UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

DECISION AND ORDER PARTIALLY DENYING RESPONDENTS' PETITION FOR RECONSIDERATION AND DIRECTING FURTHER BRIEFING ON SPECIFIC REMEDY ISSUES

I. Introduction

On December 21, 2004, we issued our final decision in this matter and found that the acquisition by Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company ("CB&I" or "Respondents") of certain Pitt-Des Moines, Inc. ("PDM") assets was likely to lessen competition substantially in four relevant markets in the United States: (1) field-erected liquefied natural gas ("LNG") storage tanks; (2) field-erected liquefied petroleum gas ("LPG") storage tanks; (3) field-erected liquid nitrogen, oxygen, and argon ("LIN/LOX") storage tanks; and (4) thermal vacuum chambers ("TVCs").[1] Having concluded that the acquisition violated

[1]This Decision and Order uses the following abbreviations for third-party companies referenced herein: American Tank & Vessel, Inc. ("AT&V"), Aker Kvaerner ("Kvaerner"), Bechtel Corporation ("Bechtel"), British Petroleum ("BP"), Cheniere Energy, Inc. ("Cheniere"), CMS Energy ("CMS"), Dynegy, Inc. ("Dynegy"), El Paso Corp. ("El Paso"), Freeport LNG

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, we ordered CB&I to reorganize its Industrial Division (and to the extent necessary its Water Division) into two, separate stand-alone divisions and divest one of them.[2]

On February 1, 2005, pursuant to Rule 3.55 of the Commission's Rules of Practice, 16 C.F.R. §3.55, CB&I filed a Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth ("Respondents' Petition").[3] The petition alleges that demand in the LNG tank market has increased since the record's close and that new entrants have bid on and been awarded LNG tank jobs.[4] Respondents identify awards associated with four LNG projects as evidence of post-acquisition entry: (1) Dynegy's award of an LNG tank contract to Skanska; (2) Sempra's award of an engineering, procurement, and construction ("EPC") contract to Kvaerner/IHI; (3) Freeport LNG's award of an LNG tank contract to Technigaz/Zachry; and (4) Cheniere's award of an LNG tank contract to the MHI/Matrix team.[5] Based on these awards, the petition argues that "the competitive landscape has . . . undergone a sea-change, rendering inaccurate the Commission's predictions" on the difficulty of entry.[6] According to Respondents, these changed conditions necessitate that we reconsider our decision

---

Development LP ("Freeport LNG"), Ishikawa Heavy Industries ("IHI"), Matrix Service Co. ("Matrix"), Memphis Light, Gas & Water ("MLGW"), Sempra Energy LNG ("Sempra"), S.N. Technigaz ("Technigaz"), Skanska AB ("Skanska"), Toyo Kanetsu K.K. ("TKK"), TRW Space & Electronics ("TRW"), Whessoe International ("Whessoe"), Yankee Gas Services Co. ("Yankee Gas"), Zachry Construction Corporation ("Zachry"). All other company references use the company's full name or the only name referred to in the record.

[2]Op. at 105

[3]This Decision and Order also uses the following abbreviations for citations to the record:

Tr. – Transcript of testimony before the Administrative Law Judge
RAB – Respondents' Appeal Brief
CCACAB – Answering and Cross-Appeal Brief of Counsel Supporting the Complaint
RRCARB – Respondents' Reply and Cross-Appeal Response Brief
OA – Transcript of the Oral Argument on Appeal held November 12, 2004
CX – Complaint Counsel's Exhibit
Op. – Commission Opinion issued December 21, 2004 (*in camera*).

[4]Respondents' Petition at 2.

[5]*Id*. at 7-10.

[6]*Id*. at 2.

and rescind our order of divestiture.[7] In addition, Respondents assert that our Order imposed relief beyond that ordered by the Administrative Law Judge ("ALJ") and requested by Complaint Counsel in their cross-appeal. Respondents therefore argue that they did not have an opportunity to address the appropriateness of the remedy.

