PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

RESPONDENTS' CORRECTED POST-TRIAL BRIEF

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INTRODUCTION

On February 7, 2001, Chicago Bridge & Iron ("CB&I") acquired the Engineered Construction and Water Divisions of Pitt-Des Moines, Inc. ("PDM") for approximately $80 million. The Federal Trade Commission, through Complaint Counsel, has been investigating and litigating this Acquisition since the year 2000. In October of 2001, Complaint Counsel instituted a Section 7 proceeding seeking to break up CB&I into two separate companies. The burdens of proof in a Section 7 proceeding are settled law. In order to succeed in its attempt, Complaint Counsel must make a prima facie case that the Acquisition has substantially affected competition in the relevant markets. At that point, Respondents are given the opportunity to rebut the prima facie case in a number of ways; they must make a showing consistent with the strength of Complaint Counsel's prima facie case. Once Respondents make this showing, Complaint Counsel bear the burden of proving that the Acquisition will result in a substantial lessening of competition. The ultimate burden of persuasion never leaves the government.

This case is the first consummated merger case to be tried in a decade. As a result, the Court has unique evidence available to it in assessing the probable impact of the Acquisition in the relevant markets -- nearly two years of activity in the markets at issue. This evidence constitutes a natural market experiment to test what competition is like without PDM, an extremely valuable tool for predicting how the Acquisition will affect competition in future years. As discussed extensively below, such evidence is dispositive in this case.

In a Section 7 case, it is well-settled that Complaint Counsel bears the ultimate burden of proof at all times. Under controlling law, Complaint Counsel must first make a prima facie case in each of the four product markets by showing evidence of post-Acquisition market concentration. If Complaint Counsel demonstrates its prima facie case, Respondents must make a showing that the prima facie case is not predictive of future competitive harm. Once Respondents make that showing, it is Complaint Counsel's burden to present additional evidence in support of its case.

Complaint Counsel has relied primarily on market concentration statistics to establish its prima facie case. These statistics purport to analyze market concentration in markets that are uniformly characterized by low and sporadic demand, with rapidly increasing and decreasing market shares over time. Use of pre-Acquisition statistics completely ignores the avalanche of new entrants that have entered the relevant markets since the Acquisition and that have captured a majority share of post-Acquisition market share in some of these markets. Because these statistics are volatile, shifting, and subject to easy manipulation, and because they fail to account for these new entrants, they are not remotely predictive of future competitive effects. As a result, they cannot be used to establish a prima facie case.

Even if Complaint Counsel has established a prima facie case, Respondents have presented compelling rebuttal evidence. Respondents have shown that entry has actually occurred in three of the four product markets at issue. These new entrants are experienced, qualified companies who have spent enormous resources to enter these markets, have been successful in gaining significant market share, and plan on being successful in these markets in the future. Respondents have also presented evidence that entry barriers in all four product markets are low, and that additional future entry is likely if demand for the product actually exists. Further, Respondents have shown that the customers in these product markets are generally large, sophisticated companies with significant ability to create competition in the relevant markets.

In the face of this powerful rebuttal evidence, Complaint Counsel bears the heavy burden of presenting additional evidence showing that the Acquisition is likely to have an anticompetitive effect in the relevant markets. They have not done so, nor is it surprising that they have been unable to do so. Although Complaint Counsel has tried to show that entry in the relevant markets has not succeeded in constraining CB&I's pricing, the evidence conclusively demonstrates that customers who have participated in the relevant markets after the Acquisition have received pricing that is equal to or better than pricing received pre-Acquisition. The evidence also shows that current customers in three of the four product markets have seen no evidence of anticompetitive effect on the part of CB&I, and that many customers are unconcerned about the effect of the Acquisition on future competition. To circumvent this evidence, Complaint Counsel relies on speculation and conjecture to claim that CB&I has raised post-Acquisition prices in the relevant markets. However the evidence presented -- much of it from Complaint Counsel's own witnesses -- undercuts the validity of the claim.

Even if Complaint Counsel was able to meet its burden to present additional evidence regarding anticompetitive effects, it should not prevail. In order to properly evaluate whether a Section 7 violation has occurred, it is necessary to look at the markets as they would have existed today absent the Acquisition. If the Acquisition had never occurred, PDM EC would not have been an independent company operating in the relevant markets. Rather, PDM EC would have been liquidated, and its assets would have exited the market. Because this scenario is essentially the same as the one that exists today, it strains credulity to assert that the Acquisition has substantially affected competition in the relevant markets.

Alternatively, if this Court finds that the Acquisition is likely to substantially limit competition in the relevant markets, Complaint Counsel would not be entitled to the remedy it seeks. Throughout this litigation, Complaint Counsel has advocated a draconian breakup remedy -- not just disgorging assets related to the relevant markets but instead splitting CB&I into two separate companies. Despite their continued insistence on such a remedy, Complaint Counsel presented no credible evidence that such a remedy was warranted by the facts or desired by customers. Nor did Complaint Counsel show that such a remedy could restore allegedly lost competition. In fact, the evidence demonstrates that a breakup remedy would not only fail to enhance competition in the relevant markets, but that such a remedy would actually harm customers by disrupting current projects, raising CB&I's costs, and diminishing CB&I's customer acceptance in some of the relevant markets. The evidence demonstrates that it would have exactly the opposite of the stated goal of the FTC -- to promote competition for the benefit of customers.

As set forth fully below, Complaint Counsel has failed to carry its burden in this case on many levels. Accordingly, the Complaint should be dismissed with prejudice.

I. APPLICABLE LEGAL STANDARDS

A.

B. COMPLAINT COUNSEL BEARS THE BURDEN OF PROOF IN A SECTION 7 CASE.

Complaint Counsel alleges that the Acquisition violates Section 7 of the Clayton Act, which proscribes acquisitions where the effect of such an acquisition "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Complaint Counsel has the initial burden of proving a Section 7 violation, and the ultimate burden of persuasion in a Section 7 case "remains with the government at all times." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990); s*ee also United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995).

This burden is not a trivial one. Complaint Counsel must show that the Acquisition is reasonably likely to have "demonstrable *and* substantial anticompetitive effects." *Kraft Foods*, 926 F. Supp. at 359 (emphasis added). A "mere possibility" of anticompetitive effect is not enough to win a Section 7 case; there must be a "reasonable probability" of such an effect. *Id.* (citing *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 351 (2d Cir. 1979)). As one court explained, a showing of "reasonable probability" is required because Section 7 "deals in 'probability,' not 'ephemeral possibilities.'" *Id.* (quoting *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 (1974)).

Complaint Counsel must also prove that the commerce affected by the Acquisition is substantial. *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 9 (D.D.C. 1990). A showing of a "substantial" anticompetitive effect is required of the government in a Section 7 case. For example, in *Baker Hughes*, the district court noted that "[t]he miniscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" *Id.* (citing *United States v. Dupont & Co.*, 353 U.S. 586, 595 (1957)).

C. THE D.C. CIRCUIT'S TEST IN *BAKER HUGHES* IS THE ACCEPTED METHOD FOR ANALYZING SECTION 7 CLAIMS.

The seminal modern case on Section 7 and the burdens it assigns to litigants is the D.C. Circuit's decision in *Baker Hughes*. In analyzing the legal framework of a Section 7 case, the D.C. Circuit laid out the relevant legal analysis:

> The basic outline of a section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.

908 F.2d at 983 (citations omitted).[1]

1. Complaint Counsel must initially establish a prima facie case of a violation of Section 7.

Baker Hughes requires Complaint Counsel to first establish a prima facie case. 908 F.2d at 982-83. The most common method for Complaint Counsel to establish a prima facie case is to show that the acquisition at issue "would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.'" *F.T.C. v. University Health, Inc.*, 938 F.2d at 1206, 1218 (11th cir. 1991) (citing authority including *Baker Hughes*, 908 F.2d at 982). If the government makes this showing, the burden shifts to Respondents to rebut the evidence of statistical

[1] It is worth noting that Justices Clarence Thomas and Ruth Bader Ginsburg both sat on the panel that decided *Baker Hughes*. Justice Thomas wrote the opinion.

concentration with evidence that suggests the statistics are not predictive of future competitive harm. *Id.*

A prima facie case based on concentration statistics alone is a thin case and may be misleading. The Supreme Court has instructed lower courts to look beyond market share statistics, because "only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (internal citations and quote marks omitted). The Court noted that such statistics "were not conclusive indicators of anticompetitive effect" and that "[e]vidence of past production does not as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *Id.* at 498. Appellate courts have also viewed market concentration statistics with a skeptical eye. The *Baker Hughes* court observed that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness. . . ." 908 F.2d at 984. That court explicitly noted that while the government can make a prima facie case using such statistics, it could not rest on those statistics because doing so would "grossly inflate the role of statistics in actions brought under Section 7." *Id.* at 992. It added that "[t]he Herfindahl-Hirschman Index cannot guarantee litigation victories." *Id.* *See also United States v. Syufy Enters.*, 903 F.2d 659, 665 n.6 (9th Cir. 1990) (holding that "evidence of a high market share does not require a district court to conclude that there is an antitrust violation."). Courts have recognized that market share statistics can often be "misleading as to actual future competitive effect" and that in such cases, market share statistics are insufficient to void a merger. *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984) (citations omitted).

Trial courts hearing evidence of market concentration statistics have also recognized the limited utility of such evidence, holding that such statistics were not conclusive and that "the focus of a proceeding such as this should not be on numbers, but rather on commercial realities." *FTC v. Great Lakes Chem. Co.*, 528 F. Supp. 84, 90 (N.D. Ill. 1981) (citing *General Dynamics*); *see also United States v. Calmar, Inc.*, 612 F. Supp. 1298, 1301 (D.N.J. 1985); *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 90 (D. Colo. 1975). Here, the facts as judged at the time of the trial are different from these suggested by the concentration statistics.

2. If Complaint Counsel makes a prima facie case, Respondents are required to make a "showing" that the prima facie case does not accurately predict the effect of the Acquisition on competition.

If Complaint Counsel makes a prima facie case in a relevant product market, the burden shifts to Respondents to rebut it by making a "showing" that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. *Baker Hughes*, 908 F.2d at 991. The required strength of Respondents' showing depends on the prima facie case presented: "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Id.* Respondents may present various types of evidence in order to rebut a prima facie case. *E.g.*, *Baker Hughes*, 908 F.2d at 985-86; *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (N.D. Cal. 1991). In fact, this is a "foundation of section 7 doctrine[.]" *Id.* at 984.

a. Evidence that Complaint Counsel's concentration statistics are misleading rebuts a prima facie case.

Evidence showing that market concentration statistics are misleading rebuts a prima facie case. For example, in *Baker Hughes*, the district court accepted respondents' argument that market share statistics were misleading because they were "volatile and shifting" and "easily skewed." 908 F.2d at 986. The fact that the products at issue "were esoteric" and that the markets were small led the district court to believe that market concentration statistics did not accurately predict future competitive strength. *See id*.

b. Evidence of actual or potential entry or the existence of low entry barriers rebuts a prima facie case.

Evidence regarding actual or potential entry rebuts a prima facie case. *See Baker Hughes*, 908 F.2d at 988. For example, in *Baker Hughes*, respondents presented evidence that two companies had entered the U.S. market immediately prior to the challenged acquisition and that those companies were "poised for future expansion." *Id.* at 988-89. However, a showing of actual entry is not even necessary. Even the *mere threat* of entry can rebut a prima facie case. *See id.* For example, in *Baker Hughes*, the court found that an acquisition was not unlawful because "a number of firms competing in Canada and other countries had not penetrated the U.S. market, but could be expected to do so if [the acquisition led to higher prices]." *Id.* In fact, *Baker Hughes* expressly recognized that the "mere threat" of entry could rebut a prima facie case because "these firms would exert pressure on the United States . . . market even if they never actually entered the market." *Id.*

Another way that evidence related to entry can rebut a prima facie case is where the evidence demonstrates the absence of entry barriers to the relevant markets. *Baker Hughes,* 908 F.2d at 989. For example, the *Baker Hughes* court found that developing a sales and service network was not an entry barrier because costs associated with developing such a network were small. *Id.* Other courts who have examined the definition of an "entry barrier" have found that experience, investment of time, and investment of money are generally not barriers to entry. *E.g., In re Heublein, Inc.*, 96 F.T.C. 385, 590-91 (1980); *United States v. Gillette Co.*, 828 F. Supp. 78, 85 (D.D.C. 1993); *International Distrib. Ctrs., Inc. v. Walsh Trucking*, 812 F.2d 786, 792-93 (2d Cir. 1987). Similarly, courts have held that locational disadvantages and business and management competence are not entry barriers because they can be overcome over time. *U.S. v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 854 F. Supp. 367, 375 (E.D. Pa. 1994).

By contrast, typical entry barriers include trade secrets, patents, licenses, barriers to customers changing suppliers, and capital outlays to start a brand new business. *McGahee v. N. Propane Gas Co.*, 858 F.2d 1487, 1495 (11th Cir. 1988). Entry barriers must be more than mere hurdles or inconveniences. As one court noted, "[t]o justify a finding that a defendant has the power to control prices, entry barriers must be significant -- they must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir.1995).

c. Evidence of customer sophistication rebuts a prima facie case.

Evidence of customer sophistication rebuts a prima facie case. *Baker Hughes*, 908 F.2d at 986. For example, the *Baker Hughes* court found that no violation of Section 7 occurred, in part because the sophistication of customers "was likely to promote competition even in a highly concentrated market." *Id.* In so holding, it noted that the products at issue cost at least several hundred thousand dollars each, that customers in the market closely examine available options, and that customers typically insist on receiving multiple confidential bids for each order. *Id.*

d. Evidence of unique economic circumstances rebuts a prima facie case.

Evidence of unique economic circumstances rebuts a prima facie case. *Id.* (citing *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *Baker Hughes*, 908 F.2d at 983; *Kaiser Aluminum*, 652 F.2d at 1340 & n.12)). For example, the fact that the acquired company's market position was deteriorating both before and after an acquisition can rebut a prima facie case. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981). Similarly, weak market position of the acquiring company can rebut a prima facie case. *FTC v. National Tea Co.*, 603 F.2d 694, 699-700. (8th Cir. 1979). Financial weakness of the acquired company can also rebut a prima facie case. *United States v. International Harvester Co.*, 564 F.2d 769, 776-79 (7th Cir. 1977).

e. Evidence that the effect of the acquisition would have less than a risk of a substantial lessening of competition rebuts a prima facie case.

Evidence that an acquisition would have less than a risk of a substantial lessening of competition rebuts a prima facie case. Section 7 itself proscribes acquisitions that "may be *substantially* to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). For that reason, an acquisition that results in only trivial price increases or a loss of competition in a *de minimis* market does not violate Section 7. In *Baker Hughes*, the district court noted that "[t]he minuscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" 731 F. Supp. at 9 (citing *United States v. Dupont & Co.*, 353 U.S. 586, 595 (1957)). To read Section 7 as proscribing an acquisition that triggered only a trivial price increase or only a loss of competition in a *de minimis* market would be to ignore the substantiality requirement of the statute.

f. Post-Acquisition evidence is highly relevant to determining the validity of a prima facie case.

In attempting to predict whether a challenged acquisition will have an anti-competitive effect, review of post-acquisition evidence is often helpful. Courts have held that "[p]ost-acquisition evidence is admissible since the probability of anticompetitive effects is judged at the time of trial." *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981). The court observed that:

> [P]ost-acquisition evidence favorable to a defendant *can be an important indicator of the probability of the anticompetitive effects* where the evidence is such that it could not reflect a deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition.

Id. (emphasis added). Such evidence can only be discounted when it is shown to have been manipulated by the party presenting it. *See United States v. General Dynamics*, 415 U.S. 486, 505 (1974).

3. A showing of entry or other relevant evidence shifts the burden to Complaint Counsel to show that entry will not constrain prices at or near pre-Acquisition levels, or to otherwise prove that its concentration statistics accurately predict a substantial lessening of competition.

Once Respondents rebut Complaint Counsel's prima facie case, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion. This burden remains with the government at all times. *Baker Hughes*, 908 F.2d at 983 (citing *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1340 & n.12 (7th Cir. 1981)). An example of the type of "additional evidence" Complaint Counsel must produce to sustain its case is evidence that substantial barriers to entry into the relevant market exist. *University Health, Inc.*, 938 F.2d at 1220. One scholar has explained:

> In a merger proceeding the government has the burden, as part of its prima facie case, properly to define the relevant market and to demonstrate at a minimum that the merger will result in an undue increase of concentration in that market. As the Merger Guidelines indicate, this will require inclusion of the reasonable import capabilities of foreign competitors, absent special circumstances such as trade quotas. We are in a global economy, and the U.S. legal system places considerable trust in the workings of the free market. It is appropriate, therefore, that the government have this

> burden when it challenges transactions between domestic competitors that face strong foreign competitors which have access to our domestic markets.

James R. Atwood, Information from Abroad: Who Bears the Burden in an Antitrust Investigation, 65 Antitrust L.J. 227, 238 (1996).

In its closing argument, Complaint Counsel contended that Respondents must show that "entry is not only timely but that these entrants would be able to be profitable at pre-acquisition prices." (Robertson, Tr. 8185). This position was flatly rejected by *Baker Hughes* as a "novel and unduly onerous standard." *Id.* at 987. In *Baker Hughes*, the government asserted that supposed ease of entry can only rebut the government's prima facie case by "clearly showing that entry will be both quick *and* effective at preventing supracompetitive pricing." *Id.* (emphasis added). The *Baker Hughes* court rejected this argument because it "would require of defendants a degree of clairvoyance alien to section 7, which, as noted above, deals with probabilities, not certainties." *Id.* It observed that the government's argument essentially imposed upon the acquiring party the burden to "disprove future anticompetitive effects," which would mean that respondents would be required to prove the ultimate issue. *Id.* at 990. The court noted that such a standard would be a "depart[ure] from settled principles." *Id.*

In an effort to shirk its burden during closing argument, Complaint Counsel cited the Merger Guidelines ("Guidelines") language stating that "the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern." *See* 1992 HORIZONTAL MERGER GUIDELINES § 0.2, *available at* http://www.ftc.gov/bc/docs/horizmer.htm. This reliance is misplaced for two reasons: First, while the Guidelines instruct the Agency to assess the "sufficiency" of entry in determining whether an action is necessary, it does not address which party bears the burden of proof concerning any item of evidence in an actual court proceeding. In fact, the Guidelines do not even address the issue of burden in a judicial or administrative proceeding.

Second, Complaint Counsel's interpretation of the Guidelines would vitiate *Baker Hughes*' holding that "the ultimate burden of persuasion" belongs to the government "at all times." 908 F.2d at 983. Such an interpretation of the Guidelines cannot prevail because the Guidelines are not law, are not binding on courts or the Commission, and cannot provide the basis to contradict well-settled principles of governing law. *E.g.*, *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 n.9 (S.D.N.Y. 1995) (internal citations omitted); *see also, e.g., FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353-54 (2d Cir. 1979); *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1300 (9th Cir. 1993). As the *Kraft* court noted, "the Merger Guidelines are helpful in providing an analytical framework for evaluating an acquisition, but they are not binding upon the court." 926 F. Supp. at 359 n.9.

D. THIS CASE IS FACTUALLY AND LEGALLY SIMILAR TO *BAKER HUGHES.*

Beyond its pronouncement of the legal standards applicable here, *Baker Hughes* is instructive because its holding addresses a set of facts and legal arguments very similar to those at issue in this case. As the following summary demonstrates, these similarities are striking:

- In *Baker Hughes*, the court examined the market for hydraulic drilling rigs. These rigs were assembled and made to suit each purchaser's needs and specifications. 731 F. Supp. at 8. The instant case deals with a variety of large field-erected tanks and structures, all of which are custom made to suit each purchaser's needs. (*See* Harris, Tr. 7166-67) (FOF 7.46).

