UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

To: Commission

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' PETITION TO RECONSIDER

Summary

Respondents' omnibus, untimely petition asks the Commission to undertake the herculean task of reopening the record and fully reconsidering both its decision on liability and its decision on remedy. None of these requests is tenable and neither decision needs to be revisited.

Liability Issues

As to liability issues, and in light of the Commission's rules on this subject, there are three principal reasons why respondents' petition should be denied:

(1) It is clear that respondents, by selectively presenting facts and selectively choosing the time at which to present them, are seeking to game the decisional process and intend to continue to try to do so.

For two years, from the close of the record, through the post-trial briefing, the Initial Decision, briefing and oral argument to the Commission, indeed, up until the Commission's

decision, respondents were content to stick with the story they told at trial -- that CB&I had lost the Hackberry LNG project to Skanska Whessoe. Now respondents try a new tack. They confess that CB&I, in fact, remained in contention for the project, throughout this period, and ask that the Commission reconsider its decision and reopen the record, in light of this "development," pursuant to Rule 3.55, 16 C.F.R. § 3.55, on the claimed grounds that the decision raises new questions upon which respondents had no previous opportunity to argue before the Commission.

Respondents sidestep the extensive evidence in the record that following the Acquisition, CB&I increased price significantly, became more selective in the work it pursued, and refused to provide front-end engineering and design ("FEED") services for proposed LNG projects, thereby forcing customers either to contract with someone else or commit to sole-source the entire project with CB&I. Respondents single out the few customers who, in respondents' words, did not "knuckle under" to CB&I as proof that CB&I's acquisition of its closest competitor did not substantially lessen competition. Respondents' Petition to Reconsider the Opinion and Order ("Respondents' Petition) at 9 (filed Feb. 1, 2005).

(2) The facts that respondents now selectively present show, at most, only that some initial steps toward viable entry have been taken in the four years since the Acquisition, a fact that is neither surprising nor inconsistent with the Commission's opinion.

Economic testimony in the record accurately predicts that exercise of market power by CB&I, following its acquisition of its closest competitor, PDM, will cause some jobs to fall to the next closest competitors. Complaint Counsel's Proposed Finding of Fact ("CPF") 291-300 (filed Feb. 25, 2003). This is the expected result of profit-maximizing behavior by CB&I, whose CEO, Mr. Gerald Glenn, conceded that CB&I can "win the work every time" but will "just sit and watch" if others "want to dive in and take the work for less than they can execute it for."

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if respondents' petition reveals post-trial evidence that must be considered, then every time respondents are awarded a contract Complaint counsel must be allowed to move to reopen the record to examine that process, if only for rebuttal purposes.

In sum, no new questions are raised by respondents' petition as to liability. Rather, respondents seek to turn the Commission's final decision in this case into the functional equivalent of merely issuing (another) complaint. Enough is enough. Respondents' petition must be denied.

Remedy Issues

As to the Final Order, respondents unsurprisingly reassert what they have said at every other stage of this proceeding – that, notwithstanding the clear language of the Complaint, they are shocked by the result. In fact, respondents may be disappointed, but they cannot be surprised. As we show in Part IV below, respondents fail to identify any questions raised by the Final Order upon which they have had no opportunity to argue.

I. THE MARKET CHANGES ALLEGED BY RESPONDENTS DO NOT JUSTIFY RECONSIDERATION OF THE OPINION AND REOPENING OF THE PROCEEDINGS.

