
NO. 05-60192

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**CHICAGO BRIDGE & IRON COMPANY N.V.,
CHICAGO BRIDGE & IRON COMPANY,
*Petitioner***~~M~~

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.4, the Federal Trade Commission concurs with the petitioners that oral argument may aid in the Court's resolution of this case.

TABLE OF CONTENTS

TAB

TABLE OF AUTHORITIES

FEDERAL CASES – Cont’d	Page
<i>Foremost Dairies, Inc. v. FTC</i> , 348 F.2d 674 (5 th Cir. 1965)	20, 39
<i>FTC v. Algoma Lumber Co.</i> , 291 U.S. 67 (1934)	19
<i>FTC v. Cement Institute</i> , 333 U.S. 683 (1948)	21
<i>FTC v. Cardinal Health, Inc.</i> , 12 F. Supp. 2d 34 (D.D.C. 1998)	36, 39
<i>FTC v. H.J. Heinz Co.</i> , 246 F.3d 708 (D.C. Cir. 2001)	28, 34, 36, 43, 48, 51
<i>FTC v. Ind. Fed’n of Dentists</i> , 476 U.S. 447 (1986)	19, 20
<i>FTC v. Nat’l Lead Co.</i> , 352 U.S. 419 (1957)	20, 21
<i>FTC v. PPG Indus., Inc.</i> , 798 F.2d 1500 (D.C. Cir. 1986)	32, 48
<i>FTC v. Proctor & Gamble Co.</i> , 386 U.S. 568 (1967)	43, 47
<i>FTC v. University Health, Inc.</i> , 938 F.2d 1206 (11 th Cir. 1991)	28, 33, 48
<i>FTC v. Warner Comms.</i> , 742 F.2d 1156 (9 th Cir. 1984)	48
<i>Grand Union Co., In re</i> 102 F.T.C. 812, 1983 FTC LEXIS 61 (1983)	44

FEDERAL CASES – Cont’d	Page
<i>Harris v. Plastics Mfg. Co.</i> , 617 F.2d 438 (5 th Cir. 1980)	27
<i>Harris v. U.S.</i> , 19 F.3d 1090 (5 th Cir. 1994)	24
<i>Hospital Corp. of Am. v. FTC</i> , 807 F.2d 1381 (7 th Cir. 1986)	20, 27, 28, 33, 47, 48
<i>Humble v. Boeing Co.</i> , 305 F.3d 1004 (9 th Cir. 2002)	27
<i>Jacob Siegel Co. v. FTC</i> , 327 U.S. 608 (1946)	21
<i>Jim Walter Corp. v. FTC</i> , 625 F.2d 676 (5 th Cir. 1980)	19
<i>Kost v. Kozakiewicz</i> , 1 F.3d 176 (3 rd Cir. 1993)	27
<i>MSC.Software Corp., In re</i> , FTC Docket No. 9299	5
<i>NLRB v. Columbian Enameling & Stamping Co.</i> , 306 U.S. 292 (1939)	19
<i>Oahu Gas Serv., Inc. v. Pacific Resources, Inc.</i> , 838 F.2d 360 (9 th Cir. 1988)	42
<i>Olin Corp. v. FTC</i> , 986 F.2d 1295 (9 th Cir. 1993)	20
<i>Pennzoil Co. v. FERC</i> , 789 F.2d 1128 (5 th Cir. 1986)	47, 48

FEDERAL CASES – Cont’d**Page**

<i>Rebel Oil Co., Inc. v. Atlantic Richfield Co.,</i> 51 F.3d 1421 (9 th Cir. 1995)	41
<i>Rothe Dev. Corp. v. Dep’t of Def.,</i> 413 F.3d 1327 (Fed. Cir. 2005)	27
<i>Singh v. Gonzales,</i> 436 F.3d 484 (5 th Cir. 2006)	24
<i>State of Louisiana v. Verity,</i> 853 F.2d 322 (5 th Cir. 1988)	24
<i>Stearns Airport Equip. Co., Inc. v. FMC Corp.,</i> 170 F.3d 518 (5 th Cir. 1999)	36, 50
<i>Town of Norwood v. FERC,</i> 962 F.2d 20 (D.C. Cir. 1992)	27
<i>U.S. v. Baker Hughes, Inc.,</i> 908 F.2d 981 (D.C. Cir. 1990)	22, 32, 45, 48, 50
<i>U.S. v. Carlo Bianchi & Co.,</i> 373 U.S. 709 (1963)	24
<i>U.S. v. E.I. du Pont de Nemours & Co.,</i> 366 U.S. 316 (1961)	16, 21, 51, 52, 55
<i>U.S. v. E.I. du Pont de Nemours & Co.,</i> 353 U.S. 586 (1957)	28
<i>U.S. v. Eastman Kodak Co.,</i> 853 F. Supp. 1454 (W.D.N.Y. 1994)	41

FEDERAL CASES – Cont’d

Page

U.S. v. Marine Bancorp., Inc.,
418 U.S. 602 (1974) 43

U.S. v. Menting,
166 F.3d 923 (7th Cir. 1999) 24

U.S. v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 55

U.S. v. Syufy Enters.,
903 F.2d 659 (9th Cir. 1990) 50

U.S. v. United Tote, Inc.,
768 F. Supp. 1064 (D. Del. 1991) 42

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 30

Yankton Sioux Tribe v. Gaffey,
188 F.3d 1010 (8th Cir. 1999) 26

Yohey v. Collins,
985 F.2d 222 (5th Cir. 1993) 27

FEDERAL STATUTES & RULES

15 U.S.C. § 18 2, 5

15 U.S.C. § 18(a)(i)(1) 5

15 U.S.C. § 21(b) 1, 15, 53

15 U.S.C. § 21(c) 1, 19

15 U.S.C. § 45 2

FEDERAL STATUTES & RULES – Cont’d

Page

15 U.S.C. § 45(b) 1

15 U.S.C. § 45(c) 1

Fed. R. App. P. 17 26

Fed. R. App. P. 28(a)(7) 26

MISCELLANEOUS

Phillip E. Areeda, Herbert Hovenkamp & John Solow,
Antitrust Law: An Analysis of Antitrust Principles