Complaint Counsel oppose Respondents' Petition[8] and argue that Respondents do not meet the standard for reopening the record, which limits a petition to new questions raised by a decision or order of the Commission that the petitioner had no opportunity to argue.[9] Specifically, Complaint Counsel assert that Respondents' Petition does not present a new question because, in this proceeding, Respondents have already raised the argument that post-acquisition entry constrains CB&I.[10] Complaint Counsel further argue that although Respondents' Petition contains new evidence, Respondents failed to timely raise this evidence, because the events described in the petition occurred prior to oral argument and the issuance of our decision.[11] In addition, Complaint Counsel argue that the evidence presented by Respondents does not show that the alleged new entry has restored the competition lost from the acquisition.[12] Finally, Complaint Counsel argue that the remedy raises no new questions under Rule 3.55.[13]

In this Decision and Order, we examine the two issues that Respondents' Petition raises – the sufficiency of entry and the relief in our Final Order – under two separate standards. We first discuss the requirements for granting reconsideration under Rule 3.55 and our reasons for rejecting Respondents' Petition under this standard. We then exercise our discretion under Rule 3.72(a) to consider the merits of Respondents' Petition. We find that Respondents have not shown that entry has restored the competition lost from the acquisition. We thus deny Respondents' Petition on the merits insofar as it raises issues concerning the effectiveness of new entry. Finally, we address Respondents' request that we modify our remedy, and we order further briefing from the parties on specific remedy issues.

---

[7] *Id*. at 18.

[8] Complaint Counsel's Opposition to Respondents' Petition to Reconsider, filed Feb. 11, 2005 ("Complaint Counsel's Opposition").

[9] Complaint Counsel's Opposition at 4 (citing 16 C.F.R § 3.55 (2005)).

[10] *Id*. at 6-9.

[11] *Id*. at 10-13.

[12] *Id*. at 12 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 3.0 (1992, as amended 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (hereinafter *Merger Guidelines*)).

[13] *Id*. at 27.

II. Standard for Granting a Petition for Reconsideration under Rule 3.55

Rule 3.55 requires that a petition for reconsideration "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."[14] This standard recognizes that litigation must end at some point, and that decision makers must render their judgment based on a finite body of evidence. We thus view reconsideration of a fully-litigated opinion and order as an "extraordinary remedy which should be used sparingly."[15]

A. Post-Acquisition Entry

Respondents' main argument – that increased demand has triggered entry that constrains CB&I post-acquisition – is not a new question raised by our decision. Rather, because the acquisition resulted in near-monopoly or monopoly in each of the relevant markets, this case turned on whether entry and expansion in the relevant markets could restore the competition lost from the acquisition. During the administrative trial, Respondents argued at length that demand in the LNG tank market had increased and spurred three new entrants with the ability to constrain CBI – Skanska/Whessoe, TKK's joint venture with AT&V, and Technigaz's joint venture with Zachry.[16] As support for Respondents' argument, they presented evidence that Dynegy considered bids from these three new entrants and excluded CB&I from bidding on its Hackberry import terminal.[17] At oral argument, Respondents again highlighted the Dynegy project and stated that this project was "dispositive"[18] of the case and showed that "CB&I has no ability to exercise market power."Ru ndents again h005 Tco

---

[14]16 C.F.R. § 3.55. Respondents' Petition addresses only the LNG tank market. In addition, Respondents request that if we re-open the record, they be allowed to present evidence of entry in the LPG and LIN/LOX markets. We presume that Respondents have presented their strongest case for reopening the record. Indeed, Respondents state that the evidence of post-acquisition entry in the LPG and LIN/LOX tank markets does not show "as dramatic a transformation" as the LNG tank market. Respondents' Petition at 2, n.3. Because we have found Respondents' Petition unpersuasive as to the LNG tank market, we conclude that we need not take evidence on the LPG and LIN/LOX markets.

[15]*See, e.g., Donald Riggs v. Anthony Auto Sales Inc.*, No. Civ. A 97-0507, 1998 U.S. Dist. LEXIS 21639, at *6 (W.D.La. Aug. 28, 1998) (applying this standard to a motion to reconsider under Fed. R. Civ. P. 59(e)).

[16]*See generally* RAB at 34-40.

[17]*Id*. at 35.

[18]OA at 6.