A. Legal Framework

Rule 3.55 of the Commission's Rules of Practice requires that a petition for reconsideration "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." 16 C.F.R. § 3.55. In order to prevail on a petition to reconsider, respondents must demonstrate that the issues raised in their petition were never explored in the record. In *American Medical International*, the Commission granted complaint counsel's petition for reconsideration of the prior notice requirement of the Commission's order where the record showed that there was no

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Here, respondents' assertions that recent developments in the LNG tank market are

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[4] At oral argument, Complaint counsel noted: "In terms of LNG [projects], yeah, it was about one and a half [projects] a year or one a year up until the time of the acquisition. After the acquisition, there are already 11 in play because that business is now going up. Liquid natural gas is a big issue in this country. Now, that business is now going up. Mr. Glenn, their CEO, testified that business is now growing." Transcript of Oral Argument Before the Commission ("OA Tr.") at 48:3-10 (November 12, 2003).

[5] Mr. Brian Price, of Black & Veatch, testified that "around two dozen terminals are in various stages of either engineering or early development" in the United States, "as well as one or two prospects in the Bahamas." Price, Tr. 592:9-22. CB&I's CEO also agreed that United States demand for LNG projects had increased markedly. Glenn, Tr. 4090:21-4091:13; *see* Glenn, Tr. 4253:14-19.

Respondents have already argued that, as demand for LNG increases, foreign conglomerates and other competitors have entered the LNG market. One of the examples of entry offered by respondents at trial is the Freeport LNG project.[6] In their appeal brief to the Commission, respondents asserted repeatedly that "the relevant markets have changed dramatically, as numerous strong competitors have entered the relevant markets."[7] Respondents again argued that "the market has changed" at oral argument: "There's been more demand,

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[6] At trial, Mr. Glenn testified that Cheniere hired Technip to do the FEED study for the project, and later, awarded the Freeport, Texas, LNG terminal project to Technip. Glenn, Tr. 4105:9-22 (state of mind); Glenn, Tr. 4107:21-4108:11; RX 9; RX 10. Mr. Glenn further testified that Technigaz-Zachry is a potential competitor for the Freeport LNG project. Glenn, Tr. 4141:23-4145:9 (state of mind).

[7] Indeed, this is one of respondents' first arguments. Respondents' Appeal Brief ("RAB") at 1 (filed Aug. 8, 2003) ("Since the Commission last reviewed this transaction in October of 2001, the relevant markets have changed dramatically, as numerous strong competitors have entered the relevant markets. The LNG market is a case in point."). In particular, respondents argued that LNG demand in the U.S. LNG market was increasing and that meaningful entry had resulted. *See id.* at 12 ("Several powerful conglomerates have recently entered the U.S. LNG market and have established themselves as formidable competitors. Other major competitors stand ready to enter as demand increases."); *id.* at 20 ("Due to increased demand, three large multinational corporations have already entered the market, and several others are planning to do so."). While the Commission acknowledged an increase in demand, the Commission rejected respondents' argument that the entry described by respondents was a meaningful constraint. Op. at 63-66.

services to the sale of tanks. Mr. Glenn explained at trial: "We choose not to sell engineering services. We are not structured and staffed in a manner that would allow us to sell pure engineering services. Neither are we interested in selling those kinds of services." Glenn, Tr. 4056:19-22; *see* Glenn, Tr. 4233:3-7; CCACB at 24. Therefore, in order to obtain FEED services for an LNG project, a customer must either agree to source the entire project with CB&I or must turn to someone else to perform the FEED work, knowing that CB&I may then refuse to bid on any aspect of the project. CB&I's strategy has paid off for CB&I by allowing it to avoid competing on price for most LNG projects. The consultant to the Hackberry LNG project testified that a sole-source supplier does not have to develop the lowest cost and can therefore "put more profit into the project because you don't have any competition." Price, Tr. 558:25-559:3.

CB&I recognizes, however, that its strategy of forcing LNG project customers to look to someone other than CB&I to provide FEED services means that if the customer is satisfied with the FEED engineering services "that could translate into an EPC contract." Glenn, Tr. 4233:1-2. The Hackberry, Freeport, Corpus Christi, Sabine Pass, and Long Beach LNG projects, relied on by respondents in their petition, are each instances in which CB&I declined to provide FEED services for the project, other than as part of a sole-source award of the entire project to CB&I, and the customer was forced to turn to someone other than CB&I.[11]

Profits are maximized at a smaller quantity than are revenues"); *id.* at 92 ("a monopoly knows that it can set its own price and that the price chosen affects the quantity it sells.").

