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.

REPLY BRIEF OF COUNSEL SUPPORTING THE COMPLAINT

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October 24, 2003

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The following abbreviations and citation forms are used:

ID-	Initial Decision
IDF-	Initial Decision Finding of Fact
CCPFO	Complaint Counsel's Proposed Final Order
CCACB-	Answering and Cross-Appeal Brief of Counsel Supporting the Complaint, filed September 10, 2003
CCPTB-	

INTRODUCTION

Complaint Counsel submits this brief, in accordance with Rule 3.52(d), in rebuttal of matters in Respondents' Reply Brief filed October 10, 2003, relating to the two questions presented by Complaint Counsel in our Answering and Cross-Appeal Brief ("CCACB"): First, what relief is necessary and appropriate to restore competition lost as a result of the Acquisition? Second, should the ALJ's Initial Decision also be affirmed for the independent reason that the Acquisition has caused actual anticompetitive effects in the relevant markets?

From the beginning of this case, Respondents clearly understood the relief that Complaint Counsel would seek in this matter. Indeed, "the mat[t]er of remedy was an important part of the trial on liability [and] Respondents elicited testimony touching on the issue of remedy from a dozen witnesses." Respondents' Motion for Directed Verdict at 9 (January 13, 2003). At the beginning of trial, CB&I expressly told its shareholders that Complaint Counsel was seeking to split the company back into two competitors. CX1588 at 14. Thus, Respondents' claim of surprise is not true. Morever, the Proposed Order is even narrower than the one Complaint Counsel initially proposed – it responds to concerns raised by Respondents and by the ALJ regarding rights of employees and customers' right of consent regarding assignment of contracts. The Proposed Order is necessary and appropriate to restore competition "to the state in which it existed prior to, and would have continued to exist but for," the unlawful Acquisition. ID-120 (citation omitted). Although Complaint Counsel believes that the Commission could simply order CB&I to transfer the PDM employees back to the reinstated company (as they were transferred to CB&I in the first place), the Proposed Order seeks a less-restrictive manner of accomplishing this goal.

On the issue of liability, the ALJ found "that the effect of the Acquisition of PDM's EC and Water Divisions by CB&I may be to substantially lessen competition" in the field-erected, LNG, LPG, and LIN/LOX tank and thermal vacuum chamber ("TVC") markets in the United States. ID-3.

Additionally, evidence of actual or attempted collusion and dramatically higher prices and margins, independently establishes that this Acquisition clearly violates Clayton Act § 7. Prior to the Acquisition senior executives of CB&I and PDM discussed Spectrum Astro's request for final bids; thereafter CB&I's TVC management proposed that, in light of the proposed Acquisition, CB&I and PDM either delay responding to the bid request, both bid high, or that only one of the competitors submit a bid. In the end CB&I and PDM bid high reflecting an end to the tough competition that had characterized their prior dealings. In another case the other bidder admitted that CB&I asked to "coordinate on making a bid or a price quote to TRW," and the customer testified that as a result it was now "basically hosed." Gill, Tr.247, 274; Neary, Tr.1451. Detailed evidence of higher post-merger margins and prices, none of which are attributable to pro-competitive efficiencies or cost savings, and unrefuted incidents of collusion, demonstrate the illegality of this Acquisition.

I. COMPLETE AND EFFECTIVE DIVESTITURE IS REQUIRED TO RESTORE THE COMPETITION ELIMINATED BY CB&I'S ACQUISITION OF PDM'S EC AND WATER DIVISIONS.

Ignoring the plain language of Section 11(b) of the Clayton Act and well-established precedent, Respondents argue that divestiture is an inappropriate remedy in this case. If divestiture is not appropriate in this 2-to-1 merger case, under Respondents' theory, it would appear never to be appropriate. Compliance with the proposed remedy will likely impose some costs on CB&I. Respondents' protests, however, that these costs would "cripple CB&I's ability to offer low tank prices" are contrary to the evidence proffered by Respondents. CB&I enjoys robust financial health in the wake of its unfettered post-Acquisition dominance of the relevant markets. Respondents' assumption, of course, is that CB&I has some right to keep what it illegally acquired in the first place. This is wrong.