[19]*Id*. at 9-10.

entrants constrained CB&I's pricing for two sole-source contracts.[20] For example, they asserted that the customers could have terminated negotiations with CB&I and sought out another supplier had they not been satisfied with CB&I's price.[21]

Our Opinion specifically considered these assertions and rejected Respondents' entry argument. After an examination of the bidding history, entry conditions, and post-acquisition bidding evidence in the relevant markets, we concluded that:

> Respondents' evidence of entry into the LNG tank market and expansion of smaller incumbents in the LPG and LIN/LOX tank markets establishes neither that entry or expansion into these markets is easy nor that it has actually occurred at a level that will meaningfully constrain CB&I post-acquisition. Although some companies have shown interest in these markets, we find that this mere interest and intention to compete does not make them competitors sufficient to replace the competition lost from CB&I's acquisition of PDM.[22]

Respondents' Petition merely seeks to provide additional factual support for a position that Respondents have already argued. It thus does not meet the mandatory requirement of Rule 3.55 that the petition present only new questions raised by Commission decisions or orders.

Previously unavailable new evidence can form a basis for reconsideration provided that it meets Rule 3.55's requirements.[23] To present such evidence, however, a petitioner also must satisfy the standards for reopening the record and admitting new evidence. Among other things, a petitioner must demonstrate that it acted with diligence to bring forth the new evidence in a timely manner.[24] Respondents' Petition does not show that they have met this requirement. Rather, the evidence relied on by Respondents' Petition is a mixture of events that occurred before we issued our decision in December 2004 and events not accompanied by a date. For example, Respondents' Petition states that Dynegy sold its Hackberry facility to Sempra in

---

[20]RAB at 35-37; OA at 10-12.

[21]OA at 10-12.

[22]Op. at 90.

[23] *Cf. Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977) (upholding the FTC's decision to allow admission of new evidence where *inter alia* the evidence was unavailable at the time of trial). *See also Riggs*, 1998 U.S. Dist. LEXIS 21639, at *7 (stating that one ground for reconsideration under Fed. R. Civ. P. 59(e) is to allow the moving party to present "newly discovered evidence or previously unavailable evidence").

[24]*Brake Guard Products, Inc.* 125 F.T.C. 138, 248 n.38 (1998).

[25]Respondents' Petition at 7.

[26]*Id*. at Ex. 2.

[27]A petition to reopen the record may be filed prior to the ALJ's filing of his Initial Decision, 16 C.F.R §3.51(e), or before oral argument. 16 C.F.R. 3.54(a). *See also Rambus, Inc.*, Dkt. No. 9302 (Dec. 6, 2004) (Order Directing Redesignation of the Record); *Brake Guard Products, Inc.* 125 F.T.C. at 248 n.38 (noting the standard for reopening the record in a pending administrative litigation after trial has ended but before the Commission has issued its opinion). In addition, a petition may be filed before we issue our decision. 16 C.F.R. 3.54(a). *See Chrysler Corp.*, 87 F.T.C. at 750 n.38 (admitting materials three weeks after oral argument).

[28]*See Novartis Corp.*, 1999 FTC LEXIS 212, at *1 (Jul. 2, 1999) (denying a petition for reconsideration where respondent could have introduced evidence of the factual developments that occurred after the record's close at an earlier stage). *See also Riggs*, 1998 U.S. Dist. Lexis 21639, at *7 (a Rule 59(e) motion to reconsider may not be used to "present evidence that could have been raised prior to the entry of judgment").

[29]Respondents' Supplement to Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth, filed February 14, 2005 ("Respondents' Supplement") states that Cheniere awarded an LNG tank to MHI/Matrix on February 4, 2005. Because our Rules do not contemplate such a filing, we treat Respondents' Supplement as a request for leave to file the supplement and accordingly grant that request and analyze it on its merits. Unlike the other evidence presented in Respondents' Petition, the event described in this

[30]Respondents' Petition at 13-14.

[31]*Id*. at 14-16.

[32]*Id*. at 15-16 (quoting Final Order at 3-4).

[33]*Id*. at 16.

[34]Op. at 101.

[35]*Id*.

[36]CCACAB at 67-68.