GLOSSARY

For ease of reference, the following abbreviations and citation forms are used in this brief:

Tr. – Transcript of Trial Testimony before the Administrative Law Judge

CX – Complaint Counsel’s Exhibit

RX – Respondents’ Exhibit

JX – Joint Exhibit

Op. – The Commission’s Opinion

ID – Initial Decision of the ALJ (Page Number)

IDF – Initial Decision of the ALJ (Factual Finding Number)

* – In Camera Material

STATEMENT OF THE CASE

This is a petition to review a final divestiture order that the Federal Trade Commission (“Commission”) issued following an administrative adjudication under Section 5 of the Federal Trade Commission Act (“

STATEMENT OF FACTS

A. The Industry and the Challenged Acquisition

Both CB&I and PDM designed, engineered, and constructed industrial storage tanks for liquified natural gas (LNG),² liquified petroleum gas (LPG),³ liquid atmospheric gases such as nitrogen, oxygen, and argon (LIN/LOX),⁴ and thermal vacuum chambers (TVCs), used to test satellites for the aerospace

LNG tanks in the United States. *Id.* Between 1975 and the acquisition, CB&I and PDM were the only firms to build LNG tanks for import terminals, *id.* at 20-21 n.110, and they built all but 7 of the 95 peak-shaving LNG tanks built during that period. *Id.*; *see* CX 125, 1645.

In the LPG tank market, only two of the 11 projects between 1990 and the acquisition were awarded to firms other than CB&I and PDM. Op. 23; Tr. 3046, 3052-54, 3670; *see* CX 26 at CBI-PL069530*, 161 at CBI-PL006114, 824, 1210*, 1212*. Although the LIN/LOX tank market was not historically a CB&I/PDM duopoly, the only other significant competitor, Graver Tank,⁶ left the market in 2001, leaving CB&I as the dominant firm in this market. Op. 25; Tr. 1543, 7312-13; *see* CX 1546.

In the TVC market, CB&I's acquisition combined the only two builders of large, field-erected TVCs in the U.S. IDF 363; Tr. 3489; *see* CX 94 at PDM-HOU017583, 264, 272, 857*, 1040 at PDM-HOU010889.⁷ CB&I and PDM were the only firms that built any TVCs in the U.S. since 1960. Tr. 1110, 1115, 1267, 1564.

⁶ Of the 109 LIN/LOX tanks built between 1990 and the acquisition, CB&I built 25, PDM 44, and Graver 34. Tr. 2452, 3422, 3429-30; *see* CX 85, 155, 183, 260, 282, 755, 1170, 1458.

⁷ Before the acquisition, CB&I and PDM allie

On February 7, 2001, CB&I acquired all of PDM's assets relating to these four markets. It did so despite receiving notice that the Commission had significant antitrust concerns and was "in the midst of [an] investigation of the acquisition," Op. 1, and before responding to the Commission's pending subpoenas and Civil Investigative Demands.⁸ CB&I thereby acquired monopoly status in two product markets and near-monopoly status in two others.

B. The Commission Decision and Order

(1) Market Definition

Section 7 makes illegal any acquisition that may tend to create a monopoly or substantially lessen competition in any line of commerce in any section of the country. 15 U.S.C. § 18. The Commission began by noting that the "relevant product and geographic markets are uncontested" (Op. 8; *see* CB&I Br. 8), and, after reviewing their respective structures and characteristics (Op. 11-17), affirmed the ALJ's determination that the acquisition must be judged for its effects on the

⁸ CB&I asserts that post-acquisition merger challenges are "unusual" (CB&I Br. 2), and implies that this challenge may be inequitably tardy. *Id.* at 4-5. Although pre-merger reporting requirements have lessened the need for post-acquisition challenges, such challenges remain an important enforcement mechanism, *see, e.g., In re Evanston Northwest Healthcare Corp.*, FTC Docket No. 9315; *In re MSC Software Corp.*, FTC Docket No. 9299, and are entirely appropriate. *See* i5.98tpTj-0.01 TwTj6.12 0 Td(i8m6.2CB&I)Tj7.kettoj/]8tpTj-0.01qare Corp.,

United States markets for LNG tanks, LPG tanks, LIN/LOX tanks, and TVCs. Op.
8.⁹

(2) *Market Concentration*

The ALJ found that sales of the relevant products are sporadic – i.e., many

markets with sporadic sales, finders of fact must treat concentration statistics with
onc
care”

The Commission separately considered entry conditions in each market. Op. 33-49. After reviewing the evidence, including customer testimony and behavior in past LNG project awards, *see id.* at 33-41, the Commission found a variety of reasons why entry into this market is exceedingly difficult and cannot be achieved in a timely fashion. It noted, for example, that the nickel-steel composition in LNG tanks requires “a specialized construction skill set.”¹⁴ *Id.* at 36; Tr. 881, 1831, 6701-02; CX 1731 at 44, 1792. LNG tanks require sophisticated engineering (Tr. 881, 1566, 1792) and must be built by companies with trained supervisors and a knowledge of local labor markets.¹⁵ Tr. 310, 1598-99, 1641*, 2625-34, 4521, 5906-07, 5917-18, 5952-53, 7017-18. Construction companies develop specialized procedures and employ proprietary techniques to weld and assemble the units. Op. 36-39; Tr. 1601, 2379, 6028-29; CX 109 at PDM-HOU006700. Additionally, the Federal Energy Regulatory Commission (FERC) regulatory and approval process is complicated and potentially time-consuming and builders must master the process to complete projects on time and in accordance with requirements. Op. 40; Tr. 310, 627, 1639-40, 4930, 6287.

