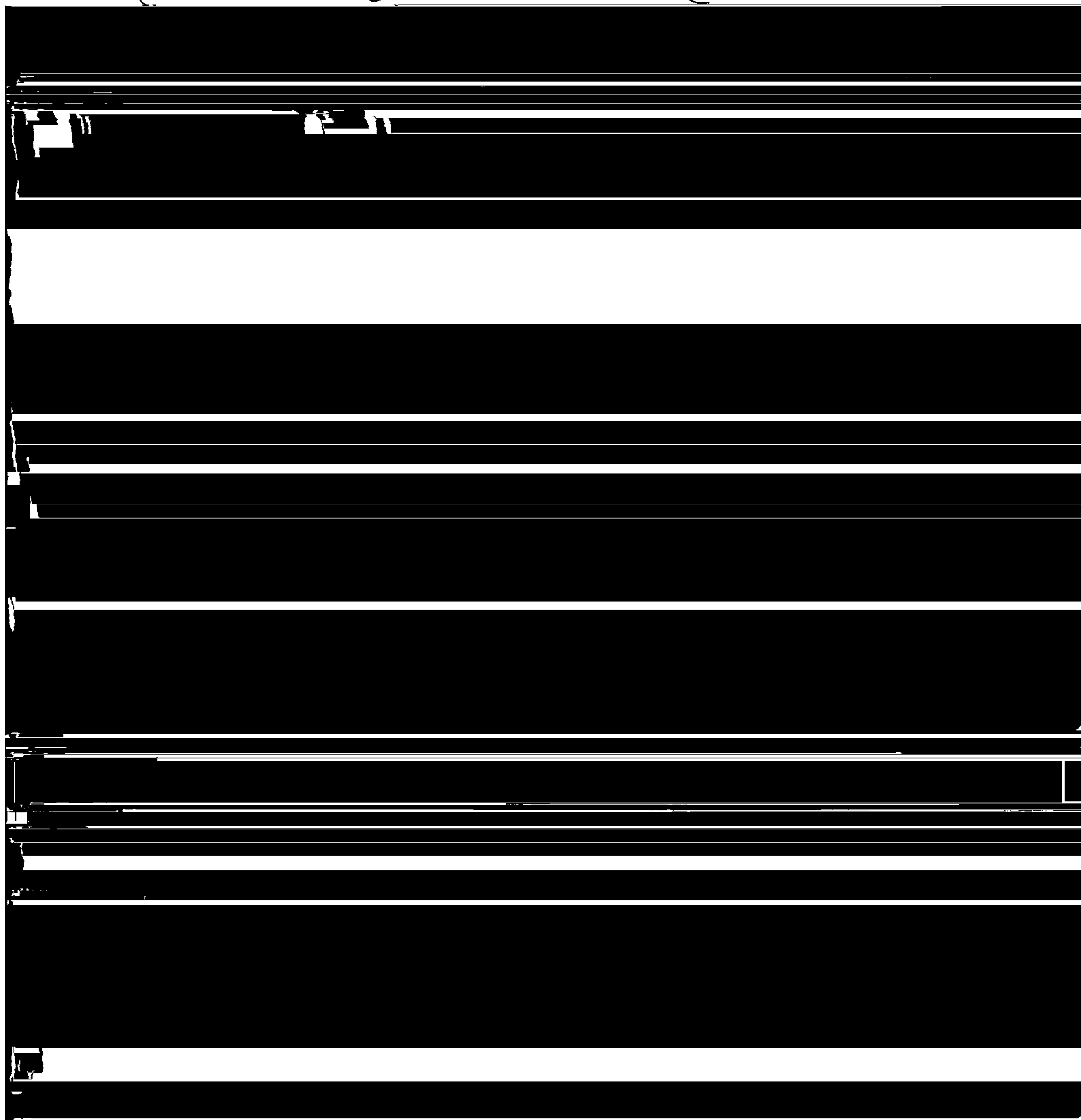

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY, N.V.