[48]Posner, ANTITRUST LAW, *supra*

Respondents' economic expert, Dr. Harris.[56] Although our Opinion did not specifically address this particular piece of evidence, it considered and rejected both Dr. Harris' specific testimony and assumptions related to the Dynegy project and Respondents' general argument that the Dynegy project showed sufficient post-acquisition entry.[57] There is also no evidence in the record to suggest that LNG tank customers accept late bids, and Respondents do not point to a single example of such behavior in their petition. Therefore, we conclude that Respondents' theoretical argument is not supported by the evidence and reject it.

b. Sempra's Hackberry Project

Prior to oral argument, Dynegy sold its Hackberry facility to Sempra. Rather than keeping Skanska as the EPC, Sempra solicited new bids for an EPC contractor and ultimately awarded the contract to the Kvaerner/IHI team.[58] Respondents argue that because Kvaerner/IHI was awarded this project, sufficient entry in the LNG tank market has occurred.[59] Respondents' argument, however, does not account for the fact that an EPC contract is different from an LNG tank contract. An EPC contractor performs the engineering, procurement, and construction of the LNG facility and is essentially a general contractor for the entire facility. Because EPC contractors often subcontract the construction of an LNG tank, we find that an EPC award is not necessarily probative of competition in the LNG tank market.

With this distinction in mind, we find that the evidence presented by Respondents does not specifically address whether CB&I lost the LNG tank contract to Kvaerner/IHI. Rather,

---

[56]Tr. at 7349 (Dr. Harris testifying that Dynegy "had the opportunity to have CB&I bid and turned them down"). Dr. Simpson, Complaint Counsel's economic expert, addressed Dr. Harris' argument and stated that Dynegy might not violate its own bidding rules because "Dynegy would do business with vendors in the future, and if it looks as if Dynegy is willing to bend their rules in one case, that this could have adverse effects in their dealings with other firms." Tr. at 3338. *See also* Tr. at 3341-42 ("Another reason why a buyer would be – might be reluctant to accept a late bid is that the late bidder hadn't complied with the way the buyer wanted things done initially, and to the extent that the buyer thought that that might indicate that the person submitting the late bid would not follow the buyer's instructions in other areas, then the buyer – that would be a basis for why the buyer would be reluctant to purchase from that late bidder.").

[57]*See generally* Op. at 58-60, 83-88.

[58]Respondents did not submit this information until they filed the current petition. Instead, they argued in their appeal briefs and at oral argument that Skanska was a viable competitor, *because* it had been named EPC contractor for Dynegy's Hackberry facility. RAB at 15; OA at 6.

[59]Respondents' Petition at 5, 8 n.15.

Respondents present a declaration from Michael Miles, a CB&I employee,[60] which states that "CB&I lost the EPC contract for the Hackberry project to Aker Kvaerner/IHI. The tank subcontract went with the EPC contract."[61] This statement, of course, does not tell us whether Kvaerner/IHI might subcontract the LNG tank work to another company.

Even if we assume that Kvaerner/IHI will build the LNG tank, the special circumstances that surround this EPC award lead us to question whether this project demonstrates that the competition lost from the merger has been restored. In particular, it does not appear that CB&I had the bonding capacity necessary to win the EPC contract, which allegedly led to the LNG tank subcontract.[62] CB&I initially partnered with Bechtel to bid on this project.[63] Bechtel agreed to "perform the systems design work and procurement work" for the terminal (essentially to be the EPC contractor), and CB&I planned to undertake the "tank design and construction on a turnkey basis for Bechtel."[64] However, Bechtel withdrew at the last moment, and CB&I was forced to bid alone for the entire project.[65] Bechtel's very late withdrawal likely had a negative impact on CB&I's chance of winning the EPC award for this project. Presumably, CB&I agreed to submit a bid with Bechtel for this project because the Bechtel/CB&I combination presented certain advantages over a bid from CB&I alone.

c. Freeport LNG

At the time we issued our decision, Freeport LNG had awarded Technip the front-end engineering and design ("FEED") contract and hired S&B/Daewoo to help with the FERC

---

[60]Although we give Respondents the benefit of the doubt and credit Mr. Miles' declaration, so far as it goes, we note that CB&I cast some doubt on his credibility at trial. Mr. Miles contacted and met with employees at Howard Fabrication, CB&I's competitor, to propose that CB&I and Howard Fabrication work together to give TRW a price for an upcoming TVC bid. Tr. at 245. To explain why this possibly collusive conduct was not problematic under the antitrust laws, Mr. Scorsone explained that "Mike Miles is a first-level salesperson for CB&I," who does not set contract prices on his own authority. Tr. at 5061-62. *See also* Complaint Counsel's Opposition at 17.