Respondents also speculate that divestiture would not benefit competition and customers *if* the result is that the acquirer would be a high-cost competitor or lack the financial strength necessary to undertake large projects. Such conjecture overlooks the Commission's divestiture approval process, which is designed to assure that any acquirer will be in a position to operate the divested assets and maintain competitive viability in the relevant markets. Respondents' assertion also is contradicted by their own argument that even tiny companies, such as ATV, can compete in these markets.

Contrary to Respondents' contentions, fundamental antitrust and economic principles instruct that *competition*, restored through divestiture to a viable acquirer, is the surest way to ensure that customers receive the benefits of the lowest prices and best quality products and services from low-cost competitors in the relevant markets. The law is clear: divestiture is the presumptive remedy for illegal mergers, and the burden is on Respondents to demonstrate that relief other than divestiture is justified on the facts of this case. Respondents have not presented credible and substantial evidence suggesting this case presents special circumstances to justify deviating from the divestiture relief mandated by the Clayton Act, Section 11(b). In short, Respondents' argument is nothing more than the usual refrain that customers are better off if CB&I keeps its monopoly. That is not what the law assumes, nor is it what the evidence demonstrated in this case.

Misciting the *Microsoft* case, Respondents revive their attempt, rejected by the ALJ, to impose on Complaint Counsel the burden of proving that the proposed divestiture relief is better than some other remedy – like Resp

elicited testimony touching on the issue of remedy from a dozen witnesses." Motion for Directed Verdict at 9. Neither Complaint Counsel nor the ALJ did anything to hinder Respondents' ability to submit record evidence relating to remedy. More importantly, Respondents ignore what the court actually said in *Microsoft* – that it was not a merger case, where "the Supreme Court has clarified that . . . 'complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001) (citations omitted).

Nonetheless, in a new argument not presented before, Respondents now contend they were denied due process because they were not provided an opportunity to present evidence against specific provisions of Complaint Counsel's Proposed Final Order ("CCPFO"). Respondents' due process argument is without merit. Contrary to their claim of unfairness and surpr

[1] Notice of Contemplated Relief, Docket No. 9300 (emphasis added).

[2] The Supreme Court has held that under Section 11(b), the Commission has the "duty" to

any violation which is found." *Fruehauf Corp*., 90 F.T.C. 891, 892 (1977) (emphasis added). Accordin

the Government proves a violation but fails to secure a remedy adequate to redress it," it has "won a lawsuit and lost a cause." *du Pont*, 366 U.S. at 323-24 (citations omitted). Respondents, nevertheless, argue that the purpose of divestiture is to increase the level of competition from current levels" and assert that "[i]n order for any relief to be effective, it must create two low-cost competitors." RRCRB-45, 57. The objective of CCPFO, however, *is* to increase the level of competition

. . . such person to . . . ***divest*** itself of the . . . assets") (emphasis added). Respondents also cite *du Pont*, 366 U.S. at 319, for the proposition that the Commission should fashion an equitable remedy that will fit the "exigencies of [this] particular case." RRCRB-45. That, of course, is exactly what Complaint Counsel proposes here: divestiture, as in *du Pont*, and specific remedies to implement that order.

In sum, the law is clear that complete divestiture is the presumptive remedy for illegal acquisitions, and it is Respondents' burden to establish that a remedy other than divestiture should be ordered. *Fruehauf*, 90 F.T.C. at 892; *Diamond Alkali*, 72 F.T.C. at 742. There is no reason to carve out an exception to the law, especially in a 2-to-1 merger case where the presumption should be its strongest.

C. Ample record evidence establishes the standards for restoring pre-Acquisition competition, the goal of effective divestiture relief.