- In *Baker Hughes*, the customers at issue sought bids from several suppliers and placed great emphasis upon a supplier's reputation for quality and service. 731 F. Supp. at 7. In this case, customers generally seek competitive bids from several suppliers for each of the products at issue. (*E.g.*, Eyermann, Tr. 6993; Patterson, Tr. 456-57; N. Kelley, Tr. 7082-83).

- In *Baker Hughes*, the acquiring party considered itself to be an industry leader. 731 F. Supp. at 8. In this case, CB&I considers itself to be an industry leader in the product markets at issue, with the exception of thermal vacuum chambers. (*E.g.* CX 832).

- *Baker Hughes* addressed a very thin product market. The overall size of the market ranged from 18 to 42 sales per year. 731 F. Supp. at 9. The case at bar also involves thin markets, far thinner in fact than those in *Baker Hughes*. For example, in the two years since the Acquisition, only one LNG Tank, one LPG tank, five LIN/LOX tanks and zero thermal vacuum chambers have been sold. (*See* Part VI, *supra*). The other markets at issue are far thinner. (*See* Parts III, IV, V, *supra*.)

- In *Baker Hughes*, the acquiring company was a "substantial business, doing business in many regions, including Europe, Africa, Asia, and Latin America." 731 F. Supp. at 9. Similarly, CB&I is a global business, with operations in many different countries. (Glenn, Tr., 4057-58).

- The *Baker Hughes* court examined acquiring and acquired companies that were both "already successfully established in the U.S., whose individual or combined shares measured over a period of years have Clayton Act significance." 731 F. Supp. at 9. Similarly, CB&I and PDM had a significant portion of pre-Acquisition market share in the relevant markets.

- In *Baker Hughes*, the acquiring and acquired companies followed each other's pricing closely. 731 F. Supp. at 9. In this case, prior to the Acquisition, CB&I and PDM followed each other's activities in the relevant markets. (*See, e.g.*, Simpson, Tr. 3773) (FOF 7.242).

- In *Baker Hughes*, competitors were global companies competing with the respondent on a world-wide basis. 731 F. Supp. at 9. As discussed extensively below, CB&I now competes in the U.S. with the same companies it competes with worldwide on a daily basis, particularly in the LNG markets. (*See* Part III, *supra*).

- *Baker Hughes* addressed the significance of failed past entry attempts. *See* 731 F. Supp. at 11. Similarly, the significance of foreign efforts to enter the LNG market in Memphis is at issue in this case.

- *Baker Hughes* addressed the legal significance of recent foreign entry and the threat of future entry. 731 F. Supp. at 11. These are also issues in the instant case. Foreign entrants have entered the U.S. LNG markets, and more companies are threatening to do so in the future. (*See* Part III, *supra*).

- Finally, *Baker Hughes* also addressed whether the government or the respondent bore the burden of proof regarding sufficiency of entry. *See Baker Hughes*, 908 F.2d at 983. As discussed above, this case presents the very same question.

In short, *Baker Hughes* provides the structural framework to analyze this Section 7 case. It addressed many of the legal and factual questions at issue in this case. As set forth below, *Baker Hughes* compels dismissals of the Complaint as to all four product markets.

II. COMPLAINT COUNSEL HAS FAILED TO MAKE A PRIMA FACIE CASE.

Complaint Counsel bases its prima facie case in each market on evidence of market concentration using statistics dating back to 1990. (*See, e.g.*, Simpson, Tr. 3704-05) (FOF 7.237). For many reasons, market concentration statistics are unhelpful in analyzing the effect of this Acquisition and thus fail to establish a prima facie case.

A. COMPLAINT COUNSEL'S CONCENTRATION STATISTICS CANNOT BE USED TO PREDICT FUTURE COMPETITION.

Dr. Barry Harris, Respondents' expert, explained that market concentration statistics are useful only if predictive of the future:

> The reason you would ever do any market share analysis as you go forward is to try to get a notion of what the world will look like going forward. It's not just, oh, I found a high number, that makes things bad. Market shares and concentration can be useful *if they help you predict as you go forward*.

(Harris, Tr. 7227) (FOF 7.116) (emphasis added). In this case, market shares and concentration statistics that measure past market strength are not predictive of current market conditions for several reasons:

First, new competitors have entered the U.S. market since the Acquisition. (*See* Harris, Tr. 7219-21). (FOF 7.108). As discussed in Part III, *supra*, strong new competitors have emerged in the LNG markets and Complaint Counsel's historical market concentration statistics do not account for them. Such statistics also do not take into account recent changes in competitiveness of certain companies. For example, Complaint Counsel's LIN/LOX statistics do not reflect the fact that AT&V has won all three of the jobs it has competed on against CB&I, Praxair's spinoff of CB&I in the mid-1990s, and the exit of Graver from that market in 1999. (*See* Harris, Tr. 7307-08, 7311-12) (FOF 7.127, 7.130).

Second, since the Acquisition, LNG demand in the U.S. has generally shifted from single-containment to double- and full-containment tanks. (Harris, Tr. 7219-21). (FOF 7.108). This shift has changed the competitive abilities of CB&I relative to new entrants. Because foreign companies are more experienced in building full and double-containment tanks, they can be expected to have advantages relative to CB&I which Complaint Counsel's historical market concentration statistics do not measure. (*See* Harris, Tr. 7227) (FOF 7.115). Complaint Counsel's economist, Dr. Simpson, did not account for these changes in his market share analysis, which is significant because it affects Dr. Simpson's HHI analysis. (Harris, Tr. 7221-22) (FOF 7.114). Further, Dr. Harris noted that, since the Acquisition, CB&I has won only 17-18 percent of the dollar amounts awarded in the four markets combined. (Harris, Tr. 7223). (FOF 7.78). For these reasons, Complaint Counsel's structural analysis is not useful. (Harris, Tr. 7227-29) (FOF 7.115).

Third, in some cases, the market concentration statistics and other economic evidence presented by Complaint Counsel were misleading because they contained products different that the relevant products. For example, the LIN/LOX market included certain spheres. Because spheres serve different functions, and are constructed in a different manner, it is inappropriate to include spheres in this market. (*See* Harris, Tr. 7301-02) (FOF 7.123).

B. COMPLAINT COUNSEL'S CHOICE OF 1990 AS THE MEASURING DATE FOR ITS CONCENTRATION STATISTICS IS ARBITRARY AND SUBJECT TO MANIPULATION.

Even if market concentration statistics were somehow found to be helpful in this case, the statistics as presented by Complaint Counsel are flawed. Complaint Counsel chose to calculate statistics in all four markets using data from the same starting point -- 1990 to the date of the Acquisition. Complaint Counsel's expert witness, Dr. John Simpson, acknowledged on cross-examination that he had no principled basis for choosing this date, other than the fact that 1990 was the earliest date he had available. (Simpson, Tr. 3704-05).

Although Respondents believe use of HHIs are not helpful in this case and are arbitrary, a more accurate basis for selecting a starting point for an HHI calculation is to select a date around which significant market changes occurred, such as rapidly rising or falling market shares. The validity of this approach has been recognized by a leading antitrust commentator relied on by Dr. Simpson (*See* Simpson Tr. 3044-45) (FOF 7.237). Under the less arbitrary approach suggested by Professor Areeda, 1995 or 1996 is a more appropriate measuring date because, beginning at that time, CB&I's large LNG and LPG market share fall to zero over a six-year period. (Simpson, Tr. 3744). There is no rational basis for selecting twelve years of data for purposes of concentration statistics as compared to fifteen or five. Sales in these markets are sporadic, and a single sale can represent a large percent of market share in any given year. Thus, as the Merger Guidelines note, "[t]ypically, annual data are used, but where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time." Merger Guidelines, §1.41. Nowhere do the Guidelines suggest going back twelve years.

For example, the arbitrary nature of the HHIs is underscored by the fact that choosing a different date achieves a completely different result; picking a different starting point of 1995 or 1996, vastly different concentration statistics emerge. CB&I did not build an LNG or LPG tank between 1995 and the date of the Acquisition, resulting in a change of zero in the HHIs in those markets, and the HHI in the LIN/LOX market is lowered. (*See, e.g.*, Simpson, Tr. 3744) (FOF 7.236). In the thermal vacuum chamber market, CB&I has not built a thermal vacuum chamber since 1984. (Scorsone, Tr. 5055) (FOF 7.235). Thus, choosing to calculate HHIs beginning in 1996 results in an HHI change of zero in three of the four markets. Under *Baker Hughes* and the Section 1.5 Merger Guidelines, an acquisition resulting in zero change in the HHI fails to establish a prima facie case. In the LIN/LOX market, even Dr. Simpson admitted that CB&I's sale by Praxair in 1997 was a significant competitive change, a fact which would justify beginning the HHI calculation in 1997 after the date of the sale. (*See* Simpson, Tr. 3753) (FOF 7.236).

In short, using a 1996 start date for an HHI calculation would result in zero change in three of the four markets at issue in this case. To the extent that this Court finds HHI analysis to be helpful, using a 1996 date is supported by antitrust theory and the evidence in this case, and should be the preferred method should the Court decide that any HHI data is relevant in this case, as opposed to Complaint Counsel's 1990 starting point, which is arbitrary and appears chosen to manipulate the HHI results.

III. RESPONDENTS HAVE SUCCESSFULLY REBUTTED ANY PRIMA FACIE CASE IN THE MARKET FOR LNG TANKS AND FACILITIES.

A liquefied natural gas ("LNG") tank is designed to contain natural gas in liquid form. (Glenn, Tr. 4066; Price, Tr. 530) (FOF 3.5). There are various types of LNG tanks including single-containment, double-containment and full-containment tanks. (Scorsone, Tr. 4919; Glenn, Tr. 4108).

As set forth above, Complaint Counsel has failed to prove a prima facie case in the LNG markets. Assuming *arguendo* the existence of a prima facie case, Respondents have successfully rebutted it in several different ways. Evidence shows that timely entry has occurred and that new entrants are large, multinational corporations that have LNG experience and the respect of U.S. customers. These new entrants do not face significant entry barriers in the U.S. Their presence in the market has successfully constrained CB&I's behavior in these markets and allowed customers to receive competitive pricing on post-Acquisition projects. Evidence also shows that current customers for LNG facilities are sophisticated consumers whose recent involvement in the market is credible and relevant and stands in sharp contrast to the stale, uninformed, and biased testimony presented by Complaint Counsel.

Increased demand for LNG in the U.S. has encouraged this recent entry. Over the past 30 years, U.S. demand for LNG facilities has been exceedingly small. World LNG demand came from international markets, such as Japan and Korea. (*E.g.*, Scorsone, Tr. 4859) (FOF 3.53). Demand for LNG in the U.S. has recently increased because of rising gas prices.[2] Glenn, Tr. 4091) (FOF 3.55). Increased demand has caused foreign LNG tank contractors with extensive international experience to enter in the U.S. market. **[xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

A. ACTUAL ENTRY HAS OCCURRED IN THE LNG MARKETS. THE NEW ENTRANTS ARE ACTIVE, EXPERIENCED, QUALIFIED, AND SUCCESSFUL.

Respondents have presented unrebutted evidence of actual entry in the market for facilities involving field-erected LNG tanks. The presence of these companies in the U.S. market rebuts Complaint Counsel's prima facie case. *See Baker Hughes*, 908 F.2d at 984. Four major international entities have entered the market in the last two years. They are controlled by large, multinational corporations, have extensive assets, and are committed to the U.S. market.

[2] Increased demand is concentrated in the area of LNG import terminals, not peakshaving facilities. The LNG peakshaving market is very sporadic. (*E.g.*, Kistenmacher, Tr. 884) (FOF 3.670). The only current known future LNG peakshaving project in the future is the Yankee Gas facility in Connecticut. (*See generally* Andrukiewicz, Tr. 6439-40) (FOF 3.337). The only other LNG peakshaving customer who testified in this case does not plan to purchase a new peakshaving facility until at least 2006. (Hall, Tr. 1832-33) (FOF 3.650).

Further, these entrants have successfully wrested LNG work from CB&I. This evidence of entry is far more compelling than that presented by the successful respondents in *Baker Hughes*. *Id.* at 988 (prima facie case rebutted by evidence that two companies entered the U.S. market for a particular type of heavy machinery, and were "poised for future expansion").

In addition, three other large foreign companies are poised to enter the U.S. market and in fact have already made efforts to enter. Like the new entrants already in the U.S. market, they have extensive experience in LNG internationally and are respected by U.S. customers.

1. Skanska/Whessoe is active in the U.S. market, and has the necessary experience and qualifications to be successful.

a. Skanska/Whessoe has made significant efforts to enter the U.S. and North American markets.

Skanska AB ("Skanska") is one of the world's largest construction groups and is a well-established Swedish based civil contractor that has operated internationally for more than 50 years. (RX 839 at 4; RX 870 at 25) (FOF 3.57). In terms of revenue, Skanska is the largest contractor in the world. Skanska has a significant presence in the U.S. In fact, it is one of the three largest contractors in the U.S. (RX 737) (FOF 3.57). In August of 2000, Skanska acquired Whessoe International ("Whessoe"), which is a 200-year-old engineering and construction firm with a well-established reputation in the international LNG business. (RX 770 at 33, RX 908 at 1) (FOF 3.57-3.58).

Skanska/Whessoe has already been successful in the LNG markets. In 2001, Skanska won the bidding to be the EPC contractor for Dynegy's Hackberry project, the largest such project in U.S. history. (Puckett, Tr. 4547) (FOF 3.68). Skanska beat several other major international engineering and construction firms, including CB&I. (*See* Puckett, Tr. 4545-46) (FOF 3.240). Dynegy chose Skanska because it had a demonstrated track record on similar projects internationally, committed to executing the project in the U.S. on Dynegy's planned schedule, and provided favorable commercial terms to Dynegy. (*See* Puckett, Tr. 4548-49) (FOF 3.244, 3.272). Skanska has teamed with Black & Veatch, a leading contractor in the field of process design and engineering. (*See* Price, Tr. 600; Puckett, Tr. 4548) (FOF 3.273). Skanska's subsidiary, Whessoe, bid to construct the tank portion of the Hackberry project. **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.]** Jolly, Tr. 4691, 4760) (FOF 3.68)**.**

Skanska/Whessoe's involvement in the U.S. LNG market extends beyond Dynegy; it is pursuing other U.S. LNG opportunities, it has been actively courting current U.S. LNG customers and introducing them to its capabilities, and has provided pricing to U.S. customers for LNG facilities. For example, it has provided preliminary information (including pricing) to Yankee Gas regarding its planned LNG peakshaving facility and is currently being considered by Yankee Gas as a potential tank constructor. (*See* Andrukiewicz, Tr. 6445-46) (FOF 3.69, 3.342). **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 3.70, 3.473)**.**

Skanska/Whessoe and Black & Veatch representatives have also recently called on Freeport LNG to discuss serving as the contractor for that planned project. These representatives provided written information regarding the capabilities of the "alliance" between Black & Veatch and Skanska/Whessoe. (Eyermann, Tr. 6981-83, 6992) (FOF 3.65, 3.72, 3.576, 3.662). In these documents, Black & Veatch touted its alliance with Skanska/Whessoe as a selling point. The fact that Skanska and Black & Veatch have formed a relationship has led customers such as Freeport LNG to believe that Skanska is a serious competitor in the U.S. market. (Eyermann, Tr. 6986-87, 6992) (FOF 3.65). Freeport LNG is not the only target of

Skanska/Whessoe's marketing efforts; they have spoken with owners **[xxxxxxxx]** regarding LNG activities in the U.S. **[(xxxxxxxxxxxxxx)]** (FOF 3.424).

Skanska/Whessoe has also been active in LNG activities elsewhere in North America. In 2001, after the Acquisition, Skanska/Whessoe bid on an LNG facility for Enron in the Bahamas. Enron solicited a bid from Skanska/Whessoe for this project because of Skanska/Whessoe's interest, and because of its proven track record with respect to LNG tanks. (Carling, Tr. 4480-81) (FOF 3.443).

b. Skanska/Whessoe is a capable, experienced, and qualified LNG contractor.

Past and current U.S. customers for LNG facilities believe that Skanska/Whessoe is a major competitor in the LNG markets. For example, Dynegy -- a company that recently went through an extended vendor pre-qualification process for LNG tanks and facilities -- had the opportunity to carefully examine the qualifications and capabilities of Skanska/Whessoe. In connection with its Hackberry project, Dynegy interviewed Skanska and found that it was qualified to be an EPC contractor. (Puckett, Tr. 4550, 4547) (FOF 3.68, 3.264, 3.267). In fact, Dynegy selected Skanska over several other major EPC candidates, including CB&I. (Puckett, Tr. 4545-46) (FOF 3.263).

With respect to the tank portion of the Hackberry project, Dynegy interviewed Skanska/Whessoe during its pre-qualification process. (Puckett, Tr. 4552-54) (FOF 3.277). During this process, Dynegy examined previous LNG tank projects performed by Skanska/Whessoe (the Dabhol, India project), and learned that they were well-done. (Puckett, Tr. 4565) (FOF 3.272). As a result of its due diligence, Dynegy was satisfied that Skanska/Whessoe had the necessary reputation and ability to perform the fabrication, field erection and construction of LNG tanks for this project. (Puckett, Tr. 4557-58) (FOF 3.278, 3.279, 3.280, 3.281). Accordingly, Dynegy sought a bid from Skanska/Whessoe for this project. (Puckett, Tr. 4552) (FOF 3.283).

Dynegy is not the only U.S. customer familiar with Skanska/Whessoe. Prior to its financial troubles, Enron had worked with Skanska/Whessoe on a variety of LNG projects. Enron saw Skanska as a very large, international, Scandanavian engineering and construction company with operations in the United States, and one of the larger contractors for steel structures in the U.S. (Carling, Tr. 4466) (FOF 3.84). According to Larry Izzo, the former CEO of Enron Engineering and Construction, Skanska is "clearly one of the largest contractors in the world, one of the top builders in the United States." (Izzo, Tr. 6496, 6505) (FOF 3.79). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].**

Unlike most of Complaint Counsel's witnesses, Enron has had direct contact with Skanska and/or Whessoe in recent years. According to Nigel Carling, who was involved with the Dabhol project, Whessoe did an "excellent" job. (*E.g.*, Carling, Tr. 4464-65) (FOF 3.91). Specifically, Whessoe and its fellow contractors were responsive and competent in controlling the local labor force. (Carling, Tr. 4459-60; *see also* Izzo, Tr. 6487) (FOF 3.91, 3.92). This performance was especially impressive to Enron because: 1) the Dabhol project was located far from a pre-existing organized labor force; and 2) the local politics in the area presented difficulties for the contractor on-site. (Carling, Tr. 4456) (FOF 3.90).[3] Under these conditions, Whessoe completed the Dabhol project in record time. (Izzo, Tr. 6487) (FOF 3.92).

Based on Whessoe's performance at Dabhol and its subsequent acquisition by Skanska, Enron permitted Skanska/Whessoe to bid on an LNG import terminal in the Bahamas during late 2001. In explaining this decision, Nigel Carling noted that Skanska "has significant

[3] According to Enron, the Dabhol job was more difficult to construct than, for example, the double-containment tank built by PDM at Penuelas, Puerto Rico. The increased difficulty lay in the remoteness of the Indian facility and the quality of the labor force. (Carling, Tr. 4473-74) (FOF 3.91).

financial strength and brings the logistical experience." (Carling, Tr. 4481) (FOF 3.84). Carling would prequalify Skanska/Whessoe for future LNG projects in the U.S. (Carling, Tr. 4485) (FOF 3.84). Similarly, based on Larry Izzo's experience with Skanska/Whessoe in Dabhol, Calpine plans to prequalify Skanska/Whessoe for its Humboldt Bay EPC and LNG tank jobs. (Izzo, Tr. 6494-95, 6498-500) (FOF 3.79, 3.246, 3.403). Calpine believes that Skanska/Whessoe has the experience and the balance sheet necessary to construct a large LNG project in the U.S. (Izzo, Tr. 6495) (FOF 3.403).