¹⁴ There are “tremendous safety considerations” regarding LNG tanks. Tr. 293-94, 564-65, 1789. Nickel-steel has crack resisting properties at very cold temperatures and is less brittle than carbon steel. Tr. 881-82, 4109-10; CX 1074 at CBI001245-PLA.

¹⁵ While CB&I has told this Court that LNG tanks are beveled steel plates put together by local labor (CB&I Br. 8), the record shows that they are “built out of fairly sophisticated materials [that you] don’t just weld up any old way.” Tr. 1789, 2379.

Customers require potential suppliers to have significant experience in that market (Op. 33-34), and it takes at least “a few years” of experience to g

to qualify for Air Products' projects. Op. 46-47; Tr. 849, 1357-60, 1388-91, 1994-96; *see* JX 25 at 83-84.¹⁷

The Commission concluded that "entry and expansion in these markets are not likely to replace the competition lost through the acquisition or to sufficiently constrain CB&I in a timely manner." Op. 49.

(4) *CB&I's Rebuttal*

CB&I did not contest either the product or geographic markets before the Commission. Nor did it argue that the acquisition would lead to enhanced efficiencies that would benefit competition. Rather, it simply contends that Complaint Counsel's evidence of extraordinarily high market concentration and high entry barriers were rebutted by actual successful recent entry and potential entry into three of the four markets.¹⁸ On examining the record evidence, however, the Commission affirmed the ALJ's conclusion that the purported new entry "is insufficient to constrain CB&I post-acquisition." Op. 81.

¹⁷ The Commission also examined the evidence relating to the TVC market and found that barriers are extraordinarily high in that market, noting that "[t]he difficulty of entry . . . is not in dispute." Op. 28 n.170; *see* Tr. 206, 1103, 1141-44, 1454, 1734-37, 1920*; JX 27 at 47-48.

¹⁸ CB&I proffered no evidence of attempted entry into the TVC market, and the record shows entry is unlikely. Op. 80; Tr. 1147-49, 1272. CB&I advanced other defenses, arguing that the relevant markets are small, CB&I lacked presence in the TVC market, and its expert's "critical loss analysis" showed that CB&I could not raise prices in the future. The Commission rejected each of these arguments (*see* Op. 49-50 n.309, 50-52, 82-87) and CB&I has abandoned them here.

The Commission analyzed the LNG tank market, considering the qualifications and experience of each alleged new entrant (Op. 52-57), the post-acquisition bidding behavior of CB&I and the entrants together with the bidding outcomes (*id.* at 58-63), and the views of customers regarding the ability of those firms to compete with CB&I. *Id.* at 63-66. The Commission found that the three joint ventures CB&I identified as new entrants – Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V – lacked sufficient experience to compete effectively with CB&I. *Id.* at 57. None had ever built an LNG tank in the United States. *Id.* at 52-53 & nn. 323, 325; Tr. 596, 1402, 1645*, 2336, 2393-95, 4458-59, 4521, 4599-600, 4719*, 6693, 6993; *see* CX 115, 135*, 693 at BP01028. As of the time of trial, none had won an LNG ta

construction firms,” there has been no new meaningful entry because “even entrants with the technical wherewithal

enter” the LPG market is only a “speculative possibility.” *Id.* at 69; *see* Tr. 2431, 4708*, 7778-79.

The LIN/LOX tank market is similarly devoid of meaningful post-acquisition entry. New entry was attempted by the French company BSL, but it “never won a bid” and “has since gone out of business.” Op. 77; Tr. 955, 1351, 1380, 2001. Similarly, post-acquisition expansion attempts by AT&V, Matrix, and Chattanooga (*see* Op. at 71-77) have been “insufficient to replace the competition that was lost from the acquisition.” *Id.* at 77. Chattanooga “still has not won a bid” (Op. 76; Tr. 6413-15; JX 2 at 2); “increased costs have made Matrix non-competitive” (Op. 75; Tr. 457*, 2159-61); and AT&V suffers from capacity shortage (Tr. 2375-76, 3315), and recent problems have made its competitive viability doubtful. Op. 79-80; Tr. 931-32, 1369, 2235-36*, 2241*, 2251-55*, 2355-56, 5036, 5269, 5273-74.

Last, the Commission addressed CB&I’s argument that sophisticated customers can constrain CB&I. The Commission noted, however, that even sophisticated customers “must have alternative suppliers in order to have any real bargaining power” and the variability and infrequent nat

“operat[e] a little bit in the dark in terms of knowing ... the costs ... for LNG tank suppliers.” Op. 88; Tr. 6238. The Commission also found that, although consultants may give some assistance, they cannot ensure that customers receive sufficient pricing information, citing CB&I’s own evidence “that it is difficult, if not impossible, to compare prices of various tanks because the specifications vary so widely from project to project.” Op. 89; Tr. 6239.

divestiture, and that the Supreme Court has instructed that “divestiture ‘should always be in the forefront of a court’s mind when a violation of § 7 has been found.’” Op. 93 (quoting

found unnecessary upon the approval of a prospective buyer.

The Commission denied CB&I's petition, finding the proffered evidence neither new nor convincing. The Commission noted that CB&I's petition raised no new issues – CB&I argued both to the ALJ and to the Commission that increased demand for LNG tanks had triggered new entry that constrains CB&I post-acquisition – and that much of the purportedly new evidence had been available to CB&I long before the Commission issued its Final Order. R.O. 4-6. Moreover, that CB&I has not won every post-acquisition bid was not conclusive, reasoned the Commission, on the relevant question of whether new entrants effectively replaced the competition lost through the acquisition. *Id.* at 9. Even considering the new by area 02 tank

D. The Reinstated Petition for Review

relation to the unlawful practices found to exist.” *Id.* (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)); *see also FTC v. Cement Inst.*, 333 U.S. 683, 726 (1948). Particularly where the remedy seeks to undo a violation of Section 7, “it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, *all doubts as to the remedy are to be resolved in its favor.*” *DuPont*, 366 U.S. at 334 (emphasis added) (citations omitted).