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The following abbreviations and citation forms are used:

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

STATEMENT OF THE CASE

STATEMENT OF FACTS

Chicago Bridge & Iron ("CB&I") acquired the Engineered Construction and Water Divisions of Pitt

work; they have solicited LNG owners and have bid on available projects. One of these competitors has already won a large U.S. LNG project. Further, four additional experienced multinational corporations are poised to enter the market, having already made efforts to secure a U.S. presence and having already made sales calls to U.S. LNG owners. Most importantly, prospective LNG customers who have researched the market have expressed comfort with these new entrants, universally agreeing that they can effectively compete in the U.S. CB&I has already recognized this new competitive threat, which has had a significant impact on its business.

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

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

the market. Evidence shows that LPG customers are receiving competitive pricing. *See* Part II, *infra*.

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

DESCRIPTION OF PROCEEDINGS BELOW

The complaint charged that the Acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Trial commenced on November 12, 2002 and concluded January 16, 2003. In an initial decision filed June 12, 2003, Administrative Law Judge D. Michael Chappell ("the ALJ") ordered "complete divestiture" of the Acquisition. He found that "the

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that PDM did not make sufficient efforts to sell its EC Division to anyone besides CB&I. (ID at 114-18).

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

QUESTIONS PRESENTED

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

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

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

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

COMMISSION STANDARD OF REVIEW

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

concentrated market. *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 4, 9-10 n.3 (D.D.C. 1990). Respondents respectfully submit that, although the ALJ recognized *Baker Hughes* as the governing standard and correctly found many facts, he misapplied *Baker Hughes* and made three fundamental errors. Each error requires reversal.

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

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

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

disregarded is that the entry barriers identified have *already been surmounted* by new

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

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

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

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

ARGUMENT

I.

per year to be "miniscule." Because the markets here are far smaller than the market in *Baker Hughes* (there are often *no units sold* in a given year), Complaint Counsel has not made a prima facie case that the Acquisition is likely to cause *substantial* anticompetitive effects in any relevant market. In the five years preceding the Acquisition, only four LNG projects and four LPG projects have been built. (Harris, Tr. 7205-06, 7288). Even the LIN/LOX market is far smaller than the *Baker Hughe*s market. In the five years preceding the Acquisition, only ten LIN/LOX tanks -- on average -- have been built. (CX 1663; *see also* Simpson, Tr. 3422). Despite this evidence, the ALJ erroneously found that Complaint Counsel established a prima facie case.

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

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

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

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

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

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

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

whether Complaint Counsel made its prima facie case, the ALJ wholly ignored this evidence.[2] This was reversible error.

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

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

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

II. RESPONDENTS HAVE FORCEFULLY REBUTTED ANY PRIMA FACIE CASE.

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

A. ACTUAL ENTRY REBUTS A PRIMA FACIE CASE.

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

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

Post-Acquisition competition for the Dynegy project in Hackberry, Louisiana ("the Dynegy Project") is dispositive of this case with respect to the LNG market. Dynegy, a global energy company, sought bids for a large LNG import terminal worth over $500 million

that will be the largest in the U.S. when completed. (Puckett, Tr. 4540-41, 4565). Three new entrants -- Skanska/Whessoe and Black & Veatch, Technigaz/Zachry, and TKK/AT&V have submitted firm, fixed price bids on the tank portion of this project. (Puckett, Tr. 4556). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxx) (xxxxxxxxx]** Moreover, Skanska has *already won* the job of EPC contractor for this project, beating out CB&I and several major international engineering and construction firms. (*See* Puckett, Tr. 4545-47) (RFOF 3.240).[3] Under *Baker Hughes*, the size of the Dynegy Project,