Other U.S. customers hold similar views of Skanska/Whessoe. For example, the management of Freeport LNG knows that Skanska/Whessoe is "a very big construction company," that Whessoe has built LNG tanks in Dabhol, India, Trinidad, and Greece, and that Whessoe did a "very good" job on the Dabhol project. (Eyermann, Tr. 6980-81) (FOF 3.72). Freeport LNG sees Skanska/Whessoe as a very serious competitor in the U.S, especially since it has already teamed up with a process engineering company. (Eyermann, Tr. 6986-87, 6992) (FOF 3.65). Freeport LNG plans to solicit bids from Skanska/Whessoe for the Freeport LNG project. (Eyermann, Tr. 6993) (FOF 3.80). The fact that Skanska/Whessoe has not previously built an LNG tank in the U.S. does not concern customers such as Freeport LNG. As Volker Eyermann explained, if Whessoe "can build an LNG tank in India with Indian labor or in Trinidad with Trinidadian labor, they should be able to do that in America with local labor." (Eyermann, Tr. 6993-94) (FOF 3.81).

Other U.S. customers have approached Skanska/Whessoe regarding future LNG projects located in the U.S. CHI Engineering, a consultant for the Yankee Gas project, requested information and pricing from Skanska/Whessoe for the LNG tank portion of its preliminary engineering report. (Andrukiewicz, Tr. 6445) (FOF 3.341, 3.342). Yankee Gas plans to consider pre-qualifying Skanska/Whessoe for this job. (Andrukiewicz, Tr. 6452-54) (FOF 3.357). Similarly, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.]**

Some of the largest energy producers in the U.S. believe that Skanska/Whessoe is an LNG contractor capable of building these facilities in the U.S. at a competitive price. For example, El Paso has "pre-qualified" Skanska/Whessoe for LNG projects in Mexico -- close to the U.S. border. (Bryngelson, Tr. 6125-26) (FOF 3.83, 3.374). The fact that Skanska/Whessoe is prequalified means that it is viewed to have sufficient financial stability and technical capabilities to execute the project. El Paso's conclusions are informed by consultations with Halliburton/KBR, a leading LNG engineering firm. (Bryngelson, Tr. 6128-29) (FOF 3.381). El Paso would also prequalify Skanska/Whessoe to build LNG tanks in the U.S. and believes that Skanska/Whessoe could build those tanks at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.382). Further, El Paso is not concerned that Skanska/Whessoe had not built an LNG tank in the U.S. previously, because "the actual construction of the tank, it would be the same in the U.S. as it would be in an international location, by and large." (Bryngelson, Tr. 6141).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx.]

Complaint Counsel's own witnesses support the view that Skanska/Whessoe is a capable tank contractor. Clay Hall (of Memphis Light, Water, and Gas) acknowledged that as of 1994 or 1995, Whessoe had significant international experience in building LNG tanks and that it had the capability to engineer an LNG tank. (Hall, Tr. 1805, 1845) (FOF 3.85) Similarly, **[xxxxxxxxxxxxxxxxxx]** of **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** acknowledged that Whessoe has an acceptable reputation worldwide. **[xxxxxxxxxxxxxx] (**FOF 3.86).

Perhaps most tellingly, competitors see Skanska/Whessoe as a formidable adversary in the U.S. market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Dr. Harris also agrees with **[xxxxxxxxxxx]** assessment. He believes that because Skanska/Whessoe now has both "brains and brawn," it has been accepted as a bidder and the EPC for Dynegy, and is viewed by customers as a good supplier, it is a good competitor. (Harris, Tr. 4239-40).

2. TKK/AT&V is active in the U.S. market and has the necessary experience and qualifications to be successful.

a. TKK/AT&V has made significant efforts to enter the U.S. and North American markets.

Established in 1941, Toyo Kanetsu K.K ("TKK"), is a Japanese constructor of low temperature and cryogenic tanks. (RX 872 at 2) (FOF 3.99). TKK has successfully constructed some of the largest above-ground storage tanks in the world and is recognized as a leader in tank construction. (RX 872, at 5; RX 186, at TWC 000084) (FOF 3.99). TKK has completed over 200 low temperature tanks throughout the world, including 72 LNG tanks in locations such as Malaysia, Brunei, Oman, Nigeria, Australia, Indonesia, Algeria, and Korea. (RX 772 at 2-21; RX 818) (FOF 3.100). TKK is the "world's leader" in constructing double-containment and full-containment LNG tanks; it has built more of these tanks than anyone else in the world. (Cutts, Tr. 2572-73) (FOF 3.101).

American Tank & Vessel, Inc. ("AT&V") is an engineering and construction firm based in Mobile, Alabama with extensive experience in the engineering, design, and fabrication of tanks, vessels and spheres. (RX 818; RX 31 at 9; Carling, Tr. 4489) (FOF 3.102). AT&V has engineering and fabrication facilities throughout the southern U.S., and owns a wide variety of equipment necessary for tank construction. (RX 31) (FOF 3.103). AT&V maintains global operations in Mexico, Argentina, Brazil, Ecuador, Trinidad, Philippines, Indonesia, and Thailand; it has worked on "hundreds and hundreds" of projects overseas. (RX 31 at 19; Cutts, Tr. 2476-77) (FOF 3.104).

In November 2001, AT&V entered into an agreement with TKK to jointly supply large-scale LNG tanks to the U.S. market. (RX 250; RX 818; Cutts, Tr. 2437-38) (FOF 3.105). TKK and AT&V have also "developed an understanding and general relationship" to jointly pursue projects outside of North America. (Cutts, Tr. 2444) (FOF 3.105). TKK will carry the lead responsibility for doing the engineering and design work for LNG tanks. (Cutts, Tr. 2327) (FOF 3.105). TKK will provide a track record, engineering expertise, management expertise, and welding technology to the TKK/AT&V partnership to build large cryogenic tanks in the U.S. (Cutts, Tr. 2376-77) (FOF 3.106). AT&V will provide field labor and field erection services. (Cutts, Tr. 2328) (FOF 3.105).

TKK and AT&V have already begun to put plans into action. TKK personnel have come to AT&V's offices to train employees. (Cutts, Tr. 2441) (FOF 3.109). TKK has already trained AT&V employees on estimating, scheduling, construction techniques, welding, operation of welding equipment, and coordinating. (*See* Cutts, Tr. 2324-26) (FOF 3.109). TKK is also assisting AT&V in developing technical specifications for LNG tanks. (Cutts, Tr. 2564-65) (FOF 3.111). TKK plans to train AT&V employees in the welding technology and fabrication necessary for an LNG tank. (Cutts, Tr. 2326, 2442, 2565-66) (FOF 3.110, 3.111).

AT&V has expended capital associated with the TKK/AT&V joint venture in connection with estimating, drafting, design, coordinating, bidding, and "all sorts of miscellaneous things." (Cutts, Tr. 2341-42) (FOF 3.109). It has already undertaken steps to research, design, and perform, "such as thermal performance, steps associated with scheduling, welding technology, and general construction sequencing" for LNG tanks. (Cutts, Tr. 2440) (FOF 3.108). Further, employees of AT&V have experience building LNG tanks in the U.S., and AT&V itself has the research and development to develop 9 percent nickel welding techniques. (Cutts, Tr. 2463-64) (FOF 3.108). AT&V also has fabrication facilities that are sufficient and fabricate LNG tanks in the U.S. (Cutts, Tr. 2457) (FOF 3.108).

Part of AT&V's goal in building a relationship with TKK for LNG projects is to provide stability: "stability requires you to sometimes do things at break even or modest profitability or almost none at all. . . ." (Cutts, Tr. 2461) (FOF 3.107). For example, TKK has a greater ability to obtain bonding at higher amounts than AT&V for LNG projects. (Cutts, Tr. 2556-57) (FOF 3.107). Customers have been satisfied that TKK is large enough to provide a financial guarantee for an LNG project. (Cutts, Tr. 2557-58) (FOF 3.107).

TKK and AT&V have already been making plans to work together on a specific LNG project. As discussed more fully below, TKK/AT&V bid on the Dynegy project, and have made plans to execute the project if they are successful. (*See* Cutts, Tr. 2468-69) (FOF 3.115, 3.116). TKK will have lead engineering responsibility for the entire project. (Cutts, Tr. 2484-85) (FOF 3.118). Engineering will be done in Japan and electronically transmitted to AT&V. (Cutts, Tr. 2473) (FOF 3.118). Fabrication will take place either in Japan or the U.S., depending on where the materials are purchased. (Cutts, Tr. 2473-74) (FOF 3.119). Dywidag, headquartered in Germany with operations in the U.S., will perform the necessary concrete work. (Cutts, Tr. 2358-59, 2471-72) (FOF 3.116). Dywidag will also handle civil engineering and civil construction coordination. (Cutts, Tr. 2484-85) (FOF 3.116). Japanese laborers will not participate in tank erection; AT&V and Dywidag personnel will handle this task. (Cutts, Tr. 2472-73) (FOF 3.118). TKK will provide four to eight on-site staff to supervise the process. (Cutts, Tr. 2444, 2476) (FOF 3.118).

The TKK/AT&V consortium has been active in the U.S. market for LNG facilities. AT&V has taken steps to provide LNG construction services to customers including "[m]arketing, research, staffing, equipment, procurement and bidding." (Cutts, Tr. 2437) (FOF 3.112). Marketing efforts include "[b]asic publicized marketing in the sense of some literature available, education of some of our sales force and literally calling on customers to introduce ourselves and explain to them what we do." (Cutts, Tr. 2439) (FOF 3.112). AT&V emphasizes its relationship with TKK with respect to its LNG marketing effort. (Cutts, Tr. 2439) (FOF 3.112). In fact, AT&V and TKK jointly make sales calls to customers. (Cutts, Tr. 2440) (FOF 3.113).

Like Skanska/Whessoe, TKK/AT&V was pre-qualified by Dynegy and submitted a bid to Dynegy for the Hackberry project. (Puckett, Tr. 4552-54). The TKK/AT&V partnership has bid on a total of three LNG projects during the past year, and has submitted budget pricing for three other projects. (Cutts, Tr. 2447, 2464-65) (FOF 3.114). TKK/AT&V has also provided pricing to Williams for a proposed expansion of the Cove Point LNG facility. (RX 185) (FOF 3.120). With respect to this expansion, Williams has plans to add between four and six new LNG tanks to the Cove Point facility. (Scorsone, Tr. 4987-88) (FOF 3.428). It has hired Halliburton/KBR to do a feasibility study for this expansion. (Scorsone, Tr. 4987-88) (FOF 3.429).

TKK/AT&V has also been pursuing other opportunities in the U.S. For example, representatives from TKK and AT&V (W.T. Cutts) contacted Freeport LNG to discuss the consortium's capabilities and to discuss contracting strategies. (Eyermann, Tr. 7000-01) (FOF 3.121). They indicated that AT&V has the "welder base" and "quality welders" to handle the Freeport project. (Eyermann, Tr. 7001-02) (FOF 3.130). Further evidence of the consortium's effort to enter the U.S. market is its effort to secure a U.S.-based process firm. AT&V, with Dywidag and TKK, recently approached Linde to form an alliance to build import terminals and peak-shaving plants. (Kistenmacher, Tr. 902-03, 915) (FOF 3.113).

TKK/AT&V has also been active elsewhere in North America. In conjunction with AT&V, TKK recently won a bid for a field-erected LNG tank in Trinidad. (Carling, Tr. 4488-89) (FOF 3.122, 3.326). CB&I is aware of this:

Q. And how are you familiar with that?

A. Recently CB&I lost a project there for another -- for a fourth tank at Trinidad to TKK and ATV, and CB&I is also in the final stages of constructing what was the third tank at Trinidad for Bechtel and for that facility.

Q. Sir, did CBI submit a bid to Bechtel for the fourth tank at the facility?

A. Yes.

Q. And do you know whose CBI's competition was?

A. Yes. It was TKK and ATV.

(Scorsone, Tr. 4949-50) (FOF 3.325, 3.326).

b. TKK/AT&V is a capable, experienced, and qualified LNG contractor.

Past and current U.S. customers for LNG facilities believe that TKK/AT&V is a major competitor. For example, Dynegy -- during its extensive pre-qualification process -- conducted due diligence regarding LNG tank vendors, including interviews with TKK/AT&V representatives. Dynegy solicited bids from TKK/AT&V because it was satisfied that it could build the necessary tanks. (Puckett, Tr. 4552-54) (FOF 3.277, 3.278). The fact that TKK/AT&V had not built an LNG tank in the U.S. was not relevant to Dynegy because

> AT&V has built a number of tanks. The key to us was the design of the tank, having somebody who definitely had capabilities to design the tank, and then whoever they team up with, if they chose to team up, does that company have the ability to execute the construction of the tank, and we were comfortable that the TKK-AT&V combination and also Dywidag, a German firm who is a piece of that group -- don't ask me how to spell Dywidag -- had the capability to execute and construct a tank here in the U.S.

(Puckett, Tr. 4584-85) (FOF 3.123).

Other U.S. customers active in the post-Acquisition North American LNG market believe that TKK/AT&V is viable. They are aware that TKK has a proven track record in places such as Indonesia, Egypt and Ras Laffan. (Carling, Tr. 4488, 4522; *see also* Izzo, Tr. 6499) (FOF 3.127). They are also familiar with AT&V as a tank maker in the U.S. and know it to employ many ex-CB&I workers. (Carling, Tr. 4489) (FOF 3.127). For example, Nigel Carling believes that TKK/AT&V can be competitive in the U.S. because of its success in remote locations such as Indonesia. (Carling, Tr. 4522-23) (FOF 3.127). As further support for the viability of TKK/AT&V in the U.S., Carling pointed to its recent win in Trinidad. (Carling, Tr. 4488-89) (FOF 3.122). Carling would prequalify TKK/AT&V for a future LNG tank job in the U.S. (Carling, Tr. 4485-87, 4489, 4491) (FOF 3.127).

U.S. customers with LNG projects on the drawing board have similar views. For example, Calpine knows that AT&V has capabilities to build LNG tanks and is known as a capable tank contractor with cryogenic capabilities. (Izzo, Tr. 6499) (FOF 3.127). Calpine believes that TKK/AT&V has the experience and the balance sheet necessary to construct a large LNG project and plans to prequalify it for the Humboldt Bay EPC and LNG tank jobs (Izzo, Tr. 6495) (FOF 3.129). Similarly, Freeport LNG is aware that TKK has successfully built LNG tanks in Japan and other countries and that TKK is "flexible enough to work in different countries . . . and can adapt to the locations and can successfully complete a project." (Eyermann, Tr. 7000) (FOF 3.130). Freeport LNG and its predecessor Cheniere Energy has received a variety of documents and materials from the TKK/AT&V consortium and met with its representatives regarding the Freeport LNG project. (Eyermann, Tr. 7002-04) (FOF 3.130). Based on this information, Freeport LNG believes that "TKK is a very qualified supplier, and ATV is a good partner in the United States" and that "they are very strong competitors." (Eyermann, Tr. 7004-05) (FOF 3.130). Although TKK and AT&V have never constructed a field-erected LNG tank in the U.S., Freeport LNG plans to solicit bids from TKK/AT&V for this. (Eyermann, Tr. 7005) (FOF 3.130).

Other U.S. customers and competitors with North American LNG projects also believe that TKK is a viable competitor. For example, El Paso has pre-qualified TKK for LNG projects in Altamira and Rosarito, Mexico. (Bryngelson, Tr. 6125-26) (FOF 3.372, 3.374). The fact that TKK is prequalified means that El Paso believes it has sufficient financial stability and technical capabilities to execute the project. (Bryngelson, Tr. 6128-29) (FOF 3.374). KBR, a leading LNG engineering firm, has determined that TKK is technically capable to execute these projects. (Bryngelson, Tr. 6129) (FOF 3,379). El Paso would also prequalify TKK to build tanks in the U.S. and believes that it has the capability to build LNG tanks in the U.S. at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.381). **[xxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

Several of Complaint Counsel's own witnesses view TKK as a viable competitor in the U.S. Errol Rapp of Bechtel noted that TKK has experience in constructing LNG storage tanks internationally and that Bechtel would consider prequalifying TKK for an LNG project in the U.S. (Rapp, Tr. 1309, 1316, 1326) (FOF 3.128). Similarly, Clay Hall of MLGW permitted TKK to bid on an LNG project in 1994 because he believed it was capable of building field-erected LNG tanks in the U.S. (*See* Hall, Tr. 1805, 1849-50) (FOF 3.132) MLGW would consider soliciting a bid from TKK/AT&V if and when it requires an additional LNG facility. (Hall, Tr. 1854) (FOF 3.657). **[xxxxxxxxxxxxxx]** of **[xxx]** has acknowledged that TKK has a good reputation worldwide. **[xxxxxxxxxxxxxxxxxxxxxx] (xxxxxxxxx).**

Respondents' expert, Dr. Harris, also believes that TKK/AT&V is a viable entrant because of TKK's good reputation worldwide in the LNG field and because of its success in Trinidad. (Harris, Tr. 7241-42) (FOF 7.98).

3. Technigaz/Zachry is active in the U.S. market and has the necessary experience and qualifications to be successful.

a. Technigaz/Zachry has made significant efforts to enter the U.S. and North American markets.

Technigaz, a subsidiary of Saipem Corporation, is an international company with extensive LNG experience. Technigaz and Saipem have revenues of more than $3 billion and employ about 20,000 people. (Jolly, Tr. 4439) (FOF 3.144). Technigaz has experience in the construction of LNG tanks worldwide. (RX 43 at ZCC 000005.) (FOF 3.144). It is currently building LNG projects in Portugal, Spain, Egypt, and Nigeria and has a proven track record of designing and managing the construction of LNG tanks. (*E.g.*, Carling, Tr. 4487) (FOF 3.185). In particular, Technigaz has expertise in LNG tanks involving concrete outer tanks and 9 percent nickel steel inner tanks or liners. (Jolly, Tr. 4439) (FOF 3.148). Technigaz has built three full-containment tanks in Qatar and is currently building eight full-containment LNG tanks **[xx xxxxxxxxxxxxxxxxxxxxxxxx].** (Jolly, Tr. 4439-40, 4732) (FOF 3.150). Taking this experience into account, Technigaz believes it is the "largest contractor today in full-containment tanks worldwide." (Jolly, Tr. 4689, 4725.) (FOF 3.151).

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[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. Customers and competitors in the U.S. market for LNG facilities view Zachry as one of the larger construction companies in the U.S. with experience in construction practices, management of labor forces, pricing structures, and completing jobs. (Carling, Tr. 4487) (FOF 3.185). Zachry has access to licensed engineers and well-trained, experienced local field labor in the U.S. (Price, Tr. 656-57, Rapp, Tr. 1325) (FOF 3.161, 3.184). In addition, Zachry has experience working with customers for LNG facilities on other projects. For example, Zachry has built several power plants for Calpine. Calpine believes that Zachry is a "competent American contractor who could team with an LNG design company to build a tank." (Izzo, Tr. 6499) (FOF 3.181). Consistent with these facts, Zachry holds itself out as a top-notch contractor. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.]**

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Technigaz/Zachry has made significant efforts to enter the U.S. LNG market. For example, it approached Dynegy to introduce their capabilities and ask for a chance to bid on the Dynegy project. The alliance eventually prepared a bid package for this project, **[xxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx].** (Puckett, Tr. 4549; Fahel, Tr. 1684-85 *see also* Jolly, Tr. 4690) (FOF 3.173, 3.271, 3.295). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx]**

The alliance's interest in the U.S. market goes far beyond Dynegy; it is currently involved with many other LNG opportunities in the U.S. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Technigaz has also called on Freeport

LNG to discuss the alliance's capabilities and to express interest in its LNG project**.** (*See* **[xxxxx xxxxxxxxxxxxxxxxxxxx]** 1668; Eyermann, Tr. 6994-96) (FOF 3.174, 3.175, 3.394). Technigaz's sales representative provided literature to Freeport LNG regarding the alliance's capabilities, indicating that "Technigaz is keenly interested in working" on this project. (Eyermann, Tr. 6996-98). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

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b. Technigaz/Zachry is a capable, experienced, and qualified LNG contractor.