SUMMARY OF ARGUMENT

Substantial evidence supports the Commission’s determination that each of the four markets at issue is highly concentrated, and that CB&I’s acquisition of its principal rival created a monopoly in two markets and a near-monopoly in two others. (Indeed, CB&I has challenged the record evidence with respect to only one of those markets, the LNG tank market). Substantial evidence also supports the Commission’s determination that entry barriers in these markets are high and future entry is unlikely to restore the competition lost as a result of this transaction or constrain CB&I’s market power for the foreseeable future. In these circumstances, the Commission properly concluded that this acquisition violated Section 7 of the Clayton Act.

CB&I relies considerably on its argument that there is evidence of post-acquisition competition by new or potential entrants in the LNG tank market. There are two main problems with this argument. First, this evidence *does not show* any effective competition for LNG tank contracts, and CB&I ignores clear evidence of the greatly enhanced power it enjoys in that market. Also, because CB&I failed to appeal the Commission's denial of its motion for reconsideration and this Court denied CB&I's motion to remand for the taking of additional evidence, much of the material CB&I relies on in its brief is not part of the record and is not before the Court. The Commission properly found that none of the new or potential entrants identified by CB&I is able to constrain the merged entity's conduct or offset the lessening of competition occasioned by the merger. This analysis does not change even if CB&I's extra-record materials are considered.

CB&I also misstates the law and the record in urging that, by producing "some" evidence, it eliminated any presumption of illegality that is created by the increase in concentration arising from this merger. Contrary to CB&I's contention, the probative weight of a defendant's evidence is clearly important in considering whether the presumption of illegality is warranted in a particular case, and "the more compelling the prima facie case, the more evidence a defendant must present to rebut it successfully." *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir.

1990). This record shows overwhelming evidence of an increase in market power as a result of this merger, and a failure by CB&I to show that timely entry will restore the competition lost in the transaction.

Finally, the Commission's order of divestiture follows textbook Section 7 principles, is fully supported by the record, and is well within the bounds of the Commission's discretion. The Commission was not required to hold a second trial to consider the form of remedy. CB&I was on notice of the proposed remedy from the very beginning of the case, presented evidence on the issue, and never asked for a bifurcated proceeding.

ARGUMENT

I. REVIEW IS LIMITED TO THE RECORD BELOW AND THE ARGUMENTS CB&I HAS PROPERLY ADVANCED IN ITS BRIEF

A. CB&I'S Petition Must Be Rejected To The Extent It Relies On Extra-Record Evidence That Is Not Properly Before This Court

Although CB&I did not appeal from, and does not challenge, the Commission's rejection of its post-record evidentiary materials, it nonetheless relies heavily on those materials. *See, e.g.*, CB&I Br. 7 n.6 (citing CB&I's petition for reconsideration before the Commission); *id.* at 12 (same); *id.* at 13 (citing declarations appended to CB&I's petition); *id.* at 14, 15, 16, 41 (same); *id.* at 28, 30, 32 (citing Commission's order on CB&I's petition for reconsideration). These

484, 487 (5th Cir. 2006) (“We review the [agency’s] denial of both a motion to reopen and a motion for reconsideration under a highly deferential abuse-of-discretion standard”).

In an analogous context, this Court has held that “an issue initially raised in a post-judgment motion” in a federal district court proceeding “cannot be considered by this court unless the judgment or order disposing of it is properly noticed for appeal.” *Fiess v. State Farm Lloyds*, 392 F.3d 802, 806 (5th Cir. 2004). As this Court explained in *Fiess*, even this Circuit’s “forgiving approach” to construing notices of appeal will not cure a party’s failure to amend its notice to cover a subsequent denial of a motion for reconsideration. *Id.* at 806-07.

Although CB&I asserts that its “proffered evidence ... was accepted into the record by the Commission” (CB&I Br. 7 n.6), CB&I cannot support that assertion.²² After failing to seek judicial review of the Commission’s rejection of its post-record evidence, CB&I filed in this Court a motion to have the administrative record reopened to include that same evidence, upon which CB&I relies here. *See* CB&I’s Motion to Adduce Additional Evidence. This Court

²² In support, CB&I cites only its petition for reconsideration. *See* CB&I Br. 7 n.6; *but see* R.O. 6 (CB&I “have not met their burden under our rules for either reopening the record or reconsideration of an issued decision”); *id.* at 9 (even if the proffered “new” evidence were to be credited, CB&I still “have not shown that the competition lost from CB&I’s acquisition of the PDM assets has been restored”).

denied that motion on April 13, 2006. Thus, CB&I's post-record materials have never been admitted in evidence. Had the Commission indeed "accepted" such evidence into the record, CB&I would have had no reason to file its motion to adduce with this Court.

Because the rejected evidence is not part of the record, this Court cannot properly consider it and should order it stricken from CB&I's brief. *See* Fed. R. App. P. 28(a)(7) (appellate brief must contain "a statement of facts ... with *appropriate references to the record*") (emphasis added); *see also, e.g., Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1015 n.4 (8th Cir. 1999) (affidavits that were not part of the record on review stricken).²³

B. CB&I's Challenge To The Commission's Factual Findings Must Be Limited To the LNG Tank Market

As CB&I acknowledges, the focus of its brief is "on the LNG tank business" (CB&I Br. 9) and its sole statement regarding the remaining three markets is in a footnote in which CB&I asserts that "many of the issues presented in this brief regarding the LNG tanks also exist with regard to the other relevant products in

²³ Nor does the inclusion of the post-judgment materials in the package sent to this Court (*see* Fed. R. App. P. 17), somehow render the proffered evidence "accepted into the record by the Commission." *See CB&I's Response to the FTC's Motion to Extend the Deadline to File Its Brief*, at 3. CB&I cites no authority to support such a proposition. Indeed, CB&I's argument would mean that the mere proffer of post-decision evidence would render the proffered evidence part of the record for purposes of appellate review. This Court has rejected any such notion. *See Fiess, supra*.

