UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9300

PUBLIC VERSION

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.,

CHICAGO BRIDGE & IRON COMPANY,

and

PITT-DES MOINES, INC.

ANSWERING AND CROSS-APPEAL BRIEF OF COUNSEL SUPPORTING THE COMPLAINT

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TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used:

ID- Initial Decision

STATEMENT OF THE CASE

Administrative Law Judge Chappell found correctly that "reliable and probative evidence" established "that the effect of the Acquisition of PDM's EC and Water Divisions by CB&I may be to substantially lessen competition" in the field-erected, LNG, LPG, and LIN\LOX tank and thermal vacuum chamber ("TVC") markets in the United States.

Despite CBI's dominance in each of the relevant markets, Respondents tell an "entry" story that is without merit. No domestic competitor has competed successfully against CB&I/PDM in LNG or LPG tanks or TVCs for decades, with the exception of Morse Construction, which built an LPG tank near its facilities in the Pacific northwest, and AT&V, which built a very small LPG tank. Strikingly, while this case was pending, CB&I acquired Morse too. [illegible]

seller." Dept. of Justice & Federal Trade Comm'n, *H*

attached.

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

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

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

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

[5]

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

With one or the other company accounting for nearly every LNG, LIN/LOX, LPG and TVC project in the United States since 1990, not surprisingly Respondents' ordinary course of business documents repeatedly Respondents'

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

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

] and **[**

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

at CBIt03609-HOU;[ratel104 see (Resp18.24 /F0 T f 28005c 0.65 Tw (CPF-729-748.ratel-11d 5Tc676

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

On October 31, 2002 (six weeks before testifying before the ALJ), Gerald Glenn, CB&I’s CEO, met with investors to explain CB&I’s ability to “win the work every time” against competitors. CX1731 at 44-45. When asked about the increase in gross margins, Mr. Glenn confirmed that the “margin levels are high. . . . [w]e can still be low bidder and make more money on it than most of our competitors, if not all of them.” CX1731 at 41-42. When asked about changes in the competitive landscape, Mr. Glenn responded that the “markets and prospects appear more attractive inin12 Tfa1.68 0 Tw 0 1 T

still

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

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

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

! **[**] Prior to the merger, competition between Respondents reduced the price by over $4 million on a TVC project for [ ]. **[ ]** On another TVC project for **[ ]**, Respondents initially bid **[ ]** before the merger. **[ ]**. After the merger, CB&I was asked for a firm offer, and it proposed a price of **[ ]**. **[**

]. The only logical reason that CB&I would raise its price is the lack of competition post-Acquisition.

! ***Cove Point***: Before

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

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

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

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

- ! CB&I's 1999 10-K boasts of its "long-term presence" intiomh [illegible]

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

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

CB&I's internal assessment of its cost advantage is borne out by past bidding experiences for LNG tanks in the United

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

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

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

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

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

CB&I acquired both tangible and intangible assets of PDM's industrial and water tank construction businesses, which were "inextricably intertwined" because they routinely shared services, human resources, physical plant and equipment. IDF-566-72. Among the most important assets were PDM's proprietary rights in existing customer contracts. CX334. This backlog of PDM construction projects represented the block of business that CB&I obtained from PDM as a result of the AcquisiPDM a [illegible]

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

SUMMARY OF ARGUMENT

1. Complaint Counsel Established a Strong Prima Facie Case

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

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

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

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

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

Finally, Respondents' claim that CB&I was not a competitor in the TVC market is not true. For three decades, ***only*** CB&I and PDM competed for these projects. Right up to the Acquisition,

projects. Right up to the Acquis2xcA0 Tc (

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

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

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

competition, or to tend to create a monopoly."

Although the ALJ did not rely on the HHI calculations, the market concentration evidence in this case reaffirms the ALJ's conclusion that Complaint Counsel has established a presumption of illegality in all four markets. ID-96. The Acquisition combined the two leading competitors and increased reaffirms ALJ's inhas established the 1market5arely the relyestablished 38.Tj 2.88 0 Tdthat the extent established The 0 9w (e

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

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

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

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

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

[10] Similarly, there is no *de minimis* exception to the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S.150, 224 n.59 (1940) ("the amount of interstate or foreign trade involved is not material . . .,

Moreover, the four markets had combined sales of about $250 million over the eleven years prior to the Acquisition.[11] This amounts to about $23 million per year, which is several times the annual market size in *Baker Hughes*, 731 F. Supp. at 6, 9, n.6, which Respondents round upward to "approximately $10 million." RAB-10-11. Additionally, the amount of commerce in the United States LNG tank market in the near future is likely to be high, both because of the upsurge in interest in LNG and because of the high prices for LNG tanks following the Acquisition. Since the Acquisition, CB&I has sold two LNG tanks in the United States, one to CMS and one to El Paso. IDF-105; RAB-31. LNG tanks can cost around $50 million each. IDF-90. Numerous other projects, some of which will require multiple LNG tanks, are currently planned. ID-103-04. Respondents' brief concedes that "LNG owners spend hundreds of millions of dollars on LNG tanks." RAB-41. Even in the smallest line of commerce, LNG hundredsLch. IDF-90. non-LNG 1 Tc 0 Tw (co1, lED.12 T7-0.096 Tc 0 T7 Tw (Lch. IDF-90

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

that evidence presented by Respondents on alleged entry and customer sophistication simply did not rebut the *prima facie* case, because they are not sufficient to constrain CB&I's ability to increase

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

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

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

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

The Courts and the Commission have recognized that the simple presence of some potential new competition is not i tsounless the ufficient of anticompetitive lostt-0.0196 Tc336 Tc2 Tj 34.8 (fa

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

Finally, Respondents claim that their evidence of entry is far more compelling

outbid CB&I, he expects them to eventually "go out of business." Glenn, Tr.4380; CX1731 at 44.