U.S. customers view Technigaz/Zachry as a viable competitor in the U.S. For example, Dynegy interviewed Technigaz/Zachry as part of the pre-qualification procedure. (Puckett, Tr. 4552-54) (FOF 3.277). Dynegy sought a bid from Technigaz/Zachry for the LNG tanks because it believed the alliance had the reputation and ability to do the requisite fabrication, field erection and construction of the LNG tanks. (Puckett, Tr. 4552, 4554, 4557-58) (FOF 3.279, 3.280, 3.281).. Other U.S. customers with LNG projects on the drawing board have similar views. For example, Freeport LNG knows that Technigaz has a reputation for building LNG projects around the world and that Technigaz was recently awarded projects in Egypt and Portugal. (Eyermann, Tr. 6994-95). Freeport LNG also knows that Zachry is a "big contractor in Texas" that focuses in concrete work and that it has joined forces with Technigaz to compete in the U.S. market. (Eyermann, Tr. 6995). Freeport LNG believes that "Technigaz is keenly interested in working" on the Freeport LNG project. (Eyermann, Tr. 6996-98) (FOF 3.175). Although the Technigaz alliance has never built an LNG facility in the U.S., Eyermann considers the alliance to be viable and plans to solicit bids from it for the Freeport project. (Eyermann, Tr. 6998-99) (FOF 3.182).

Similarly, Calpine plans to consider prequalifying the alliance for its Humboldt Bay facility. (Izzo, Tr. 6496, 6501) (FOF 3.404). Calpine is familiar with Technigaz's record of building LNG facilities around the world and with Zachry's abilities as a U.S. contractor. Calpine believes that the alliance has the experience and the balance sheet necessary to construct a large LNG project. (Izzo, Tr. 6495, 6501, 6505) (FOF 3.403). In connection with its planned peakshaving facility, Yankee Gas has received preliminary information, including pricing, from Technigaz and will consider prequalifying Technigaz for this project. (Andrukiewicz, Tr. 6445-46, 6453) (FOF 3.342, 3.357).

Other U.S. customers have invited Technigaz/Zachry to bid on LNG projects in North America and believe that the alliance can be competitive on U.S. projects as well. For example, Bechtel believes that the alliance can effectively compete for LNG jobs in the U.S., and **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Rapp, Tr. 1325; **[xxxx xxxxxx]**) (FOF 3.184, 3.334). **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]**[4]

4 Rapp was one of Complaint Counsel's witnesses. Additional witnesses called by Complaint Counsel have acknowledged that Technigaz has a good reputation worldwide. **[(xxxxxxxxxxxxxxxxxx)]** (FOF 3.186).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] Those involved in that project believe that Technigaz/Zachry can be competitive on LNG projects in the U.S., and would prequalify the alliance for such projects. (Carling, Tr. 4485-87, 4489) (FOF 3.185). Nigel Carling explained that Zachry is one of the powerhouse contractors in the United States, and that building a tank is a relatively straightforward exercise when compared with other aspects of construction. (Carling, Tr. 4526) (FOF 3.185). Despite the fact that Technigaz/Zachry has not built an LNG tank in the U.S., Carling would consider using them for a U.S. LNG job because "[b]uilding a tank is like any other construction job, it's all about the logistics of managing the job, managing the quality, managing the safety, managing the regulations and managing the unions." (Carling, Tr. 4526) (FOF 3.185, 3.509).

El Paso has pre-qualified Technigaz for LNG projects in Altamira and Rosarito, Mexico, because it believes that it has sufficient financial stability and technical capabilities to execute the project. (Bryngelson, Tr. 6125-26, 6128-29) (FOF 3.180). El Paso's consultant, KBR has determined that Technigaz is technically capable to execute these projects. (Bryngelson, Tr. 6129) (FOF 3.180). Further, El Paso would prequalify Technigaz to build tanks in the U.S. and believes that it can build LNG tanks in the U.S. at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.180).

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These customer relationships have informed Dr. Harris' view of Technigaz/Zachry as a competitor. Dr. Harris sees Technigaz/Zachry as a viable entrant because it has worldwide expertise in LNG, a clear intent to enter the U.S. market, vast experience in concrete construction, and perhaps most importantly, good reputations among customers. (Harris, Tr. 7242-43) (FOF 7.99).

4. Daewoo/S&B is active in the U.S. market and has the necessary experience and qualifications to be successful.

Daewoo Engineering & Construction Co., Ltd. ("Daewoo") of South Korea boasts revenues exceeding $2.3 billion. (RX 736, at 6) (FOF 3.195). Daewoo is a world leader in the construction of full-containment LNG tanks. (RX 873 at 3) (FOF 3.196). Since 1990, Daewoo has acted as a turnkey constructor for at least 12 LNG tanks for LNG projects in Korea and Nigeria and has worked for owners such as Korea Gas Corporation and Shell Petroleum Development Co. (RX 760 at 10, 29; RX 873 at 3-6) (FOF 3.196).

S&B Engineers and Constructors, Ltd. ("S&B") is an engineering and contracting firm with corporate headquarters located in Houston. (RX 873 at 61) (FOF 3.197). S&B offers a wide range of services including feasibility studies, engineering, procurement, field construction, and plant start-up. (RX 873 at 61) (FOF 3.197). S&B has formed alliances with various international companies to perform projects in the Asia-Pacific and India. (RX 873 at 61-63) (FOF 3.197). S&B's clients for the design and construction of process plants include Phillips, Shell USA, Arco Chemical, Conoco, and Chevron. (RX 873 at 61) (FOF 3.198).

In mid-2002, Daewoo and S&B publicly announced a joint effort to pursue LNG receiving terminals in North America. (RX 10) (FOF 3.198) (state of mind). They also told the public that S&B, Daewoo, and specialized LNG consultants have formed teaming agreements to provide a complete range of services for LNG projects throughout North America, including fast track regulatory and insurance approvals, financial guidance, developmental and detailed engineering, material procurement, and construction and commissioning services. (RX 10) (FOF 3.198) (state of mind). According to the alliance, S&B's project execution, construction management skills and knowledge of the U.S. EPC market, along with Daewoo's international experience in LNG technology, form a strong competitor in the North American LNG market. (RX 10) (state of mind) (FOF 3.198).

Dynegy viewed Daewoo/S&B as qualified to bid on the LNG tanks for Dynegy's Hackberry project although they were not given a bid package because Dynegy already had enough qualified bidders. (Puckett, Tr. 4553) (FOF 3.284). The alliance has also approached Freeport LNG to discuss its capabilities and contracting strategy. In fact, Daewoo/S&B has already established a substantive relationship with Freeport LNG, as Daewoo is providing technical assistance regarding Freeport LNG's FERC application. (Eyermann, Tr. 7008) (FOF 3.203, 3.206). Daewoo/S&B has also had discussions with **[xx]** regarding U.S. LNG projects. **[xxxxxxxxxxxxxxxxxxx]**

Customers recognize Daewoo/S&B as a viable supplier of LNG facilities in the U.S. As discussed above, Dynegy found the alliance to be a capable supplier. (Puckett, Tr. 4553) (FOF 3.204). Similarly, Freeport LNG was pleased with Daewoo's performance on the FERC application process and plans to solicit a bid from the alliance for future LNG tanks, in part because Daewoo is a "pioneer" in the LNG storage industry. (Eyermann, Tr. 7010-11, 7014)

(FOF 3.206). Further, **[xxxxxxxxxxxxx]** believe that Daewoo has the technical capabilities and skills to construct LNG tanks and import terminals in the U.S. and would consider Daewoo as a potential bidder on their LNG projects. **[xxxxxxxxxxxxxxxxxxxxxxxxxxx];** Bryngelson, Tr. 6145-46) (FOF 3.205, 3.209).

Complaint Counsel's own witnesses acknowledge the viability of this alliance. Errol Rapp, of Bechtel, believes that S&B is a qualified company that could construct an LNG tank in the U.S. if partnered with an experienced foreign LNG tank company. (Rapp, Tr. 1327) (FOF 3.208). Similarly, **[xxxxxxxxxxx]** of **[xxxxxx]** noted that Daewoo has a good reputation worldwide. **[xxxxxxxxxxxxx]** (FOF 3.207). Economic testimony supports these customers' views. Dr. Harris noted that Daewoo/S&B is a potential new entrant with the ability to constrain CB&I's prices. (*See* Harris, Tr. 7245-47) (FOF 7.100).

5. Tractebel is poised to enter the U.S. market for LNG facilities.

Tractebel is a very large Belgian company involved in building, owning and operating LNG facilities. (Glenn, Tr. 4094) (FOF 3.215). Tractebel is a subsidiary of SUEZ, a French-Belgium conglomerate that provides energy, water, waste and communication services to municipal, residential, and industrial customers. (RX 874 at 1; RX 389 at CBI065924) (FOF 3.212). In 2001, SUEZ had revenues of $36.5 billion. (RX 389 at CBI065924) (FOF 3.212). Tractebel contributed $19.36 billion to SUEZ's 2001 revenue. (RX 389 at CBI065924) (FOF 3.212). Tractebel is able to design and build LNG facilities. (RX 389 at CBI065921) (FOF 3.212). It recently acquired, and now operates, the United States' first LNG import terminal in Everett, Massachusetts. ((RX 389 at CBI065921; Glenn, Tr. 4150) (FOF 3.212). Tractebel also recently acquired international LNG tank constructor Entrepose. (Scorsone, Tr. 4998) (FOF 3.213). Tractebel is often a direct competitor of CB&I for LNG terminals around the world. (Glenn, Tr. 4150-51) (FOF 3.215).

Tractebel has recently become involved in the North American LNG market. In late 2001, Tractebel approached Enron regarding an LNG facility in the Bahamas. Based on Tractebel's past record in building LNG facilities, and its interest in the project, Enron permitted Tractebel to bid on the project. (Carling, Tr. 4480-81) (FOF 3.443). Post-Acquisition customers believe that Tractebel is a willing and viable player in the North American LNG market. In fact, Tractebel representatives have told Nigel Carling that it is interested in US. LNG projects. (Carling, Tr. 4514) (FOF 3.216). Based on his experience and Tractebel's interest, Carling would prequalify Tractebel for a future U.S. LNG job. (Carling, Tr. 4485-87, 4489, 4491) (FOF 3.216.

Other customers see Tractebel as a competitive force in the U.S. and North American markets.[5] El Paso has pre-qualified Entrepose/Tractebel for Mexican LNG projects in Altamira and Rosarito because it has, in El Paso's view, sufficient financial stability and technical capabilities to execute the project. In fact, KBR has specifically examined Tractebel's technical capabilities and found them to be sufficient. (*See* Bryngelson, Tr. 6125-26, 6129-30) (FOF 3.317, 3.379). El Paso would prequalify Tractebel/Entrepose to build tanks in the U.S. and believes that they have the capability to do so at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.381). Economic testimony also supports these customers' views. Dr. Harris noted that Tractebel is a potential new entrant with the ability to constrain CB&I's prices. (*See* Harris, Tr. 7245-47) (FOF 7.100).

6. IHI is poised to enter the U.S. market for LNG facilities.

Ishikawajima-Harima Heavy Industries, Co., Ltd. ("IHI") is rated as the world's leading constructor of LNG receiving terminals; its LNG storage tanks are currently operating at

[5] Competitors also share this view. **[xxxxxxxxx xxxxxxxxx xxxxxxxxx xx x xxxxxxxxx xxxxxxxxxx xx xxx xxx xxxxxxxxxxxx xxxxxxx xxxxxxx xxx xxxxx xxxxxxxxxxxx]**

all LNG terminals in Japan. IHI is capable of constructing double and full-containment LNG tanks. (RX 764 at 6, 22) (FOF 3.223). Recently, IHI has begun to enter the U.S. market. Representatives of IHI have discussed its capabilities with Freeport LNG and have provided extensive literature regarding its capabilities. (Eyermann, Tr. 7015-16; RX 931 (FOF 3.225) U.S.-based customers recognize IHI as a company with experience in constructing LNG storage tanks on an international scale. (Rapp, Tr. 1309, 1316) (FOF 3226). Volker Eyermann of Freeport LNG is aware that IHI has built 23 LNG terminals in Japan, with each terminal containing between four and six LNG tanks. (Eyermann, Tr. 7015-16) (FOF 3.225). **[xxxxxx]** also familiar with IHI and believes that it can construct LNG tanks and import terminals in the U.S. **[xxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 3.224)

Customers consider IHI to be a potential competitor in the U.S. **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 3.224) Freeport LNG also considers IHI as a potential supplier for its LNG tanks. However, because IHI does not yet have a local partner, Freeport LNG would require IHI to team up with an American partner -- the type of partner that TKK, Technigaz, and Daewoo, for example, have already found. (*See*, *e.g.*, Eyermann, Tr. 6995, 7004-05, 7014) (FOF 3.224). Economic testimony also supports customers' views of IHI. Dr. Harris noted that IHI is a potential new entrant with the ability to constrain CB&I's prices. (*See* Harris, Tr. 7245-47) (FOF 7.100).

7. MHI is poised to enter the U.S. market for LNG facilities.

Mitsubishi Heavy Industries ("MHI") is well-renowned for its LNG cryogenic technology; it has an excellent history of performance in the design and production of transportation and storage facilities. (RX 767 at 16) (FOF 3.217). MHI has been active in the field of cryogenic storage tanks for many decades, and is capable of constructing single-containment and full-containment tanks. (RX 767; RX 875 at 2) (FOF 3.217). MHI has built a variety of LNG tanks, including a full-containment LNG tank for Oasaka Gas Co., Ltd. in 2000, the world's largest class membrane LNG tank for Toho Gas Co., Ltd. in 2001, and three full-containment tanks at Ras Laffan, Qatar. (RX 875 at 5-7, 9) (FOF 3.217).

Customers are aware of MHI as an international player in the LNG industry. Errol Rapp, of Bechtel, noted that MHI has experience in constructing LNG storage tanks on an international scale. (Rapp, Tr. 1309, 1316) (FOF 3.220). Nigel Carling, formerly of Enron, knows that MHI is "one of the big players" in Japan, and has built tanks in Ras Laffan, Qatar, Taiwan, and Indonesia. (Carling, Tr. 4492) (FOF 3.221). In recent years, MHI has entered the North American LNG market. El Paso has pre-qualified MHI for Mexican LNG projects in Altamira and Rosarito because it has the financial stability and technical capabilities to execute these projects. Notably, El Paso's technical adviser -- KBR -- has found MHI to be technical capable. (Bryngelson, Tr. 6125-26, 6128-29) (FOF 3.219). El Paso would prequalify MHI to build tanks in the U.S. and believes that MHI can do so at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.219). Similarly, **[xxxxxxxxxxx]** that MHI has the technical capabilities and skills to construct LNG tanks and import terminals in the U.S. and will consider MHI as a potential bidder on its various LNG projects. **[xxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 3.218). Nigel Carling, formerly of Enron, would also consider using MHI as an LNG tank contractor in the U.S. if it had a domestic partner. (Carling, Tr. 4492) (FOF 3.221). Economic testimony also supports these customers' views. Dr. Harris noted that MHI is a potential new entrant able to constrain CB&I's prices. (*See* Harris, Tr. 7245-47).

B. SIGNIFICANT ENTRY BARRIERS DO NOT EXIST IN THE LNG MARKETS.

Under *Baker Hughes*, a respondent can rebut a prima facie case by showing "ease of entry." *See* 908 F.2d at 983-84. In this case, it is undisputed that four large multinational corporations have formed alliances with U.S.-based contractors and have *entered the market* within two years of the Acquisition. Skanska/Whessoe entered in early 2001, when it bid on the Dynegy project. (Price, Tr. 603, 653-54) (FOF 3.662). TKK/AT&V entered in November of 2001, when it announced its intention to do so. (RX 818; Cutts, Tr. 2437-38). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].** Daewoo/S&B entered in March of 2002, when it announced its intention to enter the market. (*See* RX 10) (state of mind) (FOF 3.196).[6]

Complaint Counsel has alleged that foreign competitors cannot provide sufficient competition in the LNG markets because they face cost disadvantages it and its economist often referred to as "entry barriers." They have advanced two different forms of entry barriers. First, they argue that CB&I enjoys a special advantage with respect to single containment LNG tanks, as opposed to full or double containment tanks. Second, they argue that CB&I has specific advantages over its competitors, regardless of containment type. These so-called entry barriers simply do not exist. Any advantage that CB&I may have on single-containment tanks is largely irrelevant, as most LNG tanks that will be built in the U.S. will use double or full-containment systems. Further, even if some single-containment tanks survive this trend, CB&I does not enjoy major competitive advantages that would prevent new entrants from successfully competing in the U.S.

1. Double and full-containment tanks, which are plentiful internationally, are the wave of the future in the U.S.

Historically, single-containment LNG tanks have been constructed in the U.S. CB&I and PDM have never constructed a double or full-containment tank in the continental

[6] Although the Merger Guidelines are not binding on this Court, Respondents note that they classify entry as "timely" if it occurs or will occur within two years of the acquisition in question.

U.S., nor has any other company. While a full or double-containment LNG tank has never been built in the continental U.S., such tanks are commonly built elsewhere in the world. (Scorsone, Tr. 4919-20) (FOF 3.7). However, recent trends in the U.S. LNG market suggest that double and full-containment LNG tanks are the wave of the future in the industry. (Izzo, Tr. 6491-92; Glenn. Tr. 4112-13; Scorsone, Tr. 4921-22) (FOF 3.11). Most current LNG projects in the U.S. involve either double or full-containment tanks. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

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(xxxxxxxxxxxxxxxxxxxxxxxx] *see also, e.g.*, Cutts, Tr. 2501) (FOF 3.164). This prediction is supported by the evidence. Dynegy's LNG import terminal will include three full-containment LNG tanks. (Puckett, Tr. 4540-41) (FOF 3.257). Freeport LNG's planned import terminal will involve a 160,000 cubic meter double-containment LNG tank. (Eyermann, Tr. 6968) (FOF 3.386). Calpine is currently planning to build a $250 million double or full-containment LNG tank in California. (Izzo, Tr. 6474-75, 6493) (FOF 3.399). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].** Yankee Gas currently plans to use double containment tanks for its peakshaving facility in Waterbury, Connecticut. (*See* [**xxxxxxxxxxxxxxxxxxxxxxxx]**; Andrukiewicz, Tr. 6441, 6443) (FOF 3.344).

This trend is not without explanation. Applicable codes and regulations (NFPA 59A) require a builder to leave a certain amount of land around an LNG tank. This spacing requirement is less stringent for double and full-containment tanks, allowing for construction on smaller parcels of land. Space considerations were one of the factors which led Dynegy to select full-containment tanks and to rule out the use of single-containment tanks. (Puckett, Tr. 4541-42, 4585) (FOF 3.260). Similarly, Freeport LNG plans to build a double-containment tank because of its own safety concerns and because it will have to acquire less land. In fact, Freeport LNG searched the entire state of Texas to find a parcel of land that would accommodate a single-containment tank, but was unsuccessful. (Eyermann, Tr. 6969-71) (FOF 3.387). According to Volker Eyermann of Freeport LNG, it is "difficult to find enough land to build a single-containment tank. . . . If you build -- try to find a new site, you are going to have a hard time finding one that will allow you to construct a single-containment tank." (Eyermann, Tr. 7054-55; *see also* Scorsone, Tr. 4922, 4988) (FOF 3.11, 3.387).