[61]Respondents' Petition at Ex. 2 ¶ 10.

[62]In testifying about another project of similar size, CB&I's CEO, Gerald Glenn, stated that CB&I was rejected as EPC contractor, because it did not have the bonding capability necessary to handle the project. Tr. at 4151, 4939.

[63]Respondents' Petition at Ex. 2 ¶ 6.

[64]*Id.*

[65]*Id.* at Ex. 2 ¶ 7.

drawings.[66] However, because the EPC contractor had not yet been selected and possible tank constructors had yet not been identified, we concluded that this project was at too early a stage to be probative of competition in the LNG tank market.[67] After the record's close, Freeport LNG awarded Technip the EPC contract for this project, and Technip subsequently sent out requests for proposals ("RFPs") to potential tank subcontractors.[68] Respondents argue that because the tank subcontract was ultimately awarded to Technigaz/Zachry, this project demonstrates that competition has been restored post-acquisition.[69]

As with Sempra's EPC award, the evidence that Respondents presented about the Freeport LNG project raises serious questions about the probative value of this award. Mr. Miles' declaration states that "Technip had been working in association with Zachry in the project's FEED stage and . . . Zachry's involvement in the FEED and EPC contract gave Technigaz/Zachry the advantage in the tank bid."[70] Freeport LNG turned to Technigaz/Zachry for the preliminary work on this project only after CB&I refused to do such work – absent a commitment from Freeport LNG that CB&I be awarded a contract to build the entire facility on a turnkey basis.[71] CB&I's refusal to perform this preliminary work thus appears to have resulted in the LNG tank being awarded to Technigaz/Zachry. Consequently, this project is not good evidence that Technigaz/Zachry sufficiently constrains CB&I or that a future entrant could constrain CB&I.

d. Cheniere's Corpus Christi and Sabine Pass Projects

Respondents' Petition finally argues that Cheniere's selection of Black & Veatch to provide FERC assistance and FEED and of Bechtel to act as the EPC contractor for both its Corpus Christi and Sabine Pass projects shows that meaningful entry has occurred. These

[66]Respondents argued on appeal that this project is evidence that competition had been restored in the LNG tank market. RAB at 27.

[67]Op. at 62.

[68]Technip pre-qualified Technigaz/Zachry, Skanska/Whessoe, TKK/AT&V, S&B/Daewoo, and CB&I. Respondents' Petition at 8.

[69]*Id*. at 8-9.

[70]*Id*. at Ex. 2 ¶ 15.

[71]Tr. at 7065-66, 7069-70. *See also* Complaint Counsel's Opposition at 9-10 n.11.

that work.[72]

In the supplement to their petition, Respondents state that Cheniere awarded its Sabine Pass LNG tank contract to MHI/Matrix and argue that this award shows that new entrants have been able to establish a presence in the U.S. market.[73] We note that the sole evidence of MHI/Matrix's award comes from an amended declaration of Ronald Blum, which states that on February 4, 2005 he "learned that the LNG tank subcontract [sic] for the Sabine Pass project [had] been awarded to MHI/Matrix."[74] Even if we assume that Mr. Blum's information is correct, we doubt that this incident has sufficient predictive significance because CB&I insisted that Cheniere grant CB&I a sole-source turnkey contract as a condition for performing any of the preliminary work.[75]

e. Early-Stage Projects

Respondents also assert that Kellogg, Brown & Root has been chosen to do the preliminary engineering and FERC work for Mitsubishi's Long Beach project and that this award further evidences entry.[76] We find Respondents' argument flawed because Kellogg, Brown & Root does not build LNG tanks – CB&I's declaration from Mr. Miles even states that he expects CB&I to bid for the tank work.[77] Thus, Kellogg, Brown & Root's award is irrelevant to competition in LNG tank market.