Once the Acquisition has been found to violate Section 7 of the Clayton Act and Section 5 of the FTC Act, the Commission's duty in ordering divestiture relief is to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." *See* ID-120, quoting *B.F. Goodrich*, 110 F.T.C. 207, 345 (1988). To address this remedial standard, Complaint Counsel presented substantial evidence on the structure, composition, and competitive viability of PDM and CB&I premerger, the precise PDM assets and personnel acquired by CB&I, and the disposition of those assets and personnel. *See* CX385 at 25 (listing PDM EC's salaried and hourly employee headcount); CX385 at 21-23 (listing PDM EC's facilities and equipment); CX134 (organization chart for PDM EC); CX133 (organization chart for PDM Water); and CX328-339 (Asset purchase agreement, listing all assets of the PDM EC and Water Divisions purchased by CB&I). This evidence serves as an objective baseline for restoring the state of pre-Acquisition

competition in the relevant markets. It also served as a template for provisions of the Proposed Final Order. *See, e.g*, CCPFO ¶¶ I.V., IV.

The record established that the Acquisition combined two thriving and intensely competitive ongoing *businesses*. CCACB-69; *see, e.g.*, IDF-74, 79-82, 228-232, 269, 277-291, 363, 376-406, 483-487. In order to recreate the vigorous pre-Acquisition competitive environment in the relevant markets, therefore, divestiture of the ongoing *business*, that was acquired including a current customer base and measures to assure the acquirer will have access to experienced personnel, is needed to ensure the viability and effectiveness of relief in this case.[3] CCACB-70. Complaint Counsel's Appeal Brief thus presented the record evidence in support of the provisions of the Proposed Final Order, which we believe will restore competition to its pre-Acquisition state. CCACB-70-75. Respondents' refrain that Complaint Counsel have failed to present evidence to justify the provisions of the Proposed Final Order is thus without merit. RRCRB-29, 32, 45-46, 49-58.

D. Effective relief is not limited to divestiture of the acquired assets.

Respondents object to a number of provisions in the Proposed Final Order on the grounds that "Complaint Counsel has never, in any fully-litigated antitrust case, obtained relief of the type and scope that it seeks here." RRCRB-45. This is not correct, and indeed ignores a series of cases litigated before the Commission in which the Commission held complete divestiture, including the division of commingled assets and ancillary relief to reconstitute a competitor, is the proper remedy for acquisitions found illegal under Section 7 of the Clayton Act and Section 5 of the FTC Act.

[3] *See, e.g.*, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (2003) [hereinafter "Merger Remedies Statement"], http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

Respondents do not appear to dispute that the Commission has ample authority to order fully effective and viable divestiture and ancillary relief, including of the type and scope in CCPFO. It is well-settled that the Commission has wide latitude to remedy the violations of law it has found in a given case, and reviewing courts will uphold the Commission's choice of remedial provisions so long as there is a "reasonable relationship" between the remedy and the unlawful conduct at issue. CCACB-66.

Complaint Counsel's duty is to propose divestiture relief appropriate to restore the competition lost as a result of *this* illegal Acquisition as established on the record by the facts in *this* case. We have met this responsibility by proposing to the Commission relief that is tailored to the facts of this case, supported by the record, responsive to legitimate concerns expressed by the ALJ in the Initial Decision, and that incorporates relevant lessons learned from the Commission's experience with merger remedies.

E. Respondents' claims that the costs of divestiture relief imposed on CB&I will harm competition or customers are without merit.

The Supreme Court in *du Pont* made clear that in ordering relief from an illegal merger, the public interest is paramount, and 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:

> The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition . . . . [C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.

du Pont, 366 U.S. at 326.[5] Respondents suggest that the divestiture relief proposed by Complaint Counsel would impose "massive costs on CB&I . . . reducing its ability to be a low-cost competitor," to the detriment of competition and customers.[6] RRCRB-57-58. Citing their expert witness, Dr. Harris, Respondents argue that "[t]here is no evidence in the record to suggest that any divestiture could create two low-cost companies." RRCRB-57. This is incorrect. The record shows that, prior to the acquisition, CB&I and PDM were the two companies that could offer customers the best deal in terms of price, quality, timeliness of completion, reputation, and safety. ID-96; Simpson, Tr.3608. The record also shows that CB&I and PDM were the two closest and strongest competitors because they uniquely possessed certain tangible and intangible assets. Simpson, Tr.3608; *see* ID-107-08. Given this, it follows that divestiture effectively recreating two companies with tangible and intangible assets comparable to those possessed by CB&I and PDM before the Acquisition would recreate the pre-Acquisition competitive environment and return the benefits of that competition to the relevant markets. Simpson, Tr.3608-09. Moreover, because Respondents have inextricably intertwined CB&I's and PDM's knowhow and trade secrets, CCPFO preserves the combined intellectual property garnered by CB&I through the Acquisition and makes it available to both CB&I and the acquirer so that the two companies will compete drawing on the shared experience of CB&I and PDM