Other factors have contributed to this changing trend in the U.S. market. Tank security is one factor. (*E.g.*, Puckett, Tr. 4586-87) (FOF 3.260). Tank safety is another factor. Some owners have moved to double and full-containment tanks in part because they are recognized as safer. (Glenn, Tr. 4112-13; Hall, Tr. 1842-43) (FOF 3.12). CB&I's competitors have also recognized this fact:

> The trend is to reduce the risk, which means full and double containment is becoming more popular. The trends start outside of the API subcommittees on tanks and vessels, associated with seismic impact, all the way over to just customer concern for terrorism and things like that.

(Cutts, Tr. 2573; *see also* Cutts, Tr. 2498-2500) (FOF 3.13). Regulators are increasingly expected to mandate use of double or full-containment tanks. (FOF 3.13)

To be sure, some single-containment tanks are still being planned in the U.S. Expansions of the Cove Point, Lake Charles, and Elba Island facilities will all involve single-containment LNG tanks. (J. Kelly, Tr. 6260; Bryngelson, Tr. 6214) (FOF 3.469, 3.484). Because these tanks involve expansions of existing facilities with single-containment tanks, construction of new single-containment tanks is "grandfathered." (Eyermann, Tr. 7054) (FOF 3.14).

2. Specific evidence supports the conclusion that entry barriers do not exist in the LNG markets.

a. Reputation is not a barrier to entry in the LNG markets.

Reputation is not a barrier to entry. As discussed in Section A, *infra*, new entrants have the necessary reputation to construct LNG tanks and facilities in the U.S. Most current customers are familiar with many (if not all) of these entrants and would permit them to bid on future LNG projects in the U.S.

b. U.S. construction standards are not barriers to entry in the LNG markets.

Complaint Counsel has argued that foreign companies cannot effectively compete in the U.S. LNG market because they are unfamiliar with applicable codes and standards, such as American Petroleum Institute ("API") standards. This argument misses the mark for two reasons. First, standards applicable to building LNG facilities in the U.S. are often used internationally. (Scorsone, Tr. 4924-25; Rano, Tr. 5950, 5891; Bryngelson, Tr. 6147) (FOF 3.512, 3.513). Second, new entrants in the U.S., such as Technigaz, TKK, and Skanska/Whessoe have all built LNG tanks overseas to API and other standards used in the U.S. (Scorsone, Tr. 4926-27; Rano, Tr. 5890-91; Rapp, Tr. 1332; Carling, Tr. 4463, 4479; Izzo, Tr. 6488) (FOF 3.515, 3.516).

c. Engineering is not a barrier to entry in the LNG markets.

Complaint Counsel argues engineering capability is an entry barrier. This argument lacks merit, as new entrants already possess engineering capabilities necessary to design LNG facilities. (*See* Harris, Tr. 7249-51). Further, this knowledge is not particularly secret; engineering of an LNG tank does not differ much from engineering of any cylindrical flat-bottom tank. (Scorsone, Tr. 4886-87; Rano, Tr. 5894-95) (FOF 3.28, 3.29). In fact, CB&I itself does not have a team of LNG-only tank engineers. Engineers that would work on an LNG project also design foundations and structural steel components on many other structures. (Glenn, Tr. 4114-15; Scorsone, Tr. 4887-88) (FOF 3.29).

d. Procurement of raw materials is not a barrier to entry in the LNG markets.

Complaint Counsel has argued that CB&I has superior access to raw materials for LNG projects in the U.S. This claim lacks merit, as the procurement process is simple and does not provide any advantage to CB&I over its foreign competitors. (Scorsone, Tr. 4892; **[xxxxxxx xxxxxxxxxxxxxxxx]** (FOF 3.548, 3.549). 9 percent nickel steel, the most specialized of the raw materials needed for LNG tanks, is not even available in the U.S; it is internationally sourced. (*See* Izzo, Tr. 6503) (FOF 3.548). All competitors must buy this steel in Japan or Europe. **[xxxxxxxxxxxxxxxxxxxxxxxxx]**; Cutts, Tr. 2474-75; *see also* Bryngelson, Tr. 6153) (FOF 3.548, 3.561). For example:

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xxxxxxxxxxxxxxxxxxxxxxxx] Like its competitors, CB&I purchases 9 percent nickel steel overseas because a credible source of this nickel steel is not available in the U.S. For its most recent LNG projects, CB&I purchased this nickel steel from Japan or Europe. (Glenn, Tr. 4116-17; Scorsone, Tr. 4891; Rano, Tr. 5896-97) (FOF 3.547). Prior to the Acquisition, PDM also purchased 9 percent nickel steel from European mills. (Scorsone, Tr. 4890-91) (FOF 3.31).

e. Fabrication is not a barrier to entry in the LNG markets.

Complaint Counsel argues that CB&I's access to fabrication facilities in the U.S. provides it with a competitive advantage. This argument lacks merit for two reasons: First, steel fabrication generally takes place at or near the producing mill, which in the case of LNG tanks is located overseas. Because CB&I has no fabrication facilities overseas, they have no advantage relative to competitors. (Rano, Tr. 5899; Bryngelson, Tr. 6153; Izzo, Tr. 6503) (FOF 3.561, 3.562, 3.563). In fact, CB&I and PDM often purchased prefabricated 9 percent steel for LNG projects in the U.S., as opposed to using its own fabrication shops. (Glenn, Tr. 4118-19; Scorsone, Tr. 4893-95; *see also* Harris, Tr. 7249-51) (FOF 3.36). Second, even if CB&I were able to use its fabrication shops, it would gain only a minor advantage because fabrication is simple and not a major part of LNG tank construction. (*See* **[xxxxxxxxxxxxxx]**; Glenn, Tr. 4117, 4119; Rano, Tr. 5898; Glenn, Tr. 4117) (FOF 3.564)].

f. Setup and logistics do not present entry barriers to the LNG markets.

After fabrication is completed, the next step in constructing an LNG tank is to bring all of the equipment to the job site. This set of tasks does not present an entry barrier. In the U.S., where equipment rental and spare parts are widely available, this task is relatively easy. (Rano, Tr. 5900-01) (FOF 3.37).

g. The assembling of a labor force is not a barrier to entry in the LNG markets.

Complaint Counsel contends that CB&I has an advantage in procuring labor in the U.S. relative to foreign competitors. They argue that foreign companies would incur increased costs by importing labor from other countries and that foreign companies somehow lack the ability to recruit U.S. labor. This is wrong for three reasons: First, LNG tank competitors use exclusively local labor in areas with a skilled labor pool. (Scorsone, Tr. 4921; Rano, Tr. 5906-07, 5909, 5916-17; *see also* Bryngelson, Tr. 6150) (FOF 3.552, 3.553, 3.557). Using local labor reduces the need to pay room and board expenses for out-of-town workers. (Rano, Tr. 5909-10) (FOF 3.554).

Second, the process used to recruit local labor in the U.S. is not particularly difficult; in fact, it is easier to recruit local labor in the U.S. than in other countries because the U.S. has a highly skilled labor pool. (Rano, Tr. 5908-09, 5972-73) (FOF 3.555). Foreign entrants have demonstrated their ability to build LNG tanks with local labor worldwide. This suggests that they should be able to do the same in the U.S. (*E.g.*, Carling, Tr. 4461-62; Rapp, Tr. 1310, 1337-38) (FOF 3.558).

Third, all competitors will have equal access to U.S. laborers. The fact that CB&I has U.S. field crews provides no advantage, as those workers are paid on an hourly basis and free to work for other tank constructors. (Rano, Tr. 5952-53) (FOF 3.550, 3.552). Further, CB&I does not plan to use a large contingent of core field workers for future U.S. LNG projects. The bulk of the labor force will be locally recruited. (Rano, Tr. 5917-18, 5952-53) (FOF 3.39). Like foreign companies, CB&I will need to pay transportation, room, and board costs for its key management and supervision. Like foreign companies, CB&I will hire the great majority of its laborers from the local labor pool and will pay them consistent with applicable regulations in the area. (*See* Rano, Tr. 5906-07) (FOF 3.556). In fact, some customers expect CB&I to be at a disadvantage because it uses large numbers of traveling field crews. (*See, e.g.*, Bryngelson, Tr. 6150) (FOF 3.556).

h. Welding is not a barrier to entry in the LNG markets.

Complaint Counsel has repeatedly asserted throughout this litigation that welding skills are a barrier to entry. The evidence presented at trial undercuts this position. Welding processes used on an LNG tank are not specific to those types of tanks. They are also used for LPG tanks, water tanks, and oil tanks. (Rano, Tr. 5931) (FOF 3.48). Further, welding 9 percent nickel steel is not particularly difficult or special. It involves the exact same processes and techniques used to weld carbon steel and is much easier to weld than stainless steel or aluminum. (Rano, Tr. 5872-73, 5947) (FOF 3.532).[7]

CB&I has no special access to experienced welders; it does not have permanent salaried welders on its payroll. It is unnecessary to find such welders, because new welders can

[7] Gerald Glenn noted that 9 percent nickel welding is a little more sophisticated in that the metallurgy would take a different kind of welding rod and a little different technique. (Glenn, Tr. 4120-21) (FOF 3.532). Similarly, Luke Scorsone noted that although the welding techniques used on a cryogenic tank can differ than those used for an ambient temperature tank, the welding processes used are the same. (Scorsone, Tr. 4899) (FOF 3.532).

be easily trained to weld 9 percent nickel steel. (Glenn, Tr. 4121; Rano, Tr. 5936-37; *see also* Rano, Tr. 5932-33, 5935-36) (FOF 3.533, 3.534, 3.536).[8]

In fact, due to re-certification requirements and a quick training process, it is easier to train new welders than to find experienced 9 percent nickel welders. (Rano, Tr. 5931-32, 5937, 5942-44, 5947-48; *see also* Carling, Tr. 4462) (FOF 3.529, 3.532, 3.536). The U.S. labor pool is highly skilled, and contains the skills sets necessary to weld 9 percent nickel steel. (Glenn, Tr. 4121-22) (FOF 3.534). Moreover, newly trained welders can deliver quality welding services. (Rano, Tr. 5918; Carling, Tr. 4459) (FOF 3.538, 3.539). Further, new entrants have necessary welding technology and experience and can pass it along to the local workforce. (*See* Carling, Tr. 4459, 4462; **[xxxxxxxxxxxxxxxx];** Bryngelson, Tr. 6152) (FOF 3.530, 3.538, 3.539).

i. Steel erection and rigging is not a barrier to entry in the LNG markets.

A company constructing an LNG tank must perform steel erection and rigging, which is the practice of attaching cables, slings, and ropes to pieces of steel and hoisting them into position. (Scorsone, Tr. 4897-98) (FOF 3.46). These skills are not entry barriers, as they are necessary for construction of any field-erected cylindrical tank as well as many other types of structures. These skills are easily found in any labor pool or developed through training. (Rano, Tr. 5945) (FOF 3.51). While erection equipment is necessary for this task it is not necessary to own such equipment. In fact, CB&I prefers not to own this equipment, because it is cheaper to rent it. (Glenn, Tr. 4122) (FOF 3.38).

[8] Welding supervisors need not have experience welding 9 percent nickel steel to work on an LNG tank. In Bonny Island the four welding supervisors did not have prior experience in welding 9 percent nickel steel. Similarly, supervisors on LNG projects in Indonesia, Das Island, and Spain did not have experience in working with nickel steel. (Rano, Tr. 6031-32) (FOF 3.535).

j. FERC is not a barrier to entry in the LNG markets.

Owners generally must receive approval from the Federal Energy Regulatory Commission ("FERC") in order to build an LNG import terminal in the U.S. (*E.g.*, Scorsone, Tr. 4930) (FOF 3.519).[9] Complaint Counsel has contended that new entrants cannot compete in the U.S. because they are not familiar with FERC requirements. This argument lacks merit. Tank contractors are not responsible for coordinating FERC filings; owners are responsible for this function. Tank contractors only provide technical data to assist in this filing. (*E.g.*, Carling, Tr. 4480; Izzo, Tr. 6492-93; Eyermann, Tr. 6975; Cutts, Tr. 2500; Bryngelson, Tr. 6148; *see also* Scorsone, Tr. 4931) (FOF 3.406, 3.520, 3.522, 3.524). Many owners have experience with FERC permitting issues, such as El Paso, CMS, Williams, and Tractebel. (Bryngelson, Tr. 6149) (FOF 3.523). Further, tank contractors do not participate in most of the FERC application process, consists of preparing 13 so-called "resource reports." (*See* Eyermann, Tr. 6972) (FOF 3.523). Only Resource Report Number 13 involves tank contractor input. (Eyermann, Tr. 6972-75; *see also* Scorsone, Tr. 4931) (FOF 3.521). Owners have many sources of input for these reports. (Eyermann, Tr. 6973-74) (FOF 3.389). In fact, two recent entrants have provided this support to LNG customers. Daewoo/S&B has provided this assistance to Freeport LNG. (Eyermann, Tr. 6974-76, 7048-49) (FOF 3.392, 3.525). Dynegy has successfully obtained FERC approval for its technical application with Skanska/Whessoe's assistance. (Puckett, Tr. 4551-52; *see also* RX 926) (FOF 3.311, 3.525).

[9] Owners who build peakshaving facilities do not have to gain approval from FERC if the facility does not involve interstate commerce. (*See* Scorsone, Tr. 4930). For example, the Memphis peakshaving facility was not subject to FERC regulation, nor does MLGW expect any future projects to be subject to FERC regulation. (Hall, Tr. 1842-43) (FOF 3.519).

k. Bonding is not a barrier to entry in the LNG markets.

Complaint Counsel incorrectly argues that bonding is a barrier to entry. All of the new entrants are large, sophisticated companies with strong financials. **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Similarly, Rob Bryngelson of El Paso noted that all of the companies on its prequalification list, including Skanska/Whessoe, Technigaz, and TKK, have the necessary financial capabilities to stand behind their projects. (*See* Bryngelson, Tr. 6125-26, 6128) (FOF 3.371). CB&I is a smaller company than many of the new foreign entrants, making it more difficult to compete in the world LNG markets. (*See* Glenn, Tr. 4222-23) (FOF 3.230).

In fact, the Acquisition actually allowed CB&I to become a larger, more financially secure company.[10] Prior to the Acquisition, CB&I was struggling in terms of letters of credit, financing, and insurance premiums. (*See* Glenn, Tr. 4080) (FOF 9.21). This created competitive problems for CB&I in the LNG markets. LNG owners evaluate the financial size of an LNG tank contractor, because they need to have comfort that it "has the financial resources and can deploy the materials, the skilled labor and equipment to construct the project without the risk of the contractor defaulting on the contract." (Scorsone, Tr. 4939). To guard against default, owners seek financial guarantees from contractors; the size of an LNG tank company bears directly on the customer's willingness to accept a financial guarantee. (Scorsone, Tr. 4939-40).

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[10] CB&I also engineered the Acquisition in an attempt to achieve efficiencies. Specifically, CB&I thought it could probably eliminate some fabrication capability, construction equipment and tools, salespeople, and sales offices. (Glenn, Tr. 4080-81). Through the combination of best practices, CB&I thought it could come up with a better, less expensive product. (Glenn, Tr. 4081). Some of these efficiencies have occurred since the Acquisition. (Glenn, Tr. 4084-84).

l. Subcontracting is not a barrier to entry in the LNG markets.

Complaint Counsel argues that new entrants will incur higher costs than CB&I because they will need to subcontract more phases of the project. This argument is unsupported by the evidence. All LNG tank builders subcontract out portions of an LNG tank job. (Bryngelson, Tr. 6143) (FOF 3.542). For example, CB&I subcontracted the foundation and concrete work for a recent project to a contractor with no prior LNG experience. (Rano, Tr. 5950-51) (FOF 3.43). In fact, CB&I has never self-performed the construction of concrete walls for field-erected LNG tanks; it has always subcontracted this function to "competent concrete people." (Rano, Tr. 5923-24) (FOF 3.546).[11] Further, there is no evidence that CB&I would need to subcontract fewer functions than foreign companies. For example, with respect to fabrication, all companies operating in the U.S. would need to subcontract out steel fabrication to a facility in Europe or Japan. (*See* Subsection III.B.2.d, *infra*). Even if such evidence existed, subcontracting does not always raise costs. In fact, subcontracting can result in lower prices because it reduces overhead costs and may take advantage of certain efficiencies possessed by the subcontractor. (Bryngelson, Tr. 6143-44; Cutts, Tr. 2472; *see also* Harris, Tr. 7253-54) (FOF 3.543).

m. "Learning by doing" is not a barrier to entry in the LNG markets.

Complaint Counsel argues that new entrants will have cost disadvantages associated with "learning by doing." (*E.g.*, Simpson, Tr. 3235-38). This argument is misplaced, as the new entrants are worldwide tank producers who can and have competed in the U.S. (Harris, Tr. 7251-52) (FOF 7.93). As discussed extensively *infra*, each one has completed LNG

[11] The concrete subcontract on a full containment, field-erected LNG tank is "significant," and can amount to 40 percent of the value of the work. (Rano, Tr. 5923).

projects around the globe, often with local partners with no prior experience in the LNG industry.

n. The U.S. political climate is not a barrier to entry in the LNG markets.

The political situation in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. In the U.S., this does not pose an entry barrier because "laws are stated and understood and applied equally." (Rano, Tr. 5974-76) (FOF 3.568).

o. Weather is not a barrier to entry in the U.S. LNG markets.

Weather in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. Because U.S. weather is relatively temperate, weather patterns do not pose a barrier to entry. (Rano, Tr. 5978-79) (FOF 3.569).

p. Communications and infrastructure are not a barrier to entry in the LNG markets.

Available communications and infrastructure can affect the ability of a contractor to construct a field-erected LNG facility. Communication is important for many reasons, such as problem solving and informing management of developments. Because of the developed communication infrastructure in the U.S., it is easier to construct LNG facilities in the U.S. than in other, less developed parts of the world. Accordingly, the communications and infrastructure system in the U.S. is not an entry barrier. (Rano, Tr. 5986-87) (FOF 3.570).

3. The Trinidad bid contest shows that entry barriers do not exist in the LNG markets.

Neither Dr. Simpson nor Complaint Counsel has conducted any experiments to validate their allegations regarding entry barriers. The recent bidding contest in Trinidad provides a natural market experiment that sheds light on whether such entry barriers actually exist.

In the fall of 2002, TKK/AT&V won a project to build a single-containment tank for Atlantic LNG in Trinidad by undercutting CB&I's price by approximately 5 percent. (Glenn, Tr. 4095, 4105; Carling, Tr. 4488-89) (FOF 3.326, 3.327, 3.329). This project was managed by Bechtel on behalf of Atlantic LNG in three phases. (Rapp, Tr. 1286; Glenn, Tr. 4138-39) (FOF 3.316). The original tanks were constructed by Whessoe; CB&I won and executed the subsequent LNG tank expansion. (Rapp, Tr. 1286; Glenn, Tr. 4139) (FOF 3.316).[12] CB&I executed its portion of the project within the last two or three years; it is currently on site completing the tanks. (Rapp, Tr. 1287; Glenn, Tr. 4139) (FOF 3.332). CB&I bid on the next phase of this project. However, it was not the low bidder. (Carling, Tr. 4488-89; Glenn, Tr. 4105, 4140; Scorsone, Tr. 4950, 4953-54) (FOF 3.330).