this case.” *Id.* at 9 n.9. Such generalized statements are insufficient designations of error with regard to the LPG and LIN/LOX tank markets and the TVC market. *See supra*, at 6 n.9. It is settled law that a petitioner abandons arguments by failing to argue them in its appellate brief. *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993); *Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980); *see also* *Rothe Dev. Corp. v. Dep’t of Def.*, 413 F.3d 1327, 1339 (Fed. Cir. 2005); *Humble v. Boeing Co.*, 305 F.3d 1004, 1012 (9th Cir. 2002); *Kost v. Kozakiewicz*, 1 F.3

the new and potential entrants identified by CB&I cannot constrain CB&I's market power; and (4) sophisticated customers cannot constrain CB&I's market power.

A. Substantial Record Evidence Supports The Commission's Finding That The Acquisition Has Increased CB&I's Market Power In Highly Concentrated Markets

Section 7 is "designed to arrest in its incipiency ... the substantial lessening of competition from the acquisition by one corporation" of the stock or assets of a competing corporation. *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957). The Section is aimed at preventing firms or groups of firms from gaining so large a share of the market that they are able to exercise market power either through unilateral conduct or tacit collusion. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717-19 (D.C. Cir. 2001). As Judge Posner has observed, "all that is necessary is that the merger creat

power in each market. CB&I has acquired its only competitor in the LNG and TVC markets, thereby acquiring monopoly status, and its only significant competitor in the LPG and LIN/LOX markets, thereby acquiring near-monopoly status. CB&I did not contest the high market concentration resulting from its acquisition, conceding that “CB&I and PDM were the dominant suppliers of the products in these four relevant markets prior to the acquisition.” Op. 8. Customers with first-hand knowledge also testified that “PDM and CB&I were the only viable LNG tank suppliers prior to the acquisition and that the acquisition substantially harmed competition.” *Id.* at 21-22; *see* Tr. 324, 703*, 1830. Similarly, PDM’s and CB&I’s internal documents confirmed that the two firms “focused almost exclusively on each other in their assessment of the competitive landscape and paid little or no attention to what other companies were doing.” Op. 22; *see* Tr. 4851; CX 68, 94 at PDM-HOU017580.²⁴

The record also shows that CB&I has been able to exercise market power. In the post-acquisition world, CB&I has forced customers into dealing on CB&I’s terms. *See supra*, at 12 n.19. It has refused to enter into bidding contests for new

²⁴ *See also* Op. 23-25 (discussing PDM’s and CB&I’s internal market assessments and customer views in the LPG tank market); *id.* at 26-27 (discussing both factors in the LIN/LOX tank market); *id.* at 27-28 (discussing same factors in the TVC market).

projects, insisting instead on lucrative sole-source contracts.²⁵ *See* Op. 63-64. In the less than two years between the acquisition and the close of the evidentiary record, CB&I successfully negotiated sole-source contracts for five LNG tanks, and was negotiating a sixth. *Id.* at 59.

Given the indisputable record evidence about the actual structure of the markets and CB&I's monopoly or near-monopoly position in each market, there is no room for CB&I's objection that the Commission relied too greatly on "historic HHIs." CB&I Br. 33-37. No matter how the markets are examined, CB&I has acquired its only significant competitor. Except for a few fringe firms, no one is left in any of the markets.

Equally important, CB&I's argument misstates the Commission's analysis of market concentration. Even as the Commission rejected the ALJ's refusal to rely on HHI data, it acknowledged the care with which HHI data must be generated and analyzed. The Commission explained its disagreement with the ALJ on that issue,²⁶ noting, for example, that the sporadic nature of sales in the markets can be adjusted for by analyzing "an extended period of time." *See* Op. 18, 20-21 n.110

²⁵ "Sole-source" contracts refer to negotiated contracts awarded to a single supplier, as opposed to contracts awarded through an open competitive bidding process. A sole-source contract is typically more expensive than a competitively bid contract. ID 110.

²⁶ The Supreme Court has made clear that the standard of review "is not modified in any way when the [agency] and its [ALJ] disagree." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

(since 1975, PDM & CB&I were the only companies that constructed LNG tanks for import terminals, and constructed all but 7 of the 95 LNG tanks for peak-shaving facilities); CX 125, 1645. The Commission reasoned that when “the probative value of the concentration data” is considered “*in light of* all other evidence” of market concentration in the record – which alone established a strong prima facie case – the ALJ’s “total disregard” for the corroborative HHI data could not be justified. Op. 18 (emphasis added).

The authorities CB&I relies upon to challenge the Commission’s use of HHIs do not support its argument. While CB&I argues that the Commission acted contrary to the *Merger Guidelines*, the *Guidelines* expressly provide that where “sales are large and infrequent so that annual data may be unrepresentative,” the antitrust agencies “may measure sales over a longer period of time.” y

infra, at 39-45), the marginal or fringe firms that CB&I has identified do not have anything approaching “an equal likelihood of securing sales.”

CB&I also misreads the cases it cites. In *Baker Hughes*, the court noted that sales in the market were “volatile and shifting” and “easily skewed,” 908 F.2d at 986, and “entry was likely.” *Id.* at 987. In those circumstances, high market shares were not an accurate predictor of future competition, and low entry barriers made it unlikely that the merged entity could ever exercise market power to harm competition. While the only similarity between *Baker Hughes* and this case is the sporadic nature of sales, the dispositive differences are the presence here of the same two major competitors, PDM and CB&I, year after year for more than three decades, and – as we show in Parts II.B and II.C, *infra* – the high barriers to entry into the relevant markets.