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

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

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

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

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

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

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

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

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

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

More compelling than the ease of entry case proved by respondents in *Baker*

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

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

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

nickel steel involves the same processes and techniques used to weld carbon steel and is much easier to weld than stainless steel or aluminum. (Rano, Tr. 5872-73, 5947) (RFOF 3.532). It is unnecessary to find welders skilled in welding 9 percent nickel steel, because new welders can be easily trained to weld this material. (Glenn, Tr. 4121-22; Rano, Tr. 5918, 5936-37; Carling, Tr. 4459; *see also* Rano, Tr. 5931-33, 5935-36, 5942-47) (RFOF 3.533, 3.534, 3.536, 3.538, 3.539). Further, new entrants *already have* the necessary welding technology and experience and can transmit it to local workers. (*See* Carling, Tr. 4459, 4462; Bryngelson, Tr. 6152; Cutts, Tr. 2324-26) (RFOF 3.109, 3.530, 3.539).

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

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With respect to specific aspects of LIN/LOX sales and construction, Respondents proved that subcontracting was not an entry barrier because LIN/LOX tank construction does not require many subcontractors -- AT&V used only three subcontractors for its first project. (Cutts, Tr. 2521-22) (RFOF 5.219, 5.220). Similarly, Respondents proved that access to experienced welders is not an entry barrier, as AT&V hired experienced welders merely by placing newspaper ads. (Cutts, Tr. 2427-28) (RFOF 5.221). AT&V's welding systems were sufficient to

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

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

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

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

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

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

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

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

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

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

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

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

C. CUSTOMER SOPHISTICATION REBUTS A PRIMA FACIE CASE.

"Well established precedent and the . . . Merger Guidelines recognize that the sophistication and bargaining power of buyers play a significant role in assessing the effects of [an acquisition]." *FTC v. R.R. Donnelley & Sons Co.*, Civ. A. No. 90-1619SSE, 1990 WL 193674, at *4 (D.D.C. Aug. 27, 1990) (citation omitted). Customers in the relevant markets are highly-sophisticated multinational companies with substantial bargaining power. This fact rebutted any prima facie case. *See*, *e.g.*, *Baker Tc (highly) Tj 30.6 0 TD -0.0*

on taking multiple, confidential bids. In some cases, they take even more aggressive measures to ensure good prices. For example, Dynegy bifurcated its bidding process for the Dynegy Project -- competitively bidding the EPC portion separately from the tank portion. (Puckett, Tr. 4543-44, 4550) (RFOF 3.68, 3.265).

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

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

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

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

Similarly rebutting any prima facie case, but receiving almost no weight by the ALJ, is the fact that customers in the LPG and LIN/LOX markets are also savvy and experienced, keeping these markets competitive. In the LPG market, ITC solicits multiple,

Section 7 case. 908 F.2d at 991. The ALJ erred in challenging the validity of *Baker Hughes*. (*See* ID at 101-02).[15] He flatly misinterpreted evidence conclusively proving sufficiency of entry. The ALJ erred by using the wrong standard -- incorrectly holding that, in order for a new entrant to create sufficient competition, it must be able to replicate PDM in all respects. (*See*, *e.g.*, ID at 106) ("AT&V does not provide the competitive force that PDM once did."). This is wrong. As Dr. Harris noted, "you never have to duplicate somebody exactly the same. There are different ways of providing the same service . . ." (Harris, Tr. 7255). The proper legal analysis requires a determination of whether competitors -- *in the aggregate* -- have sufficient capacity

(1)

process. (Puckett, Tr. 4559-60) (RFOF 3.304). The competitiveness of new entrants preserved competition and permitted Dynegy to rebuff CB&I. This conclusion is supported by Dr. Harris' critical loss analysis, discussed *infra*. According to Dr. Harris, application of critical loss theory shows that CB&I does not have good information regarding its competitors' costs and cannot raise prices without losing a substantial amount of new work. (Harris, Tr. 7263-65) (RFOF 7.82).

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

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

CMS Energy -- The ALJ correctly found that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (ID at 18). Yet, the ALJ failed to draw any conclusions regarding the pro-competitive force of new entry; he simply observed that "CB&I was awarded

the contract over **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx]** than the firm negotiated price submitted by CB&I." (ID at 103).[18] He ignored the fact that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5075; J. Kelly, Tr. 6266

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx[19] **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5078-80) (RFOF 3.485, 3.486).[20]

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

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

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

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

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

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

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

CB&I has been told by the customer that TKK/AT&V recently beat it on a project in Trinidad. (Glenn, Tr. 4095, 4105; Scorsone, Tr. 4950-52) (state of mind) (RFOF 3.326).