[11] Under these circumstances, the instances cited by respondents of customers turning to companies other than CB&I for FEED services and EPC contracts are precisely the type of evidence that is subject to manipulation by respondents. *See Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."). In the Freeport project, Freeport LNG had to turn to someone other than CB&I to provide FEED engineering

motion to reopen the record pursuant to Rule 3.54(a), 16 C.F.R. § 3.54(a).[13] At the same time that respondents represented to the Commission that Skanska's win of the Hackberry project was dispositive in this case,[14] CB&I was preparing to rebid the Hackberry project. Instead of filing with the Commission a petition to reopen the record to inform the Commission that CB&I would be rebidding the Hackberry LNG project, respondents again stuck with their story that CB&I had already lost the Hackberry LNG project to Skanska Whessoe.

At oral argument, respondents had another opportunity to disclose the latest developments in the Hackberry project. Instead, with CB&I's CEO in attendance, respondents again used the Hackberry project to illustrate the competitive significance of Skanska Whessoe.[15] Significantly, around the same time as the oral arguments, [

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[13] Rule 3.54(a) provides, in pertinent part, that "[u]pon appeal from or review of an initial decision, the Commission . . . will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a). The Commission outlined the standard for reopening the record in a pending administrative proceeding in *Brake Guard Products, Inc.*:

> In deciding whether to reopen the record to receive supplemental evidence, the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party.

Brake Guard Products, Inc., 125 F.T.C. 138, 248 n.38 (1998). The Commission reaffirmed this standard in *Rambus Inc.*, Docket No. 9302, Order Directing Redesignation of the Record, at 2 (F.T.C., Dec. 6, 2004). The petition to reopen in *Brake Guard* was filed two months after the date the initial decision issued; in *Rambus*, the petition was filed approximately four months after the initial decision issued.

[14] In their appeal brief, respondents represented to the Commission that: "Post-Acquisition competition for the Dynegy project in Hackberry, Louisiana ("the Dynegy Project") is dispositive of this case with respect to the LNG market." RAB at 14.

[15] "[T]he example that I would like to focus on which, in our view, is dispositive is Dynegy Energy Company, the project at Hackberry, Louisiana." OA Tr. at 6 (Kelley).

[16] Attachment A and the accompanying text are filed temporarily under seal in accordance with Commission Rule 4.10(g), 16 C.F.R. § 4.10(g).

[17] *Chrysler Corp.*, 87 F.T.C. 719, 750 n.38 (1976). Three weeks after oral argument in *Chrysler* complaint counsel filed an application to supplement the record with material produced by respondent. *Id*. On appeal, the D.C. Circuit ruled that under the circumstances, admission of the materials was not prejudicial: "Only documentary evidence produced by the petitioner itself was admitted; this evidence was unavailable at the time of trial; and the Commission found that FTC counsel had acted with due diligence in bringing the material to the Commission's attention." *Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977).

[18] Slow entry is not sufficient entry.

As the Commission noted in its decision, in order for entry to be meaningful, it must constrain CB&I's prices at the level that existed prior to the Acquisition.[19] In reviewing the history of CB&I's loss of one project (Dynegy) against its post-acquisition wins,[20] the