Likewise, CB&I misleadingly quotes Judge Bork’s comment in *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986), that the lower court there was “unable to calculate an HHI” for a supposedly similar market. CB&I Br. 36 n.42. In fact, the *PPG* court upheld the Commission’s right to an injunction because, regardless of potential difficulties with a precise HHI calculation, the merger left the market with “only three fully capable firms,” and therefore highly concentrated even if entry were possible. 798 F.2d at 1505. The present acquisition, which

leaves *one* capable firm and only speculative prospects for future entry, makes for a more compelling case.

CB&I also misstates the holding in *U.S. v. General Dynamics*, 415 U.S. 486, 501 (1974), and its reliance on it to support its claim that the Commission improperly relied on HHIs (CB&I Br. 38) overstates the Commission's carefully delimited reliance on them. In that case, the Supreme Court held that market share statistics were insufficient to sustain a Section 7 case because, by failing to take into account the acquired firm's long-term contracts to sell most of its reserves, the statistics overstated that firm's ability to compete in the future. 415 U.S. at 500-504. As the Eleventh Circuit aptly noted, *General Dynamics* stands for the "unremarkable proposition" that "a defendant may rebut the government's prima facie case by showing that the government's market share statistics overstate the imp

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B. Substantial Evidence Supports the Commission’s Finding That Each of the Relevant Markets Is Characterized by High Entry Barriers

As the D.C. Circuit has noted, high entry barriers “largely eliminate[] the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthen[]” a strong statistical case. *H.J. Heinz Co.*, 246 F.3d at 717. Here, substantial record evidence supports the Commission’s finding that high entry barriers will likely shield CB&I “from the threat of new entry,” making its acquired market power “more secure.” Op. 29.

1. The Commission’s Findings of High Entry Barriers Are Supported by Substantial Record Evidence

Substantial evidence supports the Commission’s findings that solid reputation for safety and reliability, substantial prior experience in the U.S., high technical skills, and specialized regulatory know-how are necessary to achieve meaningful entry into each of the relevant markets. In the LNG tank market, customers and industry participants testified, for example, that “fairly sophisticated materials” are used in LNG tanksn the

construction specifications. Tr. 533-34, 6969-71. Specialized construction procedures, including proprietary welding techniques, must be employed on each project. Tr. 1601, 2379, 6028-29. Customers do not consider even a successful history of building petroleum tanks as sufficient experience to build LNG tanks. Tr. 6701-02. Customers also look for builders who can deliver LNG tanks on time and who have significant bonding and liquidated damages capacity. Tr. 6154-55,

(3rd Cir. 1995)). But as the *Philadelphia Newspapers* court so well stated, prior case law is not particularly helpful in this area because “the importance

supervisory employees.” CB&I Br. 48. However, CB&I has not identified any domestic construction firm, other than itself, that has had any experience building LNG tanks. Op. 53. The record does not even suggest that the “alliances” that CB&I speaks of are enduring. The ability of any foreign firm to compete depends on its ability to find a “teaming alliance” for each project that it wishes to bid on. *See id.* at 52-54. Finally, CB&I’s argument confuses the ability of U.S. construction firms to supervise the projects they work on with the requirement that LNG tank builders supply the supervisors who will oversee the work of their domestic partners. The ability of LNG tank builders to build tanks outside their domestic markets is constrained by the necessity of their providing supervisors who can interface with local labor markets. Op. 54. The record is devoid of evidence showing that a foreign tank builder can do that in the U.S., except perhaps on an episodic basis.

CB&I’s criticism is merely a disagreement with the *factual conclusions* reached by the Commission after a thorough review of the evidence. But, as this Court has “consistently reiterated,” the Commission’s findings may not be set aside “if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more

reasonable and persuasive.” *Colonial Stores*, 450 F.2d at 739; accord *Foremost Dairies*, 348 F.2d at 676.

C. Post-Acquisition Entry Into the Relevant Markets Has Been Insufficient to Constrain CB&I’s Market Power

“The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future.” *Cardinal Health*, 12 F. Supp. 2d at 56.

“[T]he only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions.” 2A Phillip E. Areeda, Herbert Hovenkamp & John Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶420b, at 60 (2d ed. 2002) (hereinafter, “*Areeda, Hoven*”).

at expansion by existing firms, but falls woefully short of showing entry or expansion that replaces the competition lost through CB&I's merger-to-monopoly, or that can effectively constrain CB&I's post-acquisition conduct. *Id.* at 56-57.

CB&I proffers Dynegey's award to Skanska of an *EPC* contract²⁷ on the "Hackberry" project – and that same project's *extra-record* re-award to IHI/Aker Kvaerner after Dynegey sold the project to Sempra – as evidencing competition in the LNG tank market. *See* CB&I Br. 14-15, 41. But both the award reflected in the trial record and the extra-record EPC award concern LNG tanks *only indirectly*. As the Commission explained (Op. 58-59), EPC contracts are awarded for *entire* LNG import terminals or peak-shaving facilities, only one part of which pertains to the LNG tanks. Competition for EPC contracts is not indicative of competition in any relevant market here. Indeed, to save costs, Dynegey had bid the EPC engineering work separately from the LNG tank portion of the project, and the award of the EPC contract to Skanska *did not include* the LNG tank work. Tr. 4568-71. After Dynegey awarded the EPC contract to Skanska, CB&I *refused to bid* on the LNG tank work, continuing to push for a turnkey contract for the entire facility. Tr. 4571-72, 4576-77; CX 138, 139, 140. Ultimately, CB&I relented, but Dynegey declined CB&I's LNG tank offer as late. Tr. 4572.

²⁷ *See supra*, at n.20.

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has occurred does not necessarily preclude the existence of ‘significant’ entry barriers.” Similarly, in *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988), the court rejected a claim of low entry barriers where the new entrants remained relatively small. *See also U.S. v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) (entry by one firm insufficient to constrain anticompetitive pricing, despite firm’s ability to bid regularly and despite winning two bids).