Other current U.S. customers agree. Calpine testified that it needs four bidders to "get a very good competitive bid" and that enough new entrants are qualified to provide such bids. (Izzo, Tr. 6494-95) (j -72g284

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

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

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

First, the testimony of ITC demonstrates that new entry has kept pricing competitive. ITC was satisfied with pricing it received on its Deer Park LPG tank. (N. Kelley, Tr. 7088-89) (RFOF 4.38, 4.55). "AT&V beat the socks off of CB&I . . . they definitely can do it cheaper." (N. Kelley, Tr. 7137) (RFOF 4.56). Competition between AT&V, Matrix, and CB&I gives ITC the ability to obtain competitive pricing. The Acquisition has not hindered ITC's ability to obtain t4r TD ( ) Tain 4t t 240.72 . they definitelptDket mergiedr. 7137.0095eason to credi

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

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

In summary, although the ALJ stated that Respondents "presented little evidence of recent entry in the LPG market" (ID at 104), the reality is that at least two new entrants have entered the market in the past two years. These new entrants have forced CB&I to lower its

RFOF 4.66 Tj -72 -22317TD -0.009t 1t 1musarketntertypthe Lts "pres0092 Tc 1diproic AT& ABw (eD -0.090.

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

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

(i) [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

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

(ii) [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]

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

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

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

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

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

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

Recent post-acquisition projects awarded by BOC Gases provide further evidence of healthy competition in the LIN/LOX market. BOC awarded a project to AT&V in Midland, North Carolina because it was the low bidder. (ID at 45). BOC was satisfied with AT&V's price because it was below the projected budget for this project. (ID at 45). Notably, BOC testified that it "was quite satisfied [with ATV] in all aspects." (V. Kelley, Tr. 5287) (RFOF 5.108). Specifically, BOC praised AT&V for being proactive in solving problems as they arose on the job site, as well as its turnover package and schedule execution. (V. Kelley, Tr. 5268, 5283-84,

5287-89) (RFOF 5.97, 5.108-5.110).[28] BOC believes that AT&V has "distinguished themselves as being capable LIN/LOX tank providers." (V. Kelley, Tr. 5281-82; *see also* V. Kelley, Tr. 5285) (RFOF 5.113). Mr. Kelley confirmed that BOC planned to use AT&V again in the future, and that another division of BOC had already selected AT&V as a LIN/LOX tank contractor because it had the low bid. (*See* ID at 45; *see also* V. Kelley, Tr. 4601, 5289-92; Cutts, Tr. 2419) (RFOF 5.113-5.117).[29]

These developments have constrained CB&I's prices. When BOC awarded the

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

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

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

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

An economist makes a critical loss calculation by identifying the entity being tested, and calculating how much sales could be lost before a given price increase would be unprofitable. (Harris, Tr. 7247-59) (RFOF 7.61, 7.62). The second step is performed by identifying an entity's variable costs and variable contribution margin. The larger the variable contribution margin, the more each unit of lost sales will harm the entity's profits; i.e., the larger the contribution margin, the lower the critical loss. (Harris, Tr. 7259) (RFOF 7.63). Simply put, if an entity's cost structure could be recovered on a single project, the entity would only need that one project and could afford to lose other projects. However, if the entity must cover certain

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

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

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

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

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

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

Absent the Acquisition, PDM EC would have been acquired -- if at all -- by a smaller company and would not have been as effective a competitor as it was under the PDM banner. PDM EC benefited from being part of the larger PDM corporation, which had revenues of over $600 million. (Byers, Tr. 6734-35)eTw (tatem Tw ( ) 2.5) on. eB -0.01 Tj 0 -2.94)