With respect to the LNG tank work, Respondents also assert that "[i]t strains credulity to suggest that Mitsubishi would agree that its affiliate MHI is unqualified to build an LNG tank."[78] Respondents may be correct – Mitsubishi may think that its subsidiary, MHI, is technically able to build an LNG tank. However, as we stated in our Opinion, technical qualifications alone do

---

[72]Tr. at 521, 4936-37. Respondents' Petition recognizes this fact with respect to Bechtel and states that "Bechtel subsequently asked CB&I and others to submit new bids for the LNG tank construction on both projects." Respondents' Petition at 9.

[73]Respondents' Supplement at 3, Ex.1.

[74]*Id*. at Ex. 1 ¶ 9.

[75]Respondents' Petition at 9 (stating that "CB&I unsuccessfully attempted to negotiate a sole-source contract for the EPC position.").

[76]*Id*. at 10-12.

[77]Tr. at 4936-37; Respondents' Petition at Ex. 2 ¶ 16.

[78]Respondents' Petition at 10.

79

§ 3.43(d).

that LNG tank suppliers without a U.S. presence have failed to compete effectively with CB&I.[86]

Respondents did not argue at trial or on appeal that the attributes we have identified as necessary to compete were unnecessary. Rather, they asserted that three new entrants – Skanska/Whessoe, TKK/AT&V, and Technigaz/Zachry – could restore competition

---

[86]Lotepro teamed with Whessoe and Black & Veatch teamed with TKK to submit bids for MLGW's peak-shaving plant in Capleville, Tennessee, and their bids were well above that of CB&I. Tr. at 560, 3196-98.

[87]*See, e.g.*, RAB at 1 ("Each firm owns or is allied with a U.S. constructor to form a combination focused on competing for U.S. LNG projects").

[88]*See* Tr. at 4860-72.

[89]*Id*. Some customers also testified that although they would have concerns about contracting with foreign LNG tank suppliers, the new entrants' U.S. presence largely alleviated these concerns. *See, e.g.*, Tr. at 1322 (stating that if a foreign company teamed up with an experienced US tank construction firm, that action would alleviate Bechtel's concern with subcontracting the tank).

[90]The Opinion also discussed at length Technigaz/Zachry's lack of experience and why it was not a sufficient entrant. *See generally* Op. at 52-57. Respondents have not presented sufficient evidence to rebut these findings.

[91]Respondents also elicited testimony at trial that Kvaerner was not a good project manager. Tr. at 5543. Respondents took this position in an attempt to refute Complaint Counsel's argument that Whessoe's poor record in constructing LNG tanks outside of the United States would affect its ability to gain a foothold in the U.S. LNG tank market. Respondents accordingly argued that Kvaerner, which had previously owned Whessoe, mismanaged the projects at issue and that Whessoe would be more viable under Skanska's management.

Without such experience, it is unlikely that these suppliers have the ability to manage the project or attract and efficiently work with qualified field crews and local labor at the same level as PDM.[92] Indeed, Matrix testified at trial that it would not expect to win an LNG tank bid against CB&I given its inexperience.[93] The recent evidence of a Matrix win does not undercut this evidence, because the circumstances that surround the award do not demonstrate Matrix's ability to compete. We thus find that these firms do not have the capability to constrain CB&I at the pre-acquisition level.

We do not suggest that the new entrants will never be in a position to compete effectively with CB&I and thus constrain it. If the entrants that have been awarded LNG tank contracts successfully complete the projects, they will have established a foothold in this market. However, the evidence at trial established that it takes more than the successful completion of one LNG tank to be an effective competitor in this market. Thus, even if we were willing to assume that a few entrants will gain experience through their recent LNG tank awards, CB&I has not established facts sufficient to support a finding that such limited experience will allow those suppliers to constrain CB&I at the level PDM once did.

We also find evidence that the alleged new entrants' are unable to constrain CB&I in both CB&I's own conduct and its customers' responses. CB&I has adhered to an unwavering policy of insisting on sole-source contracts post-acquisition with little regard for whether its policy will cause some loss in sales.[94] Nonetheless, CB&I's market share appears to have *increased* post-acquisition – a trend that stands in sharp contrast to the dynamic that existed when CB&I competed with PDM. From 1990 to the acquisition, CB&I won five of nine of the LNG tanks awarded, PDM won the other four, and the value of the tank sales was roughly even.[95] The fact that CB&I has effected such an increase in market share while insisting on sole-source contracts suggests that CB&I obtained market power from the acquisition. Moreover, post-acquisition statements from CB&I's CEO suggest that CB&I views itself as unconstrained by new entry. At a shareholder discussion, he stated that CB&I can "win the work every time" if it chooses to do so.[96] Having carefully considered all this evidence, we adhere to our previous conclusion that the new entrants do not sufficiently constrain CB&I and that the competition lost

---

[92]Op. at 33-42. One of Respondents' witnesses even testified that it would consider IHI only if it were partnered with a U.S. construction firm. Tr. at 7017.