Nor does this analysis change if this Court considers CB&I’s extra-record evidence, most of which relates to either EPC contracts that do not directly concern the LNG tank market or to situations where CB&I refused to bid.²⁹

²⁹ On reconsideration, the Commission noted that, even if CB&I’s *post-record* evidence were fully credited, it would “fail to demonstrate that CB&I is constrained to the pricing that prevailed before the acquisition.” R.O. 11. Indeed, CB&I’s often-successful insistence on sole-source, turnkey contracts after the close of the record evidences the insufficient competitive forces in the post-record LNG tank market. *Id.* at 9.

As with the bidding of the Hackberry project when Dynegy owned it, *supra*, Sempra apparently re-solicited bids and awarded an EPC contract for the entire facility, not just the LNG-tank part of it. As the Commission noted, “winning an EPC contract for the entire LNG project does not necessarily show an ability to compete for building an LNG tank.” R.O. 12.

Similarly, in the Freeport LNG project, the owner apparently turned to Zachry (in association with the EPC contractor, Technip) for the preliminary “FEED” work on the project, but *only after* CB&I refused to do such work absent a commitment that it be awarded a contract for the entire facility on a turnkey basis. R.O. 15. CB&I refused to perform the preliminary FEED work although that would have given it a distinct advantage in gaining the subsequent LNG tank work. *See Miles Declaration*, attached to CB&I’s petition for reconsideration, at ¶15. CB&I’s purported loss of that contract was apparently not the result of competition, but the result of CB&I’s attempt to leverage its mapparentlyoagh k

Similarly, CB&I's argument regarding the constraini

and ineffective expansion efforts by the three existing small firms. Tr. 955, 1351, 1380, 2001.

Although actual post-acquisition entry can be probative of entry barriers, ineffective entry – which is what CB&I’s proffered evidence at best shows – is insufficient to negate a finding of high entry barriers.³⁰ Before the acquisition, each relevant market exhibited the characteristics of a market with high entry barriers. CB&I conceded that it and PDM dominated each one, despite numerous entry attempts by other bidders, and despite the occasional project being awarded to a firm other than CB&I or PDM. *See* Op. 20-28. CB&I has not explained how nominal post-acquisition entry in the LNG tank market reflects any change from the dynamic that prevailed before the acquisition, when high entry barriers ensured that CB&I and PDM remained the dominant firms despite their occasional loss of a project to a third firm. If anything, the record demonstrates CB&I’s increased market power after the acquisition – as would be expected after having acquired its principal competitor.

³⁰ *In re Grand Union Co.*, 102 F.T.C. 812 (1983), 1983 FTC LEXIS 61 – the only authority.

D.

Alternatives to CB&I are at best weak and speculative in the LNG, LPG, and LIN/LOX tank markets, and non-existent in the TVC market. Even with a purported growth in demand for LNG tanks, CB&I has repeatedly and successfully insisted post-acquisition on negotiating sole-source contracts for LNG tank projects – even *over the objections* of its customers. *See supra*, at nn.19, 29; *see also* Op. 59, 63-64; Tr. 4399. CB&I’s claim that sophisticated customers can sufficiently constrain its power is contradicted by CB&I’s own conduct.

III. THE COMMISSION PROPERLY FOUND A SECTION 7 VIOLATION IN EACH RELEVANT MARKET

A. Section 7 Does Not Require Proof of Actual Anticompetitive Effects

Although CB&I claims that “there is no basis for the Commission’s finding of anticompetitive effects,” and “Complaint Counsel failed to meet its burden to prove any such effects” (CB&I Br. 52), its argument misconstrues both the Commission’s decision and the legal standards for proving Section 7 violations. The Commission’s findings correctly related to the likely – not actual – anticompetitive effects of CB&I’s acquisition. *See* Op. 89 (“we find that ... CB&I’s acquisition of PDM *is likely to* lessen competition substantially”), 90 (“we find that customers in these markets *will likely* be harmed post-acquisition”) (emphasis added).

As the Supreme Court has consistently held, “[i]f the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated.” *Proctor & Gamble*, 386 U.S. at 577. More recently, in *California v. American Stores Co.*, 495 U.S. 271, 284 (1990), the high Court noted that the anticompetitive effects of a challenged acquisition need not be proven with certainty.³¹ *See also Hospital Corp. of Am.*, 807 F.2d at 1389.

B. CB&I’s Argument That the Commission Improperly Shifted The Burden of Persuasion Lacks Any Support in Section 7 Case Law

CB&I argues that a Section 7 defendant satisfies its burden of rebutting a prima facie case if it “come[s] forward with some evidence challenging the presumed fact, at which point the prima facie presumption ‘simply disappears’.” CB&I Br. 23 (citing *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1137 (5th Cir. 1986)).³²

This argument contradicts Section 7 jurisprudence and misconstrues *Pennzoil*.

³¹ CB&I’s claim that the Commission’s finding of anticompetitive effects was “cursory” and “rests entirely on Complaint Counsel’s prima facie case,” CB&I Br. 51, is spurious. As discussed above, Section 7 does not require the Commission to make findings as to actual anticompetitive effects, and its findings of *likely* effects were supported by an extensive discussion constituting the majority of its 104-page opinion – including a 40-page analysis of CB&I’s rebuttal case. Op. 49-89.

³² *See also* CB&I Br. 23 (“CB&I ‘need not [disprove the challenged fact], but only produce *some evidence* to the contrary’”) (citing *Pennzoil*, 789 F.2d at 1136) (emphasis and brackets CB&I’s own). Elsewhere, however, CB&I contradicts its own argument. *See* CB&I Br. 25 n.37 (“The strength of Complaint Counsel’s prima facie case affects the weight of the defendant’s burden of production on rebuttal”).