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[19] Entry that will deter or counteract the likely anticompetitive effects of the Acquisition cannot be a "hit and run" exercise. Entry is sufficient only if the entrant restrains CB&I at the same pre-merger price levels and as consistently as PDM did. CPF 294; *Merger Guidelines* § 3.0 ("Entry that is sufficient to counteract the competitive effects of concern will cause prices to fall to their premerger levels or lower."). Both economic experts agreed that entry by new firms would not restore the competition lost through an anticompetitive merger if the entry is at a price above the pre-merger price. Simpson, Tr. 3151-2; Harris, Tr. 7438; CPF 295. Dr. Harris acknowledged that entry will not keep prices from rising above the preacquisition level if entry is only profitable at higher prices. Harris, Tr. 7451. The mere fact that entry has occurred following an acquisition does not mean that the entry is sufficient to restore the premerger competitive environment. Harris, Tr. 7436. Entry by firms who can only profitably enter at prices above the competitive level would not restore competition. Harris, Tr. 7438; CPF 297. Dr. Simpson testified: "[T]he competition between CB&I and PDM EC that existed prior to the acquisition led to lower prices for buyers than whatever competition exists after the acquisition among CB&I and the foreign firms such as Skanska/Whessoe, TKK/ATV and Technigaz/Zachry." Simpson, Tr. 3347; CPF 301.

[20] Respondents' petition specifically fails to mention CB&I's post-record capture of the following projects:

- two lump-sum turnkey contracts for LNG terminal expansion projects at Lake Charles, Louisiana, for Trunkline LNG Company (Southern Union Company). http://www.cbiepc.com/ir/release.aspx?releaseid=119503, Attachment C ("CB&I Wins EPC Contract for Expansion of U.S. LNG Terminal" (October 7, 2003)) and http://www.cbiepc.com/ir/release.aspx?releaseid=136998, Attachment D ("CB&I Wins Follow-On Award for Further Expansion of U.S. LNG Terminal" (June 14, 2004));

- a lump-sum turnkey contract for an LNG peak shaving plant for Yankee Gas in Waterbury, Connecticut. http://www.cbiepc.com/ir/release.aspx?releaseid=145806, Attachment E ("CB&I Wins LNG Peak Shaving Facility Award" (October 19, 2004));

- the lump-sum turnkey contract for a major expansion of the Cove Point LNG terminal for Dominion Resources, which includes two LNG tanks. http://www.cbiepc.com/ir/release.aspx?releaseid=150752, Attachment F ("CB&I Wins Major U.S. LNG Expansion Project" (December 20, 2004)).

Each of these projects were either in negotiation or in the bidding stage during trial, were discussed extensively in the record, and were projects on which respondents alleged they faced strong competition from multiple foreign sources. Findings of the Administrative Law Judge's

Commission specifically found "the circumstances surrounding most of these projects suggest that the new entrants do not constrain CB&I in any meaningful way." Op. at 59.

The probative value of respondents' additional evidence is diminished further by the fact that CB&I has chosen to remove itself from the bidding for initial engineering work (FEED) on LNG projects.[21] CB&I repeated this conduct on Cheniere's Corpus Christi and Sabine Projects, where CB&I offered to provide technical services for the FERC approval process only if Cheniere would agree to negotiate exclusive, sole source, EPC contracts for each project. Respondents' Petition at 9; Declaration of Ronald Blum ("Blum Dec.") ¶ 4. The fact that, in respondents' words, "Cheniere did not feel compelled to knuckle under to CB&I" (Respondents' Petition at 9), and chose Bechtel instead to manage the project as an EPC is hardly evidence that competition has returned to pre-acquisition levels or that companies are comfortable dealing with new entrants. In fact, that Bechtel has asked CB&I to update its bid for one of the LNG tanks, despite Cheniere's announcement that it has chosen MHI/Matrix as the LNG tank constructor for both projects (Respondents' Petition at 10), suggests uneasiness on Bechtel's part with the choice of MHI/Matrix.

Similarly, award of the EPC contract for the LNG terminal in the Hackberry Project sheds no light on whether the price of the LNG tanks was higher than it would have been if

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Initial Decision, dated June 27, 2003 ("IDF") 114-132.