[93]Tr. at 1604.

[94]*See* discussion *supra* note 52.

[95]Accounting for the value of the tanks, Dr. Simpson estimated that CB&I's total sales amounted to 45.3% and PDM's total sales amounted to 54.7% of the U.S. LNG tank market Tr. at 3055-58; CX 1645.

[96]*See* Complaint Counsel's Opposition at 8.

[97]Contrary to Respondents' assertions, the evidence presented in their petition is also manipulable and can thus be viewed skeptically. *See General Dynamics Corp.*, 415 U.S. at 504-05 ("If a demonstration that no anticompetitive effects had occurred at the time of trial . . . constituted a permissible defense to a §7 divestiture suit, violators could stave off such actions

[99]It is worth noting that, as with the LIN/LOX tank market (which underwent a huge

[104]*Id*. (emphasis in original).

[105] *Du Pont*, 366 U.S. at 325.

[106]Final Order ¶ III.A.

[107]*Id*.

[108]*Id*.

[109]Op. at 94.

project CB&I constructs. They thus argue that we should eliminate the requirement that CB&I divest these unrelated assets.[110] Second, Respondents request that we modify the Final Order to make clear that the relief does not include assets beyond CB&I's domestic business and contracts. Although Respondents should have raised these issues well before now, we have decided to seek additional briefing on each of them. This approach should ensure that the divestiture will include the assets necessary for an acquirer to compete effectively in the relevant markets without imposing unnecessary requirements on CB&I and interrupting the efficient operation of the market.

Therefore, we direct Respondents to file a brief within 10 days of service of this Decision and Order. The brief should specifically identify those assets in the "Relevant Business" definition that are unnecessary to build the relevant products and the water tank products. To the extent the brief identifies any assets, we direct Respondents to explain why the inclusion of such assets is unnecessary, especially in light of the facts that: (1) the assets identified in the "Relevant Business" definition match those identified in PDM's offering memorandum to CB&I; and (2) the assets defined as CB&I's "Relevant Business" are integrated with the assets necessary to build the relevant products.[111] Respondents may include an alternative suggestion for a divestiture package that is consistent with our findings that "the additional water tank assets, allocation of customer contracts, and transfer of employees are necessary to ensure that the divested entity can compete effectively in the relevant markets" and that the provision of technical assistance and administrative services may also be needed.[112] Respondents' brief should also address which assets outside of the United States the "Relevant Business" definition encompasses and why the inclusion of such assets is unnecessary for an effective divestiture. Complaint Counsel may file a response within 10 days after service of Respondents' brief on these issues.

Accordingly,

IT IS ORDERED THAT Respondents' Petition, filed February 1, 2005, is **DENIED** to the extent it seeks reconsideration pursuant to § 3.55 of the Commission's Rules of Practice, 16 C.F.R. § 3.55; and

---

[110]Respondents also request that we require the acquirer to justify the divestiture of assets beyond those acquired from PDM. Respondents' Petition at 16. We reject this request. Our Opinion specifically discussed whether a divestiture of the assets acquired from PDM would remedy the harm from the acquisition. Based on the evidence, we concluded that a divestiture of solely those assets "leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by § 7 has not been satisfactorily eliminated." Op. at 103 (citing *DuPont*, 366 U.S. at 331-32).

[111]For example, the evidence shows that employees that build the relevant products also build other types of water tanks. Tr. at 4058-60.

[112]Op. at 99.

IT IS FURTHER ORDERED THAT Respondents' Petition is **DENIED** on its merits under § 3.72(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(a), insofar as it raises issues concerning the effectiveness of new entry; and

IT IS FURTHER ORDERED THAT Respondents file a brief within 10 days of service