The probative weight of a defendant's evidence is clearly important in considering whether the presumption of illegality is warranted in a particular case, and "the more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully

Pennzoil does not help CB&I here, where the fact of a merger to monopoly and near-monopoly is clear, and ample additional evidence bolsters the inferences that can be drawn from the market share data. CB&I’s introduction of “some” evidence does not negate the fact that CB&I has acquired its only competitor in two markets and its principal competitor in two others. More important, here the Commission carefully and systematically weighed all the evidence – market share data (the fact that creates the Section 7 presumption), qualitative evidence relating to market structure and behavior, and entry barriers, as well as CB&I’s rebuttal arguments concerning the effect of recent and potential entry. Nothing in the Commission’s opinion suggests it did not give due weight to all of the evidence.³³

C. There Is No Merit In CB&I’s Arguments That The Commission Imposed Too High a Standard on CB&I In Considering the Entry Issues

CB&I raises two legal issues concerning entry, arguing, first, that the Commission should have asked whether there would be sufficient entry “*if*” CB&I charged supracompetitive prices (CB&I Br. 29-31), and, second, that the

³³ CB&I mischaracterizes the Commission’s decision when it asserts that “[a]lthough the Commission acknowledged that the correct burden-shifting framework should apply to this case . . . , it explained that ‘as a practical matter it would be difficult’ to apply”). CB&I Br. 21. The words “as a practical matter it would be difficult,” did *not* refer to the burden-shifting framework at all, but rather to consideration of Complaint Counsel’s evidence of high entry barriers as part of the prima facie case. In context, the Commission merely noted “as a practical matter it would be difficult to consider this evidence elsewhere in our analysis, because Complaint Counsel introduced this evidence as part of their prima facie case.” Op. 28-29 n.171; *see supra*, at n.13.

Commission's painstaking analysis. While the Commission properly rejected CB&I's arguments based on entry that had supposedly already taken place (e.g., Op. 52-53), it also considered and rejected CB&I's contention that effective potential entrants "can be expected to enter the market in the event of anticompetitive price inc marke

Commission considered whether the “new entrants” will be able to constrain CB&I’s conduct, as PDM had done – i.e., whether they would replace the competition that had been lost. It concluded that the substantial loss of competition resulting from the acquisition likely would not be replaced by the insubstantial entrants that CB&I had identified.

IV. THE COMMISSION’S FINAL ORDER OF DIVESTITURE IS PROPER AND SHOULD BE ENFORCED

Divestiture is the “natural remedy” for a Section 7 violation, intended “to pry open to competition” the market.

The manner and scope of divestiture orders are subject to the Commission's discretion. *See* 15 U.S.C. § 21(b) (granting the Commission the power to order divestiture "in the manner and within the time fixed by said order"); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 376 (1965) (Commission has "wide discretion in its choice of a remedy"). To "restore the competition lost through CB&I's acquisition," Op. 93, the Commission properly exercised its broad discretion and ordered CB&I to reorganize its Industrial Division into two separate, reasonably equivalent stand-alone businesses and to divest one of them to an approved buyer.

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terms of the Order, and well-settled authorities. Without adequate divestiture, CB&I has the power to harm competition in each relevant market.

Moreover, CB&I raised these objections with the Commission in its petition for reconsideration. *See* R.O. 6-8. Responding to the overbreadth argument, the Commission directed CB&I to file a brief and “include an alternative suggestion for a divestiture package” consistent with the Commission’s findings on the relief necessary to ensure the divested business’s ability to compete effectively. *Id.* at 22-25. Contrary to CB&I’s representations to this Court (CB&I Br. 53-55), the Commission fully considered the remedy issues and found that CB&I’s showing was insufficient to support its claims that the Order’s scope was unnecessarily overbroad and that a narrower set of assets, or CB&I’s suggested alternative to the Order, would restore an effective competitor to the relevant markets. *See* Order Granting in Part and Denying in Part Respondents’ Petition for Reconsideration of the Final Order (August 30, 2005).³⁶ CB&I has not sought review of that ruling.

CB&I’s remaining objection – that it was not granted a separate evidentiary hearing on the remedy issue – is also without merit. Incorrectly citing *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), as authority for a “fundamental

³⁶ The Commission did modify the Order to clarify that CB&I’s foreign assets are available for divestiture only if necessary to enable the acquirer to compete in the relevant United States markets. *Id.*

right to a remedy-specific evidentiary hearing” (CB&I Br. 55-56), CB&I ignores the fact that the *Microsoft* court itself distinguished that case – which concerned single-firm conduct – from a merger case, where “the Supreme Court has clarified that ... ‘complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.’” 253 F.3d at 105 (quoting *Ford Motor Co.*, 405 U.S. at 573).³⁷ The other cases cited by CB&I are similarly inapposite. The Supreme Court in *DuPont* remanded that case because the record there bore on tax and other investor issues having nothing to do with “the competition-restoring effect of the several [remedy] proposals” at issue. 366 U.S. at 320-21. In *Ford Motor Co.*, the Court remanded on the remedy issue because the record lacked the evidence – abundantly available here – relating to the structure and competitive conditions of the relevant market, necessary to craft a proper divestiture remedy. *See* 405 U.S. at 572-77.

CB&I had a full opportunity to submit evidence on the appropriateness and scope of any divestiture order and availed itself of this opportunity. *See generally* Op. 93-104, ID 77-83. As the Commission explained, CB&I never proffered any

³⁷ CB&I asserts that the Commission “concedes in its Opinion” that it has such a right, but fails to identify where the Commission allegedly made such a concession. CB&I Br. 55.

evidence at trial or on appeal that might have warranted a separate evidentiary hearing on remedy. Op. 103-04; R.O. 22-23. CB&I's objections to the remedy must therefore fail.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's Order affirmed and enforced.

Respectfully submitted,

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AUGUST 21, 2006

CERTIFICATE OF SERVICE

I certify that on August 21, 2006, I caused two copies of the foregoing brief to be delivered by overnight courier to each of the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B), and with 5TH CIR. R. 32.3, because it contains 13,804 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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