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

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

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

III.

divestiture could result in *fewer* qualified bidders for LNG projects. For example, Calpine noted that breaking up CB&I could result in two companies lacking the "bonding or guarantee ability to make our bid list." (Izzo, Tr. 6511-12) (RFOF 9.24). It explained that foreign companies, such as Skanska, Technigaz, and TKK had the financial strength to guarantee a large LNG project. (Izzo, Tr. 6511-12) (RFOF 9.22). By contrast, the two "residual" companies left by a divestiture could have difficulty:

> I'd be concerned about whether either of the two residual companies would have the bonding or guarantee ability to make our bid list, and unless a company could guarantee what we were asking them to do, which I feel comfortable with with the Skanskas and Technigazes and TKKs, I don't know -- I seriously doubt PDM's ability being able to backstop a large enough project as we're talking about. I don't even think PDM would make my bid list, and whether a split company -- whether CBI would make it
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> companI'm bid

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

* * *

Q. If CBI were split in two, would you be concerned that both of the newly created companies as a result of the breakup might not have a sufficient size to satisfy El Paso that they1la 11E1it up,d youknow,f the nclesarly

A.

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

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

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

Further, the ALJ failed to consider potential effects of divesting the Water Division. Complaint Counsel presented no evidence that water customers wished to see CB&I's water business divested from it or that CB&I's ownership of PDM's Water Division (and its

integration with CB&I's current water assets) impacted competition in any way. He also misinterpreted PDM's desire to sell the EC and Water divisions together. PDM would have needed to spend $5-$10 million to separate the divisions. (Scheman, Tr. 2959-60, 6922-23; RX 163 at 27) (RFOF 8.37). There is no evidence that the two divisions *could not have been sold separately*. Nor is there evidence that a party purchasing the EC Division could compete in the relevant product markets without Water Division assets. For these reasons, inclusion of the Water Division in the Order is unwarranted and is entirely different from the d

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

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

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

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

Absent the Acquisition, PDM would have liquidated its EC Division and exited the market. (Scheman, Tr. 6952) (RFOF 8.115). There is no evidence that PDM would have done otherwise. Yet, the ALJ concluded that liquidation was unlikely because PDM's CFO

testified that he had a fiduciary duty to try one more time to sell the assets. (ID at 117). This conclusion directly contradicts testimony from PDM's CFO and its investment banker, who testified that that *liquidation was the likely alternative to the Acquisition*. (Byers, Tr. 6769-70, 6773; Scheman Tr. 6952) (RFOF 8.115, 8.118). The likely decision to liquidate was created by the history and circumstances of PDM as a corporation, its need to receive cash and not stock for selling off its component parts, as well as the poor state of the economy at the time PDM was selling its EC division. (*See, e.g.,* Byers, Tr. 6731-32, 6763-64; Scheman, Tr. 6948-49) (RFOF 8.1-8.3, 8.23, 8.83).

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

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

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

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

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

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

CB&I was the only potential purchaser for PDM EC. It was the only company with sufficient financial strength to give PDM what it needed: a quick, all-cash transaction. Speed was critical, as the ultimate disposition of PDM, a final rollup transaction, was to occur approximately six months after the PDM Board authorized liquidation. (Byers, Tr. 6761-62) (RFOF 8.5, 8.25, 8.33, 8.34, 8.39). As part of this rollup, the last remaining division would be

sold to an investment company who would, simultaneously at closing, resell it to a third party. (Byers, Tr. 6759-61) (RFOF 8.24). The evidence demonstrates that this transaction would have been far more difficult if the EC Division's assets were still within the company at the time of the final transaction. (Byers, Tr. 6759-61) (RFOF 8.24).

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

ORDER

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

Dated: ________________

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The Commission

CERTIFICATE OF SERVICE

CHI:1243974.1

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

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(original and twelve copies)

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Rhett Krulla
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room NJ-6109
Washington, D.C. 20580

Steven L. Wilensky
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room NJ-6121
Washington, D.C. 20580

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