Respondents err in claiming that the costs CCPFO would impose on CB&I to recreate a competitor comparable to the pre-Acquisition PDM would lead to higher prices for customers.

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[5] "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." *du Pont*, 366 U.S. at 326-27 (citations omitted).

[6] Respondents do not assert that divestiture would eliminate synergies from the Acquisition. At trial, Respondents abandoned any efficiencies defense.

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RRCRB-45, 57-58. These costs would primarily be "sunk" (non-recoverable) costs: CB&I may need to make lump-sum payments to induce some employees to work for the newly created firm, and CB&I may need to make lump-sum payments to induce some customers to agree to the transfer of contracts to the new firm. RRCRB-57. However, since sunk costs do not affect pricing decisions, these divestiture costs should *not* affect the price paid by customers of CB&I or the acquirer.[7] Respondents' claim that CBI would need to raise prices in order to fund the costs of the proposed divestiture relief is also undercut by the fact that the Acquisition has been extremely profitable for CB&I: CB&I's income from continuing operations in the first ni

[7] *See* Dennis Carlton and Jeffrey Perloff, MODERN INDUSTRIAL ORGANIZATION 28 (3rd ed. 2000). "A sunk cost is like spilled milk: once it is sunk, there is no use worrying about it, and it should not affect any subsequent decisions."

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[8] *See* Merger Remedies Statement, regarding divestiture application process.

[9] *See id.*

[10] Respondents cite *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), in which the Supreme Court held that the respondent employees had a right to a pre-termination hearing but that "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545 (citations omitted). Respondents do not claim that they did not receive a full, adversarial proceeding on the issue of

at 14. During trial, Respondents' examination of witnesses made clear that Respondents had full notice that Complaint Counsel's proposed remedy would include divestiture of significant portions of the combined entity's assets and ongoing contractual business, and would likely necessitate the transfer of contracts and personnel to an acquirer. For example, Respondents' counsel's questions to Dr. Simpson illustrate that Respondents understood the proposed remedy. Respondents' counsel stated:

- "[I]n order to restore the competition that was lost, you have to split apart CBI into two separate companies." CB&I Counsel, Tr.5706.
- "[C]ustomers would have to waive their rights to prevent assignment in order for the work to be transferred from CBI to a newly created company?" *Id*. at 5710.
- The FTC needs "enough people in each discipline to split up into two companies?" *Id*. at 5713.
- "CBI has several hundred projects going on in any given time[;] . . . how those projects could be equitably split between the two companies?" *Id*. at 5714.
- "[There is] evidence in this case that customers would assent to the assignment of their contracts to the new entity." *Id*. at 5718.

Moreover, Respondents concede that they elicited testimony from a dozen witnesses at trial relating to these same issues of remedy. *See* Respondents' Motion for Directed Verdict at 9-13.

At the end of trial, as mandated by Commission procedure, Complaint Counsel provided the detailed provisions relating to the divestiture in a proposed order attached to its Post-Trial Brief, timely filed according to the Prehearing Schedule established by the ALJ, and in accordance with Commission Rule 3.46(a), which provides: "*Upon the closing of the hearing record,*[11] . . . any party

[11] The fact that the Rules provide for submission of a proposed order only *after* the record has closed is a strong indication that due process does *not* require that each specific detail of Complaint Counsel's proposed order be subjected to a full adversarial administrative proceeding.

may file . . . for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and . . . *order* . . . ." (Emphasis added). In their appeal brief, Respondents made only general arguments that divestiture was inappropriate and that the Water Division should not be divested, but did not otherwise contest any of the detailed provisions contained in the proposed order submitted to the ALJ by Complaint Counsel. RAB-52-57.