[21] Respondents incorrectly assert that the Commission placed "great weight" on misplaced optimism in "testimony that CB&I was confident it would obtain the award for the Freeport LNG project." Respondents' Petition at 8, n.18, citing Op. at 61. Respondents are doubly wrong. The Commission accurately cited Mr. Glenn's testimony in support of the observation that "CB&I's CEO even testified that he believes CB&I to be in the running for this project." Op. at 61. Mr. Glenn accurately predicted that CB&I's choice not to provide FEED engineering services increased the likelihood that if the Freeport project proceeded, it might be contracted to someone other than CB&I. Glenn, Tr. 4232:23-4233:2.

[22] LNG storage tanks account for a fraction of the cost of an LNG import terminal. Price, Tr. 541:11-16 ("It's in the range of about 30 percent of the cost of the facility would be in the LNG tank, ballpark"). The three Hackberry LNG tanks were estimated, at trial, to cost approximately $150 million out of a total project cost of about $700 million. Kelley ,Tr. 331 ("are you aware that Skanska/Whessoe has been hired and is the EPC contractor for a $700 million import terminal in Hackberry, Louisiana?"); Price, Tr. 603:1-4 (budget price $55 million for each of three LNG tanks); Simpson, Tr. 3776:20-24. At $150 million, the three LNG storage tanks would represent 21.4 percent of the project cost.

premerger levels." *Merger Guidelines* § 3.0. None of the asserted facts suggest that entry "would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of the Acquisition. *Id*.

B. Respondents' Proposal to Reopen the Record Based on their Business Managers' Accounts Is Prejudicial.

The selective, supplemental information now presented by respondents consists of immaterial and unreliable evidence, which, even if had been timely presented at trial, would properly have been excluded by the ALJ under Rule 3.43(b). The prejudice in reopening the record to admit this kind of evidence is particularly great and outweighs any relevance it may have to this case, 16 C.F.R. § 3.43(b), and should not outweigh the substantial relevant, material and reliable evidence that was admitted during the trial by the ALJ in accordance with Rule 3.43(b).[23]

Respondents base their petition on the declarations of three business development managers whom respondents, at trial, disparaged as unreliable and lacking authority to set prices or make strategic decisions. *See* Respondents' Proposed Finding ("RPF") 6.132 ("Mr. Miles is an entry-level salesperson, and not a CB&I executive. (Scorsone, Tr. 5061-62). Mr. Miles does not have the authority to set contract prices, set bidding strategy . . . . (Scorsone, Tr. 5062)."); *see* Complaint Counsel's Response to RPF 6.132 ("CCRRPF"); CCRRPF 5.224). At trial, respondents trivialized the position of these employees, dismissed as uninformed the documents

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[23] "Cases must be decided on the law and facts as they exist at the evidentiary hearing or trial and not re-decided as later events occur, except in the most unusual circumstances; judicial proceedings cannot be denied finality and repetitively litigated." *Ulloa v. City of Philadelphia*, 692 F. Supp. 481 (E.D. Pa. 1988). *See Federated Dep't Stores v. Moitie*, 452 U.S. 394, 402 (1981) ("the interest of the state requires that there be an end to litigation"). If the Commission were to grant respondents' petition the Commission would have to entertain a motion to reopen the record and reconsider its decision, in this as well as in other cases, every time a project is awarded.

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The Notice of Contemplated Relief contained in the Commission's Administrative Complaint makes clear that respondents have been on notice, since service of the Complaint, that:

the Commission may order such relief against respondents as is supported by the

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Commission on appeal from the Initial Decision. RAB at 53-54; *see id*. at 56 ("no evidence that creating an independent company from the ribs of CB&I would be practical, desirable or effective"; "any evidence showing that customers would favor disassembly of CB&I.").

[26] Section 3.54(a) of the Commission's Rules of Practice provides:

> Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, *exercise all the powers which it could have exercised if it had made the initial decision.*

that:

> [W]e adopt the findings set out in the Initial Decision to the extent they are not inconsistent with our Opinion. We also make a number of new factual findings based upon our own de novo review of the record. We order Respondents to divest such assets and take such actions as are necessary and appropriate to establish a viable competitor to the market that will restore the competition lost from this acquisition.