The Fall 2002 award to TKK of the third phase provides valuable information regarding the ability of TKK/AT&V and other new entrants to compete with CB&I on an equal footing. First, analysis of projects in the Western Hemisphere is relevant because jobs near the U.S. provide information that is useful to determine whether or not suppliers can sell in the U.S. (Harris, Tr. 7218-19) (FOF 7.103). Second, as discussed below, the recent Trinidad award provides insight on the existence of entry barriers in the U.S., because CB&I has many of the same advantages in Trinidad that it is alleged to have in the U.S.:

- **CB&I's prior experience in Trinidad** -- CB&I had extensive prior experience working in Trinidad. In fact, CB&I was in the process of completing an LNG tank on the same site. (Scorsone, Tr. 4954-56; *see also* Simpson, Tr. 3852) (FOF 7.218). Despite this "advantage," CB&I lost the job.

- **Familiarity with Trinidad subcontractors** -- Complaint Counsel has argued that CB&I's familiarity with subcontractors in the U.S. gives it a competitive advantage. Trinidad shows this advantage is not meaningful because, in Trinidad, CB&I also had extensive experience in dealing with Trinidadian

[12] CB&I believes that this facility supplies natural gas to the U.S. market. (Glenn, Tr. 4104-05)..

local subcontractors. (Scorsone, Tr. 4956) (FOF 3.332). This "advantage" was not enough to win the job for CB&I.

- **CB&I's access to workforce in Trinidad** -- Complaint Counsel argues that CB&I's familiarity with local labor gives it a competitive advantage. However, in Trinidad CB&I had a strong local following among the Trinidad labor force, and CB&I had knowledge of that labor force because CB&I was currently employing many local workers at the time this contest took place. (*See* Scorsone, Tr. 4954-56) (FOF 3.332). Despite this "advantage," CB&I lost the job.

- **Familiarity with local regulations** -- Complaint Counsel argues that CB&I enjoys advantages over competitors because it is more familiar with U.S. regulations. However, in Trinidad, CB&I was very familiar with the local regulations, especially because it was currently working in the country. (*See* Scorsone, Tr. 4956) (FOF 3.332). Despite this recent familiarity, CB&I could not win the job.

- **No prior experience in location** -- Complaint Counsel argues that a company without prior experience in the U.S. cannot compete with CB&I. However, despite the fact that CB&I had already built LNG tanks in Trinidad on a site only yards from where the new LNG tank will be built, it lost the bid contest to a company with no prior experience working in Trinidad. (RX 838).

CB&I's alleged advantages in Trinidad simulate its alleged advantages in the U.S. and the alleged disadvantages of the new entrants in the U.S. As such, it is a natural market experiment disproving Complaint Counsel's entry barrier and cost disadvantage assertions.

C. CUSTOMERS IN THE LNG MARKETS ARE SOPHISTICATED.

Under *Baker Hughes*, Respondents may also rebut a prima facie case by presenting evidence that customers are sophisticated and able to fend for themselves. *See United States v. Baker Hughes*, 908 F.2d at 986 ("The court's consideration of [factors including the sophisticated nature of consumers] was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition would have anticompetitive effects"). Most current customers for LNG facilities are massive global energy companies who have created specific parameters for their bidding or the negotiation processes, have engaged in careful examination of contractors' qualifications, and use the services of specialized consultants to assist them on matters of technology and pricing. Further, those current LNG customers are large, multinational corporations with extensive experience in the LNG field.

Under *Baker Hughes*, one indicium of sophistication is an insistence on taking multiple confidential bids. 731 F. Supp. at 11. Many customers for LNG tanks accept confidential bids from multiple bidders in a sophisticated bidding process. In some cases, owners bifurcate the bidding process. For example, Dynegy insisted on competitively bidding the EPC portion of its project separately from the tank portion. (Puckett, Tr. 4543-44, 4550) (FOF 3.68, 3.265). Other owners plan to solicit multiple bids from tank vendors. (*E.g.*, Eyermann, Tr. 7018, 7022-23; Izzo, Tr. 6494-95) (FOF 3.395, 3.403). In some cases, owners choose to enter into a sole source arrangement with one contractor. Owners choosing this approach engage in extensive negotiations and have been in control of negotiations. For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

In many cases, customers have carefully examined bidder qualifications, tending to show that these customers are sophisticated. For example, Dynegy recently conducted an extensive pre-qualification process. The process involved, for example, face to face interviews and investigations regarding performance on prior projects. (*See* Puckett, Tr. 4554) (FOF 3.277). To assist it in the process of selecting a tank manufacturer, Dynegy has worked with Black &

Veatch -- a contractor that holds itself out as being a leader in LNG gas processing. Other customers have examined abilities of new entrants, such as Freeport LNG and BP. (*See* Eyermann, Tr. 6981-83, 6994-96, 7000-01, 7008, 7015-16; Sawchuck, Tr. 6062-63) (FOF 3.394, 3.423).

Further, owners often hire consultants with experience in the industry and access to pricing information for LNG tanks. For example, El Paso retained KBR to assist it in the bid evaluation process. KBR is the "leading EPC contractor dealing with owner issues, front-end engineering studies, specifications development, taking the bids, construction terminals." (Scorsone, Tr. 4941). It assists owners in evaluating tank bids, has access to historical pricing information of LNG tanks and can determine whether LNG tank prices are reasonable based on this pricing. (Scorsone, Tr. 4940). Similarly, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Other consultants, such as Project Technical Liaison Associates ("PTL"), also have access to historical pricing information. (*See* Scorsone, Tr. 4941)..

Most LNG customers are large, international corporations with extensive experience in the LNG field. For example, Bechtel employs approximately 50,000 employees worldwide, and is regarded as a "world-class construction firm, engineering construction company." (Rapp, Tr. 1303-04) (FOF 3.316). Bechtel has engineered and constructed LNG facilities in a variety of locations, including Alaska, Indonesia, and Algeria. (Rapp, Tr. 1286) (FOF 3.231). Similarly, Enron (before its demise) was a world leader in LNG, developing projects in India, Puerto Rico, and the Bahamas for years. (Carling, Tr. 4448) (FOF 3.571). [**xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

D. EVIDENCE SHOWS THAT ENTRY IN THE LNG MARKETS IS SUFFICIENT.

As discussed in Part II, *supra*, Complaint Counsel's prima facie case in the LNG markets is very weak. *See Baker Hughes*, 908 F.2d at 986. Accordingly, Respondents need only make a minimal showing to rebut this case. *See Baker Hughes*, 908 F.2d at 983. Despite this slight burden, Respondents have presented compelling evidence that new entry will constrain CB&I's pricing in the LNG markets. Accordingly, Complaint Counsel must present additional evidence showing that lessening of competition is likely, including evidence regarding the sufficiency of entry outlined by Respondents. *See Baker Hughes,* 908 F.2d at 984-86.

Although it is not Respondent's burden to do so, it has presented evidence demonstrating that new entry has created competition sufficient to ensure that the Acquisition will not have an anticompetitive effect. The evidence shows that CB&I is aware of (and fears) the new entrants in the LNG market, that customers receiving post-Acquisition pricing are satisfied with that pricing, and that current customers for LNG facilities are not concerned by the Acquisition.

In attempting to meet its burden, Respondents expect Complaint Counsel to argue that none of the new entrants could replace PDM as a competitor on its own. This is simply not the standard. New entrants need not replicate PDM for entry to be sufficient because there are different ways of providing the same service, and the entrants can collectively prevent CB&I from exercising market power. (Harris, Tr. 7255-56) (FOF 7.92). Consistent with this view, Dr. Harris believes that new entrants can compete or are already competing in the market and that they are preventing CB&I from unilaterally exercising market power. (Harris, Tr. 7244-45) (FOF 7.93). As Dr. Harris noted, "there's no harm to competition from the acquisition in the LNG market" because the new entry has created competition that is "quite robust." As Dr. Harris notes, "[t]here are numerous, numerous bidders and the testimony as I understand it is that prices have not gone up." (Harris, Tr. 7194-95) (FOF 7.90). Further, customers have "numerous options" to CB&I in the LNG market. (Harris, Tr. 7194-95) (FOF 7.89, 7.90).

1. CB&I is aware of new entrants and fears their ability to compete.

CB&I is well-aware of new entrants in the U.S. market and fears this new competition. CB&I's state of mind regarding this issue was called into question by Complaint Counsel's expert witness -- Dr. Simpson. In attempting to show that the Acquisition lessened competition, Dr. Simpson relied on a "critical loss" analysis. CB&I's state of mind is a critical part of such an analysis, because the important question is whether CB&I will behave in a certain manner. (Harris, Tr. 7260-61; Simpson, Tr. 3865) (FOF 7.79, 7.245).

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CB&I is very familiar with Skanska/Whessoe. It has competed against Skanska/Whessoe in various international locations and regards them as an extremely formidable competitor. (Glenn, Tr. 4093; Scorsone, Tr. 4863-64) (FOF 3.95). CB&I knows that Skanska is one of the largest engineering construction companies in the U.S. and around the world. (Glenn, Tr. 4093 (state of mind); Scorsone, Tr. 4852) (FOF 3.97). CB&I also is aware that Skanska/Whessoe is marketing itself to several U.S. LNG customers and that customers such as Dynegy take Skanska/Whessoe seriously. (Glenn, Tr. 4094, 4221; *see also* Scorsone, Tr. 4863) (FOF 3.97). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

CB&I also considers TKK/AT&V to be a formidable competitor in the U.S. market. (*See, e.g.*, Glenn, Tr. 4102; Scorsone, Tr. 4856, 4861) (state of mind) (FOF 3.135). CB&I has competed against TKK around the world in the LNG market. (*See* Scorsone, Tr. 4850, 4856, 4860; Glenn, Tr. 4092-93) (FOF 3.136). PDM and CB&I have worked with TKK in the past. For example, in the 1970's, PDM had a licensing agreement with TKK under which PDM transferred LNG construction technology to TKK in exchange for royalties. (Scorsone, Tr. 4857) (FOF 3.137). CB&I perceives that AT&V/TKK are "very serious about capturing work in the United States and in North American for . . . LNG storage projects." (Scorsone, Tr. 4856) (FOF 3.135). CB&I fears this alliance because AT&V is a current competitor in other markets and has a good reputation in the industry. (*See* Glenn, Tr. 4103; Scorsone, Tr. 4866) (state of mind) (FOF 3.138).

CB&I has been told by the customer that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]** (*See also* Scorsone, Tr. 4950) (FOF 3.236). CB&I believes that AT&V was involved with this project because TKK and AT&V had recently formed a joint venture to tackle these types of projects and because AT&V had connections in Trinidad. (Scorsone, Tr. 5224) (FOF 3.325). CB&I saw the Trinidad job as winnable because it had a number of advantages. It was the incumbent contractor, was already employing local laborers, had a good understanding of the local labor force, and had done a good job for the owner. (Scorsone, Tr. 4954-56) (FOF 3.332). CB&I believed that its scheduling was on time and that its safety record was excellent. (Glenn, Tr. 4139-40; *see also* Scorsone, Tr. 4957-58) (FOF 3.323). As a consequence of these tangible advantages, CB&I attempted to raise its margin by 5-6 percent on the most recent Trinidad bid. (JX 11) (FOF 3.330).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Glenn, Tr. 4140) (state of mind) (FOF 3.333). CB&I learned from Bechtel that "[t]he price that TKK and ATV was awarded was greater than 5 percent or more under the price that CB&I submitted for the project." (Scorsone, Tr. 4950-52) (FOF 3.327). TKK was able to overcome CB&I's advantage of already being on site. This information leads CB&I to believe that TKK/AT&V can compete for projects on a cost-competitive basis in North America, including the U.S. (Scorsone, Tr. 4951-54) (FOF 3.336). The fact that AT&V has never built an LNG tank in the U.S. does not give CB&I comfort, because AT&V has "always been willing to push itself into new areas" such as pressure spheres and LOX/LIN tanks." (Scorsone, Tr. 4867) (FOF 3.139). Similarly, TKK's 1994 Memphis loss does not change CB&I's view of TKK/AT&V, because it occurred well before they had "planted their flag" in the U.S. (Scorsone, Tr. 5014) (FOF 3.507).

CB&I knows Technigaz as a global competitor in the world LNG market. (Glenn, Tr. 4093, 4095) (FOF 3.189). Recently, Technigaz was acquired by Saipam, making it one of the largest engineering construction companies in the world, many times the size of CB&I. (Glenn, Tr. 4093) (FOF 3.143). CB&I has much respect for Zachry and knows it to be a San Antonio-based general contractor that is "low-cost driven" and has broad capabilities in the industrial and heavy civil industry. (Glenn, Tr. 4095; Scorsone, Tr. 4865) (FOF 3.160, 3.190).

CB&I has seen Technigaz/Zachry's press release describing the alliance and believes it to be a serious signal that Technigaz/Zachry intends to compete hard in the U.S. (*See* Scorsone, Tr. 4854-55; RX 306) (FOF 3.192). In particular, CB&I is concerned about Technigaz/Zachry's expertise in concrete, which will be necessary for many of the upcoming U.S. LNG projects. CB&I also knows that Technigaz/Zachry has hired a former CB&I salesman to assist in marketing. While Zachry has never built an LNG tank, it has experience in the general contracting and heavy civil industries, which includes concrete placement, logistics management, and direct craft hire, and it understands the various types of cultures of owners with sophisticated projects. (Scorsone, Tr. 4855, 4868) (FOF 3.160). **[xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 4853-54, 4865-66) (state of mind) (FOF 3.192, 3.193).

CB&I executives saw a press release announcing the Daewoo/S&B alliance. (Scorsone, Tr. 4857-58; RX 10) (FOF 3.210). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Glenn, Tr. 4223) (state of mind) (FOF 3.211). Specifically, CB&I perceives the Daewoo/S&B alliance to be "formidable, tough, experienced, worldly competition." (Scorsone, Tr. 4858; *see also* Scorsone, Tr. 4862) (FOF 3.210). CB&I has experience competing against Daewoo in the LNG markets, and is aware of Daewoo's extensive LNG construction records worldwide. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Glenn, Tr. 4223) (FOF 3.211).

CB&I has evaluated competition for specific U.S. LNG projects and expects significant competition for each project. For example, CB&I expects Skanska/Whessoe and Technigaz/Zachry to compete on the Yankee Gas peakshaver because Yankee Gas has indicated a preference for a double concrete tank. While Skanska/Whessoe and Technigaz/Zachry have expertise in this area, CB&I does not. (*E.g.*, Glenn, Tr. 4141; Scorsone, Tr. 4988-89) (FOF 3.346). CB&I does not execute its own concrete work, nor does it have a double concrete wall full-containment LNG tank design. (Glenn, Tr. 4141; Scorsone, Tr. 4989) (FOF 3.346).

CB&I also expects stiff competition for the Freeport LNG job. CB&I is aware that Freeport LNG has hired Technip to handle preliminary engineering and Daewoo/S&B to handle tank designs for a FERC application. (Glenn, Tr. 4105, 4142; *see also* Scorsone, Tr. 4991) (FOF 3.393). CB&I believes its potential competitors for this project include Skanska/Whessoe, Technigaz-Zachry, TKK/AT&V, Daewoo/S&B, MHI, and IHI. (Glenn, Tr. 4145; Scorsone, Tr. 4990-91) (state of mind) (FOF 3.396). CB&I perceives competition for other U.S. LNG projects as well. For example, CB&I expects Skanska/Whessoe, TKK/AT&V, and possibly Technigaz/Zachry to compete for an expansion of Cove Point. (Glenn, Tr. 4148 (state of mind); Scorsone, Tr. 4988) (FOF 3.433). Similarly, CB&I believes that Skanska/Whessoe, Daewoo/S&B, MHI and IHI will compete for the Calpine job in California. (Glenn, Tr. 4102, 4147) (state of mind).

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CB&I also expects tough fights from these competitors on other LNG projects in North America. El Paso is considering several potential LNG projects including a project in Rosarito, Mexico. El Paso has hired KBR as the FEED contractor and would, in all likelihood, be the EPC contractor. (Glenn, Tr. 4146) (FOF 3.378). CB&I believes that Skanska/Whessoe, TKK, Technigaz/Zachry, MHI, and IHI will compete for the tank portion of this project, as well as other projects being developed by El Paso in Mexico. (Glenn, Tr. 4146; Scorsone, Tr. 4992-93) (state of mind) (FOF 3.372). Marathon owns an LNG project in Baja California that is being built to service the U.S. (Glenn, Tr. 4151) (FOF 3.434). CB&I approached Marathon about being the overall contractor for the entire terminal. (Glenn, Tr. 4151) (FOF 3.435). Marathon told CB&I that it did not think CB&I had the financial capacity and bonding capability to handle the $500 to $700 million project. (Glenn, Tr. 4151) (state of mind) (FOF 3.437). At this point, CB&I believes that KBR will be the EPC contractor for this project. (Glenn, Tr. 4151-52) (state of mind) (FOF 3.438).

Finally, prior to its financial difficulties, Enron planned an LNG import facility in the Bahamas to serve southern Florida via sub-sea pipeline. (Glenn, Tr. 4149; Scorsone, Tr. 4997) (FOF 3.442). CB&I submitted pricing to Enron around the time it went into bankruptcy. (Glenn, Tr. 4149-50) (FOF 3.442). At that time, CB&I believed Skanska/Whessoe and TKK were competitors for the project. (Glenn, Tr. 4150) (state of mind) (FOF 3.443). Enron sold this project to Tractebel. (Scorsone, Tr. 4998) (FOF 3.446). CB&I expects Tractebel to build the project utilizing its own forces. (Glenn, Tr. 4151; *see also* Scorsone, Tr. 4998) (state of mind) (FOF 3.446).

2. Post-Acquisition transactions show that CB&I's behavior has been constrained by new entrants.

Current customers for LNG facilities are satisfied with the firm, fixed pricing they have received since the Acquisition.[13] This fact, combined with other post-Acquisition transactions occurring in the LNG market, shows that CB&I has been constrained by new entry. Each instance is discussed below:

a. Dynegy is satisfied with prices received by foreign competitors.

The Dynegy project is going forward. Dynegy "will award the tank very soon and . . . as part of that process they will award the tank and then will begin the EPC project after the first of the year." (Price, Tr. 619-20) (FOF 3.310). In 2002, Dynegy accepted bids from

[13] Because it cannot present favorable evidence regarding firm, fixed price bids, Complaint Counsel relies instead on "budget pricing" or "budget estimates." For numerous reasons, budget pricing cannot be used as an accurate depiction of what customers have been paying, or will pay in the future, for LNG projects. This issue is fully addressed in Section VIIA, *supra*.

Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V and was satisfied with the bids received. (Puckett, Tr. 4556, 4587-88) (FOF 3.287, 3.309).

Q. And at this point in the process, speaking for Dynegy now, you are satisfied with those bids at this time?

A. Yes.

(Puckett, Tr. 4587-88) (FOF 3.309).

Complaint Counsel makes much of the fact that CB&I did not initially bid on the Dynegy LNG tanks, arguing that: 1) CB&I's refusal to bid on these tanks was an exercise of market power; and 2) the fact that CB&I was not present in the Dynegy bidding process rendered the bids received useless in assessing the competitive impact of the Acquisition. These arguments ignore the facts surrounding CB&I's activities with respect to this project. These facts are briefly discussed below:

CB&I did submit a proposal to become the EPC contractor for the Hackberry project. (Glenn, Tr. 4128-29) (FOF 3.270). Dynegy notified CB&I that it had not been chosen as EPC contractor, and that Skanska/Whessoe won the job. (Glenn, Tr. 4129; RX 142) (FOF 3.272). Skanska/Whessoe hired Black & Veatch to evaluate bids for the tank portion of the project. (Glenn, Tr. 4130) (FOF 3.273). Dynegy offered CB&I the opportunity to bid on the tank portion of the project, asking CB&I to submit its drawings, technical information and firm price to Black & Veatch, a competitor, for evaluation. (Glenn, Tr. 4130-31) (FOF 3.297). Because of its concerns regarding Black & Veatch's competitive position relative to it, CB&I initially refused to bid. (Glenn, Tr. 4411; RX 143) (FOF 3.300, 3.301).[14] In February of 2002, Dynegy again asked CB&I to submit a bid for the tanks. To accommodate CB&I's security

[14] Luke Scorsone testified that this was a most unusual situation. He has never encountered a situation where one of the competitors was the EPC contractor taking bids on the tank, and also competing to bid on the tank. (Scorsone, Tr. 4948) (FOF 3.286). Scorsone believes this arrangement is highly unusual, and Dynegy was the (continued. . .) only project in which Scorsone ever encountered it. (Scorsone, Tr. 4948-49) (FOF 3.286).

concerns, Dynegy invited CB&I to submit its bid directly to Dynegy, rather than Black & Veatch. (Puckett, Tr. 4578; Glenn, Tr. 4134-35; RX 144) (FOF 3.302).