Finally, in accordance with Commission Rule 3.52(b)(1)(v), Complaint Counsel filed with its cross-appeal brief "[a] proposed form of order for the Commission's consideration instead of the order contained in the initial decision." Respondents now argue that they are prejudiced because, according to Respondents, Complaint Counsel incorporated new or modified provisions in CCPFO. RRCRB-48. There is no prejudice; CCPFO is consistent with the order presented to the ALJ, is squarely within the Notice of Contemplated Relief, and is appropriate to the record in this case.

On appeal, Complaint Counsel merely 00 1.000006n Relief, and is appropriate to the record in th

incentives. CCPFO ¶II.F. It is indeed strange that Respondents now claim it is unfair that Complaint Counsel proposes a narrower remedy to address the arg

[12] Respondents agreed that on the closing day of the Acquisition PDM would terminate the employment of each employee of the EC and Water Divisions and that the terminated employees could accept employment with the acquirer. Asset Purchase Agreement ¶7.1.1. CX328 at CBI 001299-CHI.

[13] In their Revised Witness List of June 30, 2002, Respondents listed some thirteen witnesses that they intended to call on the issue of remedy. But by their own volition, at trial, they called only one, Gerald Glenn.

viability and competitiveness in the relevant markets. Consequently, these provisions are necessary for effective relief.

As discussed in CCACB, CCACB-74-75, the record demonstrates that the know-how and expertise of the former-PDM personnel contributed to PDM's competitive track record and reputation in the industry. *See, e.g.*, IDF-168, 170-71, 252, 323, 328-31, 334, 415-16, 578-79. The ALJ agreed and found that "educated, experienced, and knowl

[14] The Supreme Court decisions in *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395

acquisition, CB&I and PDM's EC Division competed both in the United States and in markets outside the United States. PDM EC's revenues from sales outside the United States contributed to the division's profitability and helped support its design and engineering work. In order to assure the viability of the divested business it must likewise be in a position to compete outside the United States as well as in the United States.

Finally, Respondents object to use of Respondents' pre-acquisition respective revenues as a benchmark for determining the portion of the merged firm's current contracts that should be assigned to the acquirer. RRCRB-54-55. In attempting to reestablish the competition that existed prior to the merger it is appropriate to look at CB&I's and PDM's respective positions in 1999, the last full year before Respondents entered into their acquisition agreement. In the summer of 2000, Respondents signed the deal and no longer aggressively competed against one another. Contrary to Respondents' arguments, there is no reason to believe that CB&I and PDM would not have captured similar shares of revenues in subsequent years if the acquisition had not transpired, or if PDM's EC and Water Divisions had been acquired by ano

The gist of Respondents' arguments is that, because the exact amount of contracts PDM would have today absent the merger cannot be determined with certainty, the Commission's recourse is "simply throwing up our hands and surrendering all chance that this Section 7 violation will be remedied." *Diamond Alkali*, 72 F.T.C. 700 at 751. The Commission should reject this argument now, as it did in *Diamond Alkali*. *Id.*

3. Cloning the merged firm's confidential information is necessary because unscrambling is not practicable.

Respondents argue that the acquirer should not be given access to the merged firm's customer files and that confidentiality and non-compete agreements should be preserved as impediments to employment by the acquirer of the merged firm's employees. RRCRB-46, 56, n.65. Since the Acquisition, CB&I has absorbed and integrated PDM employees and all of PDM's confidential customer files. The merged firm has built on the confidential information of CB&I and PDM and has continued to develop confidential information, including development of estimates and proposals for future work. Following the divestiture, CB&I will continue to use the merged firm's confidential information in competing for new business. The acquirer must be in a position to compete against CB&I for this work immediately following divestiture.

It is impracticable to purge CB&I of confidential information it gained through the Acquisition and the subsequent confidential information that grew therefrom. Therefore, CCPFO provides, insofar as possible, that both CB&I and the acquirer step into the merged firm's shoes with respect to confidential information held by the merged firm at the time of divestiture. Following divestiture CB&I and the acquirer will build separately on this confidential information and use it to compete for and conduct new business. As Complaint Counsel explained in CCACB, deterrence of collusion is one reason why CCPFO ¶ V. provides for the appointment of a Monitor. CCACB-76.