]

[ ].

Finally, any firm seeking

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

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

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

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

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

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

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

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

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

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actual entry into the United States LNG market.

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

AT&V's performance [

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

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

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

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

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

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

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

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

The second step in a critical loss analysis involves estimating the amount of sales that a firm would actually lose for various prospective price increases. If this amount of lost sales exceeds the critical loss, then the firm could not profitably increase price. Dr. Harris testified that CB&I's actual loss of sales resulting from a price increase would far exceed its critical loss because CB&I has won only "18% of the dollars at risk post-merger" in the relevant markets. CPF 632. Dr. Harris bases this claim, however, on an inaccurate sample of post-merger projects

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

whether

Antitrust 49, 53-54 (Spring 2003).

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

Probably

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

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

Respondents cite to [ ] sophisticated pricing model for assessing LNG tank pricing as reason it TD 0.0321 Tc 0 L 0 Tc 00.12 Tw ( ) Tj 2.88 0 TD -0.0320.024 Tc 0 Tw (conceded) Tj 45.12 0 TD 0 Tc

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

As for Bechtel's Mr. Rapp, he testified that the only two United States LNG competitors he

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commission's Rules recognize that "respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files." 16 C.F.R. 3.43(b)(2).their

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

4. The Acquisition Has Already Had Substantial Actual Anticompetitive Effects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The BP Projects: Post-Acquisition, CB&I has secured a sole-source relationship with British Petroleum ("BP") for several current LNG projects. BP chose CB&I because, based on actual prices it obtained from

[

]; BP knew that with the elimination of PDM, CB&I dominated the United States market; without PDM to turn to, BP has no choice but to acquiesce to CB&I's demand that BP work exclusively with CB&I. In 2001 BP analyzed the competitive environment post-Acquisition, and concluded that since the Acquisition of PDM, "CB&I 2f

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

Separately, in 2002, CB&I submitted a bid to Praxair for a similar LIN/LOX tank, also to be located in Newin

] and is the very comparison Respondents have themselves cited as the means by which [

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

[21] The only

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

Respondents never demonstrated that PDM conducted an "exhaustive" searchPDMsfo

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

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

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

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

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

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

Judge Chappell properly concluded, "[t]he evidence does not establish that PDM had made the decision to close the business in the near

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

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

It is undisputed that divestiture is the appropriate remedy for an acquisition found to be illegal under Section 7 of the Clayton Act.[23] ID-118-119. The Clayton Act states that upon a finding of a Section 7 violation, "the Commission. . . *shall*. . . order. . . such person to cease and desist from such violations, and *divest*

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

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

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

Thus, under the Clayton Act and the FTC Act, the Commission has ample authority to order effective and viable divestiture and ancillary relief,[26] including the division of commingled assets to reconstitute a competitor.[27]

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

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

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

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

law and ensure against its repetition." *Hospital Corp.,* 807 F.2d at 1393 (7th Cir. 1986); *see also RSR Corp.,* 88 F.T.C. 800, 892-97 (1976) (Divestiture of plants that were not part of the original acquisition); *Diamond Alkali*, 72 F.T.C. 700, 742 (1967) [illegible]

[29] In *Fruehauf* the Commission ordered divestiture ten years after the acquisition, including divestiture of any other assets necessary to restore the acquired companies as effective competitors. *Fruehauf Trailer Co.*, 67 F.T.C. 878, 939 (1965). In *Crown Zellerbach* the Commission stated "clearly, the broad purpose of the statute cannot be

[34] The Initial Decision relies on *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 230-31 (D.C. Cir. 1962) and *Luria Bros. & Co. v. FTC*, 389 F.2d 847, 865 (3d Cir. 1968), but neither case supports this proposition. The

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

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

[37] The Commission's institutional experience with

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

[40] *See, e.g.*, IDF-483: PDM is the

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litigations involving consummated mergers

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

[46] ID-123. Complaint Counsel agree with the ALJ that "employees are not owned by the company for which they work." *Id.* We do

[47] *See, e.g.*,

The ALJ Order also eliminated the provision for appointment of a Monitor. ID-123. When the Commission orders respondents to provide an acquirer with needed short-term assistance, the Commission frequently also provides for the appointment of an independent third party to oversee Respondents' compliance with their order obligations.[49] The need for a Monitor, whose presence would also deter collusion, is particularly great in this case given the commingled

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

[50] IDF-576-77.

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

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

The Commission's order enforcement experience teaches that a successful divestiture remedy can be best achieved when order requirements are clearly defined and delineated, and order language and provision2.88 0TD -0.032 Tc [illegible]

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

one hand, they claim that this Commission should not order the divestiture of the entire PDM

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

VI. CONCLUSION

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

Dated: September 16, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Public Version of the Answering and Cross-Appeal Brief of Counsel Supporting the Complaint to be delivered by hand to

The Commission

APPENDIX A

PROPOSED FINAL ORDER