Internally, CB&I decided that if Dynegy would accept and evaluate its bid directly, it would submit a tank bid. (Glenn, Tr. 4136) (FOF 3.303). Within two to three weeks of receiving Dynegy's invitation, CB&I indicated interest in submitting a bid for the LNG tanks. (Glenn, Tr. 4136-37; *see also* Puckett, Tr. 4559) (FOF 3.303). Puckett's response was a surprise: "Mr. Puckett responded that they had received three bids for the tank and that they were satisfied with the pricing and conditions on those three bids and that they therefore did not need nor would they accept a bid from CB&I." (Glenn, Tr. 4137; *see also* Puckett, Tr. 4559-60). Mr. Puckett's testimony is corroborative:

> Q: And did you tell them that you were satisfied with the bids that you had and that their bid was not necessary at that time?
>
> A. We told them that we had received three bids, that we were satisfied with the three bids, and that they were just too late in the process to come back in.

(Puckett, Tr. 4559-60) (FOF 3.304). In an effort to get Dynegy to reconsider, Gerald Glenn contacted Dynegy's CEO, Chuck Watson. (Glenn, Tr. 4137) (FOF 3.305). Based on his conversation with Mr. Watson,[15] Mr. Glenn concluded that Dynegy would not permit CB&I to bid on the project. Accordingly, CB&I did not submit a bid. (Glenn, Tr. 4138; *see also* Puckett, Tr. 4573) (FOF 3.305).

In addition, expert testimony presented by Respondents shows that the Dynegy bidding is relevant, especially to rebut the "critical loss" theory of Complaint Counsel's expert -- Dr. Simpson. Dr. Harris pointed out that, if CB&I truly was the low cost supplier, they should

[15] Glenn testified that "Mr. Watson reiterated the fact that Dynegy was perfectly happy with the three bids that they had and that it simply was not necessary. His organization had concluded that they had everything they needed to proceed with the project and that they just didn't need a bid from CB&I." (Glenn, Tr. 4137) (state of mind) (FOF 3.305).

have been able to win this job. Critical loss theory, as applied by Complaint Counsel's own expert witness, suggests that the loss of this job cost CB&I $21 million. Dr. Harris concluded that this was not a plausible result if CB&I truly had good information regarding its competitors' costs. (Harris, Tr. 7263-65). (FOF 7.82).

b. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

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[xxxxx] understanding regarding its contracting options is consistent with CB&I's. The tradeoff between time and money is often one that CB&I's customers examine when deciding whether to enter into a sole-source arrangement. An owner may choose to sole-source because it does not have the in-house staff available to manage a bid process or because its schedule does not allow sufficient time for such a process. (Glenn, Tr. 4124; *see also* Scorsone, Tr. 4959) (FOF 3.462, 3.463). Conversely, an owner may solicit bids because of a company policy or a loose schedule. (Glenn, Tr. 4124) (FOF 3.463). In the end, the owner decides what format the contracting process will take. Owners often choose to sole-source contracts even if they have competitive alternatives. (Glenn, Tr. 4125; Scorsone, Tr. 4959) (FOF 3.461, 3.464).

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c. The Trinidad bid contest is a natural experiment showing that the new entrants will be successful at competitive prices.

The bid contest in Trinidad shows that CB&I is being disciplined by foreign competition in North America. Dr. Harris came to this conclusion after reviewing the facts surrounding this contest. Dr. Harris noted that CB&I's pricing on this project was "roughly 5 percent higher than their pricing had been on the earlier Trinidad project," after adjusting for inflation and other factors. (Harris, Tr. 7350-51) (FOF 7.103). He also noted testimony suggesting that "the winning price here was roughly 5 percent lower than the CB&I price." (Harris, Tr. 7350-51) (FOF 7.103). Dr. Harris explained that CB&I's loss of the Trinidad job to a competitor with a 5 percent lower price shows that prices for LNG tanks have not changed since the Acquisition. (Harris, Tr. 7350-51) (FOF 7.103). He also pointed out that TKK's ability to win this project from CB&I "tells you something about the ability of the other companies to compete and to compete with a cost structure similar or better than CB&I." (Harris, Tr. 7350-51).

d. Enron received a band of tight pricing for a recent job in the Bahamas.

Further evidence of vibrant competition in post-Acquisition bidding can be found less than 100 miles from U.S. shores. In late 2001, Enron received firm, fixed price bids for an LNG import terminal in the Bahamas. Enron planned this project to serve energy needs of South Florida. (Carling, Tr. 4881; Glenn, Tr. 4149) (FOF 3.442). Enron received three bids for this project, from Tractebel, Skanska/Whessoe, and CB&I. The bids were within 7-10 percent of each other. Tractebel was the low bidder, followed by Skanska. CB&I was third. (Carling, Tr. 4481-82) (FOF 3.445).

Nigel Carling, who was directly involved with this project, does not believe that the Acquisition has "adversely affected [his] ability to get a competitively priced LNG tank." (Carling, Tr. 4494) (FOF 3.253). In fact, he believes that competition has *increased* as a result of the Acquisition because foreign companies are "trying to break into the U.S." According to Carling, these foreign companies have "excellent credentials, having been able to put together competitive pricing." (Carling, Tr. 4494) (FOF 3.253). "There's no reason to believe they can't be competitive in the U.S." (Carling, Tr. 4495) (FOF 3.253). Carling explained, "[s]o in actual fact where you had a field of two, you've now got a field of at least four, maybe even five. So that increases competition, which means the prices are going to come down." (Carling, Tr. 4495) (FOF 3.253).

e. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

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3. Most current customers are not concerned about the effect of the Acquisition.

Other current customers for LNG facilities in the U.S. and North America are unconcerned with the effect of the Acquisition. They believe that existing competition is sufficient to keep prices low. For example, Freeport LNG plans to seek bids from Technigaz, TKK, CB&I, Daewoo, Skanska/Whessoe, and IHI for its upcoming project. (Eyermann, Tr. 7018, 7022-23) (FOF 3.395). Freeport LNG has determined that it will need four or five bidders to receive a good price for its LNG tanks. (Eyermann, Tr. 7023-24) (FOF 3.397). As Volker Eyermann explained, more bidders are not necessary because most LNG tank construction costs are fixed:

> They all will have to go to the Texas labor market . . . and the labor rates are whatever they are in the Freeport area. And they cannot do a lot of - a lot of maneuvering with the concrete price. A cubic meter of concrete is what it costs, So, most of these things are really fixed.

(Eyermann, Tr. 7024) (FOF 3.397). Freeport LNG "is comfortable with the options that it currently has available for builders of field-erected LNG tanks for the Freeport project." (Eyermann, Tr. 7019) (FOF 3.398).[16]

Other current U.S. customers agree. Larry Izzo testified that Calpine needs four bidders to "get a very good competitive bid" and that Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V, and CB&I are qualified to provide such bids. (Izzo, Tr. 6494-95) (FOF 3.405). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

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Like Calpine**, [xx]** and Freeport LNG, El Paso does not believe that the Acquisition has affected LNG tank prices or harmed competition in any way. (Bryngelson, Tr. 6155) (FOF 3.251). El Paso's Rule 3.33 representative noted that the LNG business is "international" and that "no one participant controls the market." (Bryngelson, Tr. 6159-60)

[16] During Mr. Eyermann's cross-examination, Complaint Counsel made much of the fact that Mr. Eyermann had not seen pricing from previous LNG projects, such as the Memphis peakshaving project bid in the mid-1990s. As discussed in Part III-E, *infra*, Respondents contend that knowledge regarding these aged projects is not relevant. Mr. Eyermann further explained that, because the price of an LNG tank depends on the size, the location, the foundation, labor rates, labor efficiencies, material costs, and owner specifications, it is difficult to compare prices of LNG tanks that sit in different locations. (Eyermann, Tr. 7071-72). Accordingly it is not relevant to have pricing on past projects, such as Memphis, because the projects are not comparable. (Eyermann, Tr. 7072).

(FOF 3.251). Further, El Paso does not believe that CB&I has any competitive advantage over other companies in providing turnkey LNG facility services: "It's a very competitive global market and we haven't seen them exert dominance in any of our bid -- our one bid process to date or any other information I have from KBR or any of the four advisers." (Bryngelson, Tr. 6146) (FOF 3.251).

Even Complaint Counsel's own witnesses, to some degree, agree that the Acquisition has not substantially harmed competition. For example, Errol Rapp of Bechtel believes that Bechtel can get a "reasonable price" as a result of bidding between CB&I and Technigaz for U.S. LNG projects and that Technigaz/Zachry can effectively compete for LNG jobs in the U.S. (Rapp, Tr. 1325, 1333-34) (FOF 3.184, 3.249). Similarly, Clay Hall of MLGW agreed that he has seen no evidence to date that CB&I has the ability to control a market as a result of the Acquisition. (Hall, Tr. 1858-59) (FOF 3.255). Further, Hall believes it is possible that there may be more competition for LNG tanks in the U.S. today as compared to 1994-95. (Hall, Tr. 1860-1861) (FOF 3.255).

E. RESPONDENTS' WITNESSES HAVE PROVIDED MORE CREDIBLE EVIDENCE THAN COMPLAINT COUNSEL'S WITNESSES.

Respondents presented numerous customers, both live and via deposition, who have been directly involved in the post-Acquisition LNG market. Each of these witnesses has knowledge regarding the current market and the competitors who participate in that market. Many of these witnesses work for companies with a strong incentive to complain about an acquisition that has affected their ability to obtain LNG tanks, as such tanks often cost hundreds of millions of dollars. These witnesses have not complained. Instead, they have testified that the Acquisition has not substantially lessened competition and that it may have actually improved competition.

By contrast, Complaint Counsel presented a variety of witnesses who generally lack foundation for their views, as they are unfamiliar with current LNG market developments. In particular, they lack knowledge regarding experience and capabilities of new entrants. For example, Eckhard Blaumueller has not been involved in the purchase or construction of an LNG facility since 1973 -- a time when LNG tanks were built of aluminum, rather than 9 percent nickel steel. (Blaumueller, Tr. 286) (FOF 3.642). Mr. Blaumueller retired from Peoples' Energy Resources Corporation in December of 2001. Since then, he has not been involved in, or done research regarding, the LNG industry. (Blaumueller, Tr. 279, 325, 329) (FOF 3.643). Further, he has no current knowledge regarding any foreign LNG tank suppliers or their efforts to enter the U.S. market. (Blaumueller, Tr. 321, 332-35) (FOF 3.644, 3.645).

Clay Hall of MLGW also lacks current information regarding the LNG industry. MLGW searched for LNG tank builders in 1994. Since that time, neither Mr. Hall nor MLGW have conducted such a search. (Hall, Tr. 1843-45) (FOF 3.653). MLGW has not received firm bids on such a tank since 1994, nor does it plan to purchase another until at least 2006. (Hall, Tr. 1832-33) (FOF 3.650). Further, Mr. Hall was not familiar in any significant way with LNG import terminals, current competition for LNG tanks in the U.S. today, or pricing submitted by any foreign company for an LNG tank in the U.S. over the last five years. (Hall, Tr. 1854-57) (FOF 3.652, 3.653).

Other witnesses involved in the Memphis project admit to having virtually no current knowledge regarding the LNG markets. Robert Davis of Air Products acknowledged that Memphis was the "sole reference point" for his testimony. (Davis, Tr. 3204) (FOF 3.668). Mr. Davis has no responsibility for LNG in his current position, has not had experience with the construction of an LNG tank since 1974, lacks knowledge regarding companies that are constructing LNG tanks in the U.S. or worldwide, and is not familiar in any specific way with LNG import terminals. (Davis, Tr. 3177-79, 3187-88) (FOF 3.666, 3.668). Similarly, Dr. Hans Kistenmacher of Linde has not bid on a peakshaving facility since Memphis. (Kistenmacher, Tr. 890) (FOF 3.671). He has been involved with "very, very few LNG tanks," and his experience is limited to the bidding of those tanks. (Kistenmacher, Tr. 888; *see also* Kistenmacher, Tr. 887) (FOF 3.669, 3.671). Specifically, Dr. Kistenmacher is unfamiliar with the activities of TKK/AT&V, Technigaz/Zachry, Daewoo/S&B, or Skanska/Whessoe in the U.S. market for LNG facilities. (Kistenmacher, Tr. 937, 941-42) (FOF 3.672).

Even Complaint Counsel's witnesses with current involvement in the LNG industry know very little. For example, Brian Price of Black & Veatch has not received any fixed, firm price bids from CB&I or PDM on an LNG tank since 1990. (Price, Tr. 644) (FOF 3.665). Although Black & Veatch is a subcontractor on the Dynegy job and has access to the bid pricing for that job, Price himself has not seen that pricing. (Price, Tr. 609-10, 625) (FOF 3.314, 3.660). Price was also unaware that Dynegy itself was satisfied with that pricing:

> Q. Are you familiar, sir, since you claim to be a person who communicates with the client, that they are satisfied with the bids that they have for the tanks? Are you familiar with that?
>
> A. No.
>
> * * *
>
> Q. Are you familiar or do you have knowledge based on your communications with the client that they have found the budget pricing on the tanks to be within their estimated price range?
>
> A. No.
>
> Q. You're not familiar with that?
>
> A. No.

(Price, Tr. 641; *see also* Price, Tr. 667) (FOF 3.664). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Outtrim, Tr. 763) (FOF 3.692).

1. Many of Complaint Counsel's witnesses expressed views based on a single, irrelevant project: Memphis 1994.

Throughout this litigation, Complaint Counsel has vehemently argued that new competition will not constrain CB&I's prices in the way PDM did pre-Acquisition. They assert that the costs of foreign entrants will be higher than CB&I's, permitting CB&I to implement a price increase. As support for this conclusion, Complaint Counsel relies heavily on bidding results from the 1994 Memphis project. CB&I won that project over several other bidders, including two bidders that had foreign participation. Complaint Counsel's heavy reliance on the results of this project is overly simplistic, ignores key facts surrounding that bid contest, and ignores market changes that have occurred since that time. As *Baker Hughes* noted, failed entry in the past does not imply failed entry in the future. *Id.* at 987 n.9. Complaint Counsel's reliance on Memphis is flawed for many reasons:

First, the bidders involved in the Memphis project are different than the bidders currently involved in the market. Complaint Counsel makes much of the fact that Whessoe was involved in the 1994 Memphis project. However, Whessoe was not a bidder in 1994, it was a small subcontractor. Further, Whessoe was a far different company in 1994. It did not have an office in the U.S. at that time, nor was it owned by a company with the financial size and muscle possessed by Skanska/Whessoe. (Kistenmacher, Tr. 939) (FOF 3.681). In addition, the joint venture involving Whessoe submitted a $15 million tank price for this project, only $1 million of which was attributable to Whessoe itself. The remaining $14 million consisted of a bid from Titan Constructors for construction and field-erection. (Kistenmacher, Tr. 900, 938) (FOF 3.498, 3.679). Titan is not a current entrant in the LNG market, nor is there a shred of evidence suggesting that any current entrant would incur the same costs, or require the same profit margin that Titan did at Memphis.

Second, the willingness of foreign bidders to participate in the Memphis project is far less than the willingness of current entrants to participate in the market. Complaint Counsel's own witnesses acknowledge that Whessoe was reluctant to bid on the Memphis project in 1994. (Kistenmacher, Tr. 939-40) (FOF 3.497). Dr. Kistenmacher "had difficulties" getting Whessoe to provide the engineering quotation for the project. (Kistenmacher, Tr. 940) (FOF 3.497). Whessoe requested to be paid for its quote because it did not want to take the risk of bidding. (Kistenmacher, Tr. 940) (FOF 3.497).

Third, unlike the current entrants in the U.S. LNG markets, the foreign bidders involved in Memphis did not have a prior relationship with its joint venturers. For example, Brian Price noted that TKK's participation in the Memphis project was a "one-shot deal in 1994". (Price, Tr. 650) (FOF 3.508). By contrast, current market entrants have all announced their entry into the U.S. market and have made efforts to win work in several areas of the U.S. (*See* Section III, *infra*).

Fourth, to the extent Complaint Counsel has used the Memphis bidding contest to show that PDM and CB&I both had lower costs than their competitors, such an effort is misplaced. PDM's bid was disqualified because it did not comply with MLGW's bid requirements. (Davis, Tr. 3196; Hall, Tr. 1823-24) (FOF 3.505). In fact, PDM's bid had approximately 157 shortcomings that were out of line with the request for proposal. (Hall, Tr. 1823-24) (FOF 3.505). Because of these differences, it is difficult to accurately compare PDM's bid to CB&I's bid on this project because the two bids were "not quoted on the same item." (Hall, Tr. 1839-40) (FOF 3.505).

Fifth, Complaint Counsel's effort to show that foreign bidders had higher tank prices has failed. In many cases, it is not possible to determine tank prices associated with each bid. Although MLGW requested a specific breakout of the price for the LNG tank, both PDM and Lotepro ignored this requirement. (RX 888) (FOF 3.502). Further, attempting to provide a tank-only price for this project is difficult. (Scorsone, Tr. 5011-12) (FOF 3.506). The evidence reflects this difficulty. One Black & Veatch document pegs CB&I's tank price at $10.5 million, while another puts it at $13.5 million. (*Compare* RX 888 to CX 1571) (FOF 3.502). The same documents also compare tank prices secured by Black & Veatch; a similar discrepancy can be found. One document estimates the tank price at $13 million, while another estimates it at $16.7 million. (*Compare* RX 888 to CX 1571) (FOF 3.502).

Sixth, and perhaps most importantly, there is no evidence to support the view that a bidding contest from 1994 will shed light on bidding contests a decade later. Differences between 1994 and 2003 are numerous. For example, technologies have changed, financial conditions are different, and the types of LNG projects built today are larger and more complex. To rely solely on evidence of Memphis, without examining current market conditions, is extraordinarily myopic.

2. Many of Complaint Counsel's witnesses are CB&I's competitors.

Brian Price of Black & Veatch offered wide-ranging views on his perceptions of competition in the market and the ability of foreign companies to effectively compete in the U.S. Mr. Price's testimony should be given little or no weight, as he has a personal stake in the outcome of this litigation. Black & Veatch is a head-to-head competitor of CB&I on peakshaving facilities. In fact, CB&I's liquefaction process competes with a process patented by Price himself. (Price, Tr. 641) (FOF 3.659). Black & Veatch competed against CB&I on the Memphis peakshaving job, and is currently competing against CB&I for the Yankee Gas job. (*See* Price, Tr. 548, 555, 651-53) (FOF 3.362, 3.495, 3.662).