[17] *MSC Software Corp.*, Docket 9299, Decision and Order ¶ V.C.3., November 1, 2002 ("Respondent . . . shall eliminate any confidentiality

[18] Judge

extends as well to customers such as BOC and Air Liquide who settled for a LIN/LOX tank from a less experienced and less qualified supplier.[19]

Contrary to Respondents' arguments, the evidence of price increases for at least seven of these customers (Williams, BP, CMS, Linde, Praxair, Spectrum Astro, and **[ ]**,) do not depend on comparing firm to budget pricing. RRCRB-34. Moreover, Respondents' argument that a budget price is less precise than a firm, fixed bid price (RRCRB34-36), fails to address why, after entering into the acquisition agreement, Respondents increased the ***margins*** in their price qt7c00 0.00000 0.000000000 0

[19] *See id*. at 13-14, identifying resources expended by customers to avoid being charged monopoly prices as an additional dead weight cost of monopoly.

[20] Respondents characterize CB&I's BDM as "an entry-level CB&I salesperson." RRCRB-34. This mischaracterizes Mr. Miles who was assigned by CB&I with responsibility for the TRW account as well as other important accounts. CRF-6.127.

[21] Respondents chose not to call Miles as a witness at trial to explain his actions. The Commission can infer that Mr. Miles's testimony, if given, would have been unfavorable to Respondents. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Respondents argue that CB&I's BDM contacted Howard "to determine if Howard would be willing to serve as a subcontractor to CB&I" on TRW's TVC project. RRCRB-34. But there is no evidence to support such a pretext, and it is refuted by Mr. Scorsone who testified that Mr. Miles had no authority regarding subcontracting. Scorsone, Tr.5059-61; CRF-6.127.

president informed CB&I's BDM that Howard had already submitted an initial bid for the TRW project. Gill, Tr.245, 252-53, 274. Instead of ending any further conversation with Howard about the TRW project, CB&I's BDM proceeded to propose that Howard and CB&I "coordinate" on the next bidding round for the TRW project. Gill, Tr.247, 274; CPF-1173-1177. Mr. Neary of TRW testified that the effect of CB&I's proposal to Howard on TRW is "we're basically hosed."[22] Neary, Tr.1451; CPF-1177-78.

B. During negotiation of the Acquisition executives of CB&I and PDM discussed Spectrum Astro's request for final bids; CB&I management then outlined coordination strategies for CB&I and PDM to avoid price competition prior to the Acquisition; keen competition between CB&I and PDM ceased; CB&I increased price and margin further following the Acquisition.

Complaint Counsel detailed in its proposed findings the vigorous pre-acquisition competition between CB&I and PDM for the Spectrum Astro TVC project (CPF-1108-1118); the inappropriate communications between executives of CB&I and PDM concerning Spectrum Astro's request for bids during negotiation of the Acquisition agreement (CPF-1119-1124); written communication within CB&I detailing proposed responses by CB&I and PDM to avoid pre-acquisition price competition for the project (CPF-1125-1129), including "CB&I and PDM bid high" (CPF-1129); and the result that both CB&I and PDM did, in fact, bid high, causing a witness who had been involved in CB&I's bidding on the project to acknowledge that he did not see the same sort of competitive pricing behavior on the November 2000 bidding as he had seen in previous competition between CB&I and PDM (CPF-1130-1136; Scully, Tr.1193-1194). Respondents simply disclaim that all of this is any evidence of collusion. RRCRB33-34.

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[22] This was not, as Respondents now claim (RRCRB-34 n.41), merely a response to a hypothetical. Neary, Tr.1451 ("[I]t's not right . . . because we're not going to get a competitive bid from two independent companies.")

As Complaint Counsel noted in the Cross-Appeal Brief, the Commission need not decide whether collusion actually occurred. CCACB-49. The question instead is whether competition and customers have been harmed by the Acquisition. Spectrum Astro clearly lost the benefit of competition once CB&I and PDM began Acquisition discussions and turned their attention to ending fractious competition rather than winning the job. CB&I and PDM management recognized that whichever company won the bid, the business would belong to the merged firm; there simply was no one else to whom the customer could turn, and Respondents used the opportunity to increase price.