Op. at 10-11. Respondents effectively read out of the record in this proceeding the findings and determination by the ALJ in the Initial Decision that complete divestiture of the assets constituting the former PDM's Engineered Construction ("EC") Division was the *minimum* presumptive divestiture to remedy the effects of CB&I's illegal acquisition. Initial Decision of the Administrative Law Judge ("ID") at 121-22 (June 27, 2003). Because the Commission in its decision expressly reaffirms the findings of the ALJ that the record evidence *also* supports divestiture of the PDM Water Division assets,[27] respondents suggest this implies their obligation "to establish a viable competitor to the market that will restore the competition lost from this acquisition" should be narrowed to less than what comprised the PDM EC Division. It does not and should not; the record establishes the need for respondents to divest enough assets to re-create the combined former PDM EC and Water Divisions to assure the resulting entity will be competitively viable. Op. at 95; ID at 121.

Nor is the scope of the assets and products that comprised the former PDM EC Division in any doubt. Complaint Counsel's Proposed Final Order ("CCPFO"), attached to its answering and cross-appeal brief to the Commission, clearly defines the to-be-divested "Tank Business" to consist of:

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[27] The ALJ found that CB&I acquired both PDM's Engineered Construction ("EC") and Water Divisions (IDF 10, 12), and concluded that, "[a]lthough only the products made by the EC Division are within the affected lines of commerce, the Water Division must be divested along with the EC Division." ID at 121.

> the business of engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating, or selling any water storage tank or system; industrial process system, which includes, but is not limited to, any digester, absorber, reactor, and tower; flat bottom tank; pressure vessel or sphere; low temperature or cryogenic tank or system; vacuum chamber or system; steel plate fabrication; and specialty structures. The Relevant Products are included in the Tank Business.

CCPFO ¶ I.Y. The Commission's Final Order contains identical language. Final Order ¶ I.P.9. Significantly, the products included in the order provisions of both Complaint counsel and the Commission are derived from the offering memorandum describing the PDM EC Division for purposes of its proposed sale in July 2000. CX 385. Contrary to respondents' assertions, the products are clearly defined. *Id*. at 10-11. Specialty plate structures, for example, are defined as products such as wind tunnels, fusion facilities, and autoclaves. *Id.*

At trial, respondents clearly understood Complaint counsel's request for a broad divestiture package that included all of the products constructed by the former PDM EC Division. During his closing argument, respondents' counsel in fact warned the ALJ of the implications of Complaint counsel's proposed relief:

> Here, the companies have been fully integrated at the management level, at the engineering level, at the fabrication level, at the field erection level, every level ... and if you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business. So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff.

Business," as defined in the Final Order, constitutes a "new question that the petitioner had no opportunity to argue before the Commission," justifying reconsideration of the remedial provisions of the Final Order (Respondents' Petition at 13), is without merit. Respondents' arguments in the petition are not new and have been fully considered by the Commission in rendering its Opinion and in issuing the Final Order.

[28] CB&I's Worldwide Administrative Office is located at One CB&I Plaza, 2103 Research Forest Drive, The Woodlands, TX 77380 USA. http://www.cbiepc.com/locator/.

CX 385 at 1 (emphasis added). The offering memorandum stated that "PDM EC serves many of the largest global petrochemical and petroleum companies," and explained:

> [i]n order to effectively participate in the worldwide market, the Division has forged strategic alliances with engineering and construction companies in Mexico, India, China, Australia, South Korea and Saudi Arabia. These alliances provide PDM EC with local capabilities in these regions, including a skilled workforce, that *complement the Division's technology and project management capabilities*

> The Division also offers complete project management skills. These services are offered to customers seeking the Division's leading expertise in designing and erecting complex storage facilities. *Project management assignments allow the Division to showcase its strong talents to customers around the world and participate in projects where PDM EC cannot supply the required erection or other services due to location or other reasons. These projects are very attractive to the Division as they usually involve only higher margin management and design skills and carry far less risk.* In addition, PDM EC believes that project management assignments *help to enhance its reputation as the leading worldwide provider of valuable services* to petroleum, petrochemical and other customers.

Id. at 14 (emphasis added).

The Commission found that "the evidence overwhelmingly demonstrates that experience is the lynchpin to success in any of the relevant markets, which logically means that the transfer of employees is crucial to this divestiture's success." Op. at 96. Accordingly, the Final Order requires the transfer of employees "so that New PDM and New CB&I each have the expertise to complete the customer contracts assigned to them and to bid on and complete new customer contracts." *Id.* It is foreseeable that many of these employees will possess the skills necessary to design, manage and complete foreign as well as domestic projects. Given the fact that many Customer Contracts contain key employee provisions that require customer approval to replace key employees on a project (IDF 580), it is also foreseeable that the allocation of employees between the two new entities respondents are required to create (Final Order ¶ III.) may necessitate the transfer to the acquirer of Customer Contracts and assets relating to projects outside the United States.

The Commission determined to take the approach in its Final Order of giving "CB&I, which is best positioned to know how to create two viable entities from its current business, the opportunity to do so." Op. at 94. Respondents' obligation should be to restore fully the competition lost from CB&I's acquisition of PDM, even if that implicates projects and assets outside the United States. Consequently, respondents do not raise valid grounds for the

Commission to reconsider and circumscribe the scope of the Final Order's requirements as respondents request.

IV. RESPONDENTS HAVE FAILED TO DEMONSTRATE ANY GROUNDS FOR STAYING THE EFFECTIVE DATE OF THE DECISION AND ORDER.

Respondents request, pursuant to Section 3.55 of the Commission's Rules (16 C.F.R. § 3.55), that the Commission stay the effective date of the Final Order pending resolution of respondents' petition. *Id.* at 18. Complaint counsel oppose any stay of the entire Final Order. For the reasons stated above, we believe there are no grounds for a stay as respondents raise no new questions that warrant reconsideration of either the Commission's Opinion or the Final Order. Moreover, we believe the public interest in safeguarding the integrity of the assets comprising the Relevant Business pending appeal strongly counsels that provisions of the Final Order, other than divestiture requirements stayed by operation of Section 5(g)(4) of the FTC Act and except as discussed in our Answer to Respondents' Stay Motion (filed on February 7, 2005), become final and effective on the sixtieth day after service of the Final Order as provided by statute and the Commission's Rules.[29] 15 U.S.C. § 45(g)(2); 16 C.F.R.§ 3.56 (a).

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[29] In particular, these requirements include asset maintenance provisions and provision for appointment of a Monitor Trustee to oversee respondents' compliance with obligations to maintain assets.

V. CONCLUSION.

For the foregoing reasons, Complaint counsel request that respondents' petition for reconsideration be denied.

DATED: February 11, 2005.

Respectfully submitted,

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Steven Wilensky
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I hereby certify that I today caused:

One original and twelve copies of Complaint Counsel's Opposition to Respondents' Petition to Reconsider, to be served by hand delivery and one copy to be served by electronic mail upon:

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

One copy to be served by hand delivery upon:

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Commission Counsel

Dated: February 11, 2005

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Deborah Platt Majoras, Chairman** **Orson Swindle** **Thomas B. Leary** **Pamela Jones Harbour** **Jon Leibowitz**

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ATTACHMENT A

Temporarily under seal in accordance with Commission Rule 4.10(g), 16 C.F.R. § 4.10(g).

ATTACHMENT B

ATTACHMENT C

ATTACHMENT D

ATTACHMENT E

ATTACHMENT F