But harm to Spectrum Astro did not end with the Acquisition. Following the Acquisition, CB&I took advantage of project delay to increase the price of the project by 11.7%. CPF-1140-1154. The customer agreed with Respondents' counsel's assessment that CB&I simply saw an opportunity to "stuff some extra profit into the work," because, following the Acquisition, CB&I was not satisfied e000.00 rgBT518.5u623.76BT108 0.00 0.00 rt f38.80000ec

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another opportunity to raise price following the Acquisition. CPF-1213-14.

In light of the detailed data already known to CB&I and the customer's request for renewal of the fixed, firm price, Respondents' suppositions about the uncertainty of budget pricing are beside the point. **[ ]**, Tr. 1933-35.

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[23] PDM's analysis is confirmed by PDM's and CB&I's price quotes to BP for alternative size tanks. CPF-869-870, 882-928.

[24] The customer requested the price quote from CB&I because "[it is] the only one who can give a

Respondents' argument that CB&I's 8.7% price increase on a another Praxair tank should be ignored, because the comparison is based on budget prices, overlooks the fact that both tanks use Praxair's standard design and that Praxair expected that the post-Acquisition price should be lower than PDM's pre-acquisition price. CPF-1077-1084; CPF-1079 CX444; CX446; JX7 at 70 (Knight Dep.).

I. The ALJ improperly disregarded or excluded evidence regarding anticompetitive effects.

Complaint Counsel ask that the Commission consider Complaint Counsel's pedagogical-device summaries, their underlying exhibits, and the proposed findings based thereon: CPF-801, 825, 826, 827, 828, 829, 830, 869, 882-896, 902-911, 912-928, 935, 1043-1052, and CRF-7.106. The graphs include detailed citations to the record for the data contained therein. Certain proposed demonstrative exhibits corresponding to some of the graphs were used during the cross examination of Dr. Harris and some of these were marked or modified by Dr. Harris. CX1760, corresponding to CPF-882, was received in evidence after Dr. Harris substituted the abbreviation "WGT" for the name "Whessoe" appearing in the legend of the graph. RX 157 at **[ ]** 02 002; see Harris, Tr.8035-42. Based on this difference between CPF-882 and CX 1760 (*e.g.*, "WGT" instead of "Whessoe"), Respondents argue that CPF-882 is misleading and should be stricken. RRCRB 42, n.50. Afevidence afte

Respondents further argue that Mr. Vaughn's testimony was properly excluded notwithstanding that at the start of trial and at the time of his deposition, Mr. Vaughn was Respondents' designated expert on bids based on his many years of experience as a CB&I estimator. CCACB-59. His sworn testimony regarding the comparability of budget estimates and firm bids is squarely within his expertise.

The ALJ improperly disregarded evidence involving price quotes. CCACB-58-60. An initial price quote, sometimes called a budget price, may be a supplier's only chance to quote a price to a customer. CRF-7.8-13. As illustrated by **[ ]** price quote to CMS and BP's decision to sole source with CB&I, customers make purchase decisions based on budget prices and accept or reject suppliers based on budget prices. *Id.* CB&I adjusts its price quotes to reflect recent actual prices, as it did in using the Cove Point LNG price to quote prices to **[ ]**. Price quotes and firm bids are both measures of price in the market. CMS and **[ ]** each accepted CB&I's price quote as the price it would have to pay. CRF-7.13, CRF-12.15. While CB&I can adjust the price up or down after providing a price quote, it does so based on the competition it perceives and does not lower the price unless it has to. Consequently, CB&I has quoted higher prices following the Acquisition.

III. CONCLUSION

For the foregoing reasons Complaint Counsel respectfully requests that the Commission enter Complaint Counsel's Proposed Final Order as the Commission's Final Order in disposition of this matter.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Reply Brief of Counsel Supporting the Complaint **(Public Version)** to be delivered by hand to:

The Commission
Federal Trade Commission
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Washington D.C. 20580