Mr. Price's testimony cannot be squared with the facts. While Mr. Price expressed concerns regarding the ability of Skanska/Whessoe and other foreign companies to compete in the U.S., Mr. Price never bothered to share those concerns with anyone at Dynegy, even though he professed to be part of Black & Veatch's activities for that project. Further, Black & Veatch itself touted the "alliance" between Black & Veatch and Skanska/Whessoe to U.S. LNG customers as a positive development. In a letter to Freeport LNG, Bill Minton, Technology Manager of Gas Processing, advertised that "Black & Veatch recently formed an alliance with Whessoe who is one of only two LNG storage tank contractors operating in the Western Hemisphere." (RX 935) (state of mind) (FOF 3.65).[17]

Complaint Counsel presented other witnesses who competed with CB&I in Memphis. Robert Davis and his employer, Air Products, have competed with CB&I for liquefaction units, and lost the Memphis contest to CB&I. (Davis, Tr. 3188, 3204) (FOF 3.667). Dr. Hans Kistenmacher of Linde also competes against CB&I in the sale of liquefaction units; he also lost the Memphis bidding contest to CB&I. (Kistenmacher, Tr. 885, 890, 934).

Complaint Counsel also presented other competitor witnesses. Patricia Outtrim of Project Technical Liaison Associates is also a current competitor of CB&I's. She owns part of a company called Cryocrete, which is in a position to compete with CB&I in the LNG markets. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

17 Price is familiar with this alliance. He acknowledged that Skanska/Whessoe and Black & Veatch have offices in the same building in Houston. (Price, Tr. 659-60).

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(Outtrim, Tr. 787) (FOF 3.690).

F. SUMMARY: DISMISSAL OF THIS CASE WITH RESPECT TO THE LNG MARKETS IS APPROPRIATE.

Applicable law compels dismissal of this action with respect to the LNG markets. As discussed in Part II, *supra*, Complaint Counsel's prima facie case is very weak because its market concentration statistics are "volatile and shifting" and "easily skewed." *Baker Hughes*, 908 F.2d at 986. Accordingly, Respondents need not present an extensive showing. *Id.* at 991. Nevertheless, Respondents have presented evidence on numerous fronts to rebut Complaint Counsel's case. New entry in the U.S. market is far more extensive than the entry discussed in *Baker Hughes*. *See id.* at 988. Further, Respondents have proven that entry barriers to the LNG markets do not exist. Complaint Counsel's proffered entry barriers are unsupported by the evidence, and in any event are not recognized as entry barriers under the law. This ease of entry strongly suggests that future entry will occur if the market requires it. *See id.* at 989. Respondents have also shown that customers are sophisticated in the same ways that the *Baker Hughes* customers were, and that this sophistication is "likely to promote competition even in a highly concentrated market." *Id.*

While not required to do so, Respondents have presented compelling evidence regarding the sufficiency of entry in the LNG market. Customers who have received post-Acquisition pricing are satisfied with prices received and choices available to them, and the evidence demonstrates that new entrants are severely disciplining CB&I's activities in the LNG markets. In light of this evidence, there is no conceivable way that Complaint Counsel can carry its ultimate burden of persuasion in this case. Accordingly, the Complaint as it relates to the LNG markets must be dismissed.

IV. RESPONDENTS HAVE SUCCESSFULLY REBUTTED COMPLAINT COUNSEL'S PRIMA FACIE CASE IN THE LPG MARKET.

Liquefied petroleum gas ("LPG") is an umbrella term referring to butanes and propanes. (Cutts, Tr. 2436) (FOF 4.2). A field-erected LPG tank stores liquefied petroleum gases at low temperatures -- approximately minus 50 degrees Fahrenheit. (*E.g.*, N. Kelley, Tr. 7096-97) (FOF 4.1). The purpose of an LPG terminal is to store liquid petroleum gases that would have been stripped out of natural gas and may be sold as independent gases. (G. Glenn, Tr. 4072-73) (FOF 4.2). Typical owners of LPG terminals are owners of pipelines intended for distribution of propane, natural gas, or trucked to other outlets. (G. Glenn, Tr. 4073-74).

Over the past 13 years, demand for field-erected LPG tanks has been virtually nonexistent. (Harris, Tr. 7281-85, 7299-7300) (FOF 4.10-4.13). During that time, only eight projects have been built. (RX 947) (FOF 4.11). LPG tanks are a very small part of CB&I's business, and were a very small part of PDM's business prior to the Acquisition. From 1993 to the Acquisition, CB&I had built no LPG tanks and has built only one since the Acquisition, worth $1-$3 million. (RX 947; Scorsone, Tr. 5039, 5042; G. Glenn, Tr. 4089, 4156) (FOF 4.12, 4.14). Since 1992, PDM had constructed only three tanks in the U.S. (RX 947).

As noted in Part II, *supra*, Complaint Counsel has not established a prima facie case in the LPG market. The lack of demand makes it virtually impossible to extract meaningful data from market concentration statistics. *See Baker Hughes*, 731 F. Supp. 3, 9 (D.D.C. 1990). Assuming *arguendo* the existence of a prima facie case, Respondents have successfully rebutted it for two reasons. First, CB&I's LPG market share plunged to zero beginning in 1995 through the Acquisition, yielding an HHI change of zero. Second, two entrants -- AT&V and Matrix -- have recently begun to compete for LPG jobs in the U.S. Both AT&V and Matrix are well regarded by customers in this market. Because entry barriers in this market are low, it is reasonable to expect additional companies to enter the market if sufficient demand for LPG tanks exists. Evidence shows that this entry and potential entry threat has constrained CB&I's behavior, and that customers are receiving competitive prices on LPG tanks.

A. ACTUAL ENTRY HAS ALREADY OCCURRED IN THE LPG MARKET, AND MORE ENTRY IS FORESEEABLE.

AT&V has recently entered the market for LPG tanks. It recently bid on and won an LPG project for ITC and also bid on a project for ABB Lummus. (N. Kelley, Tr. 7086; Scorsone, Tr. 5040) (FOF 4.35, 4.67). AT&V's activities in the LPG market are not limited to these two projects. In recent years, AT&V has successfully completed three different LPG projects. (Cutts, Tr. 2436-37) (FOF 4.20). It built LPG tanks in 1996 (in Equatorial Guinea) and an LPG tank (in the U.S.) in 1994. (CX 396, 397) (FOF 4.18). AT&V has also built LPG spheres and pressure vessels over the past two years; these products can serve as substitutes for a field-erected LPG tank. (CX 396, CX 397; *see also* Scorsone, Tr. 5170-71) (FOF 4.19, 4.21). AT&V's LPG customers have been satisfied with AT&V's work, and AT&V intends to pursue LPG opportunities in the future. (Cutts, Tr. 2455-56) (FOF 4.22).

AT&V was permitted to bid on the Deer Park LPG project because it was a "good reputable contractor[] that ha[s] the capability of building the tank." (N. Kelley, Tr. 7083-84) (FOF 4.34). Previously, AT&V had successfully built several other stainless steel tanks for ITC, similar to the Deer Park project. (N. Kelley, Tr. 7085-86) (FOF 4.36). AT&V won this project, beating out Matrix and CB&I, because it had the best price. (N. Kelley, Tr. 7086, 7088) (FOF 4.35-4.37). AT&V successfully completed construction of this LPG tank. ITC was satisfied with AT&V's performance with respect to the tank's design. It was completed on time, according to ITC's plans, and without any major defects or problems. (N. Kelley, Tr. 7088-89, 7130-31) (FOF 4.38, 4.42). ITC believes AT&V has an excellent reputation, and will consider AT&V for its next LPG tank. (N. Kelley, Tr. 7090, 7130-31).

Matrix has also entered the U.S. LPG market. Along with AT&V and CB&I, Matrix bid on ITC's Deer Park LPG tank. ITC permitted Matrix to bid on the Deer Park project because they were "good reputable contractors that have the capability of building the tank." (N. Kelley, Tr. 7083-84) (FOF 4.34). ITC perceives Matrix as "a large contractor, and quite capable." (N. Kelley, Tr. 7085) (FOF 4.44). ITC's confidence in Matrix is growing, because they have done a good job on a variety of tank repairs. (N. Kelley, Tr. 7109) (FOF 4.45-4.46). For its next LPG project, ITC will solicit a bid from Matrix. (N. Kelley, Tr. 7090).

Chattanooga Boiler & Tank ("CB&T") has not yet entered the U.S. market. However, it is poised to enter this market if and when demand for these products exists. CB&T has built a variety of ambient temperature storage tanks, and has the capability to design and construct low-temperature tanks, as discussed in connection with the LIN/LOX market. (*See* Part V, *supra*). CB&T is interested in pursuing these jobs in the future. (Stetzler, Tr. 6365).

B. THERE ARE NO SIGNIFICANT BARRIERS TO ENTRY IN THE LPG MARKET.

Evidence demonstrates that significant entry barriers to the LPG market do not exist. Under *Baker Hughes*, a respondent has many available ways in which to rebut a prima facie case. One way is to show evidence regarding "ease of entry." *See* 908 F.2d at 983-84. In this case, it is undisputed that AT&V and Matrix have entered the market. Using Complaint Counsel's own Guidelines, this constitutes timely entry.[18] Further, Respondents have presented compelling evidence that entry barriers are low, and that entry of other companies is possible.

[18] Although the Merger Guidelines are not binding on this Court, Respondents note that they classify entry as "timely" if it occurs or will occur within two years of the acquisition in question. (See 1992 Horizontal Merger Guidelines, RX 844 at 20)

Morse Tank ("Morse"), a relatively small tank builder based in Washington State, successfully entered the market in 1994 when it built a large LPG tank for Texaco in Ferndale, Washington. Morse completed this "highly visible" project for Texaco in a timely manner and to Texaco's great satisfaction. (Crider, Tr. 6714-16; *see also* Maw, Tr. 6560-63, 6586) (FOF 4.84, 4.86, 4.87). Further, Morse made a significant profit on this job -- over $1 million. (Maw, Tr. 6586, 6690).

The story of Morse's successful entry shows "ease of entry" in the LPG market, which squarely rebuts Complaint Counsel's prima facie case. *Baker Hughes*, 908 F.2d at 984. Further, customers support Respondents' contentions regarding ease of entry. According to customers, any tank builder with experience in building API 620 and API 650 tanks has the ability to build LPG tanks. (N. Kelley, Tr. 7091-92) (FOF 4.127). The construction of an LPG tank requires the same type of equipment used for standard flat-bottom tanks -- welding machines, cranes, and rigging equipment. Further, the same people that build API 650 tanks also build API 620 tanks. (N. Kelley, Tr. 7091-92) (FOF 4.127). The same skills are used to build an API 650 as an API 620 tank. All you have to do is read the code, find out what the differences are, use the right metal and the right welding rods, the right welding procedures, and anybody can build either tank." (N. Kelley, Tr. 7103) (FOF 4.120). The fact that entry is easy in the market makes it unlikely that the Acquisition will have any anti-competitive effects. (*See* Harris, Tr. 7285-97, 7300).

1. Reputation is not an entry barrier to the LPG market.

Complaint Counsel has argued that reputation is a barrier to entry. This is wrong. Prior to constructing the Ferndale facility, Morse had never constructed an LPG tank before. In fact, Morse told Texaco that it had no LPG experience. Nonetheless, Texaco asked Morse to bid the Ferndale project. (Maw, Tr. 6550) (FOF 4.90). Lack of experience was not a concern for

Texaco because companies hire people to do the job; Morse's personnel sold the project. (Crider, Tr. 6713-14).

2. Transportation costs are not entry barriers to the LPG market.

Complaint Counsel has argued that transportation costs can present a barrier to entry in the LPG tank market, and have asserted that Morse only won this job because it was close to Ferndale. Any advantage Morse had with respect to location is minimal. The fact that Morse hired local field labor was not an advantage, as union regulations called for all contractors to pay a set amount in wages and subsistence. (Maw, Tr. 6563-54) (FOF 4.99). To the extent transportation costs provided an advantage, it amounted to about $70,000 -- a little over 1 percent of the price of the LPG tank. (Maw, Tr. 6564-65; *see also* N. Kelley, Tr. at 7121).

3. Assembling of a labor force is not an entry barrier to the LPG market.

Complaint Counsel has argued that assembling a labor force is an entry barrier. The Morse case study shows this to be wrong. In 1994, Morse had about 20 salaried employees, including two engineers. Morse hired no additional salaried employees to fabricate or construct the Ferndale LPG tank, nor did it acquire special equipment, methods personnel, or procedures for fabricating the LPG tank. (Maw, Tr. 6557, 6567, 6572) (FOF 4.96, 4.98). In order to obtain the necessary field crews, Morse contracted with union employees through a collective bargaining agreement; hiring non-union field crews was not an option. (Maw, Tr. 6552) (FOF 4.100). Morse won this job without adding any additional salaried employees and despite incurring the high cost of hiring union labor. (Maw, Tr. 6551-52, 6553-56).

4. The costs of bidding projects is not an entry barrier to the LPG market.

Complaint Counsel has argued that the cost of bidding is an entry barrier. This is not the case. In connection with the Ferndale project, Morse submitted a bid package. In so doing, Morse did not incur any additional expenses than it does on any other tank project. Further, no additional salaried employees were hired to prepare the bid. (Maw, Tr. 6556-57).

5. Engineering is not an entry barrier to the LPG market.

Complaint Counsel has argued that the ability to engineer an LPG tank is an entry barrier. Based on the lessons learned from Morse, this is incorrect. As part of its Ferndale bid package, Morse submitted a preliminary design. Duane McMahan, a professional engineering consultant, was hired to perform the design work. After submitting its bid, Morse hired Pressure Sciences, Inc. to consult in the final design. (Maw, Tr. 6557-60).

6. Welding is not an entry barrier to the LPG market.

Complaint Counsel incorrectly argues that access to welding procedures and equipment is an entry barrier. This is wrong. The Ferndale LPG tank was welded under Morse's supervision. Morse developed in-house special procedures required for the LPG tank, which cost about $2,000 to develop. Once Texaco approved these procedures, Morse individually trained its welders on these procedures. This training required about one-half hour per person over the course of two days. (Maw, Tr. 6569-72) (FOF 4.49, 4.95).

7. Bonding requirements and financial size are not entry barriers to the LPG market.

Complaint Counsel contends that bonding capacity and financial capacity are barriers to entry. This is not the case. In 1994, Morse's total annual sales were about $12-14 million. (Maw, Tr. 6551) (FOF 4.72). This relatively small financial size did not affect Morse's ability to win and construct the project.

C. CUSTOMERS FOR LPG TANKS ARE SOPHISTICATED.

Current customers in this market are sophisticated. ITC is the only recent customer to testify in this case. ITC owns 10 field-erected low temperature tanks. (*See* N.

Kelley, Tr. 7093-94) (FOF 4.27). During his 25 years at ITC, Mr. Kelley has procured LPG tanks over 23 of those 25 years. Tank procurement is Mr. Kelley's area of responsibility. (N. Kelley, Tr. 7079-80). Mr. Kelley regularly sorts confidential bids from multiple tank suppliers. (N. Kelley, Tr. 4.159, 4.160).

D. ENTRY IN THE LPG MARKET IS SUFFICIENT.

As discussed in Part II, *supra*, Complaint Counsel's prima facie case in the LPG markets is nonexistent. *See Baker Hughes*, 908 F.2d at 986. Accordingly, Respondents need not make any showing. Assuming the existence of a prima facie case, Respondents have rebutted it with strong evidence that entry in the U.S. market will constrain CB&I's pricing in the LPG market. Accordingly, Complaint Counsel must present additional evidence showing that lessening of competition is likely, including evidence regarding the sufficiency of entry outlined by Respondents. *See Baker Hughes*, 908 F.2d at 983.

Although Respondents have no burden to do so, they have presented evidence that entry in the LPG markets is sufficient. Respondents' expert, Dr. Harris, does "not believe that the acquisition of the PDM assets by CB&I has harmed competition or reduced competition in the market for the sale of LPG tanks . . . in the United States." (Harris, Tr. 7281) (FOF 7.117). Dr. Harris noted that competition in this market has been nearly nonexistent since 1992, and that prices have not risen since the Acquisition. (Harris, Tr. 7281-85, 7299-7300) (FOF 4.10, 4.11). Evidence supports Dr. Harris' conclusions. Customers in this market are satisfied with the prices received on recent LPG projects, and have no concerns that the Acquisition has affected their ability to obtain LPG tanks at competitive prices. Further, entry in the LPG market has disciplined CB&I's behavior.

1. Customers are satisfied with the prices received, and are not concerned that the Acquisition has affected their ability to obtain competitive pricing.

ITC was satisfied with the price that it received on the Deer Park LPG tank. (N. Kelley, Tr. 7088-89) (FOF 4.38, 4.55). As Norman Kelley noted, "AT&V beat the socks off of CB&I. AT&V can definitely do it cheaper." (N. Kelley, Tr. 7137) (FOF 4.56). Mr. Kelley observed that the competition provided by AT&V, Matrix, and CB&I gives ITC the competition that it needs to obtain a competitive price. ITC does not need to research additional tank suppliers in order to find additional competition. (N. Kelley, Tr. 7091, 7134) (FOF 4.60, 4.61). Further, ITC does not believe that the Acquisition has hindered ITC's ability to obtain competitive pricing for LPG tanks. (N. Kelley, Tr. 7092, 7135, 7137) (FOF 4.56, 4.58). The following quote is illustrative:

> Q. And just to sort of sum up, do you believe that the merger between CB&I and PDM has had the -- has hindered ITC's ability in any way to obtaining any of those types of products at a competitive price?
>
> A. No. I don't think it's hurt us in any way.

(N. Kelley, Tr. 7135; *see also* N. Kelley, Tr. 7090-91, 7137-38) (FOF 4.62, 4.55-4.62). In fact, Mr. Kelley noted that CB&I has trouble competing in the LPG tank market because of its large overhead costs. (N. Kelley, Tr. 7122).

Complaint Counsel's evidence is not to the contrary. Amy Warren of Fluor was Complaint Counsel's only witness regarding the LPG market. While Ms. Warren and Fluor were involved in a project involving LPG tanks, they were not responsible for selecting a tank supplier. Sea-3, the customer, had that responsibility. Ms. Warren had virtually no information regarding pre-Acquisition competition. She did not know whether Fluor received a lower price as a result of Sea-3's bidding process, nor could she say whether the prices received on Sea-3 projects were competitive. (Warren, Tr. 2299-2300, 2302, 2303-07) (FOF 4.158). Ms. Warren has no knowledge regarding post-Acquisition competition. She has not been involved in buying an LPG tank since 1998. She has no knowledge regarding any field-erected LPG tanks currently planned by anyone anywhere, nor does she have current knowledge regarding companies that currently have the ability to construct LPG tanks. She has no knowledge regarding which companies are currently prequalified by Fluor, or which companies Fluor would prequalify in the future. (Warren, Tr. 2309, 2318).

2. Entry has disciplined CB&I's behavior in the LPG market.

CB&I perceives competition from AT&V, Matrix, TKK/ATV, Skanska Whessoe, Technigaz/Zachry, and any other flat bottom tank manufacturer. (Scorsone, Tr. at 4850) (FOF 4.64). CB&I does not believe it can impose a price increase in this product area without losing work to competitors. (Scorsone, Tr. 5043) (FOF 4.70). Recent events have confirmed this view. CB&I last won a LPG project in 2001 for ABB Lummus, involving a $1.5 million LPG tank. (Scorsone, Tr. 5039) (FOF 4.66). CB&I competed against Wyatt and AT&V. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5039-43) (FOF 4.68, 4.69). After these efforts, CB&I won the job. (*See* RX 947) (FOF 4.14, 4.15). Based on this experience, CB&I perceives intense competition in this market, and believes that price increases will lead to lost work. (Scorsone, Tr. 5043).

E. SUMMARY: DISMISSAL OF THIS CASE WITH RESPECT TO THE LPG MARKETS IS APPROPRIATE.

Applicable law compels dismissal of this action with respect to the LPG market. As discussed in Part II, *supra*, Complaint Counsel's prima facie case is virtually nonexistent. Accordingly, Respondents need not present an extensive showing. *Baker Hughes*, 908 F.2d at 991. Nevertheless, Respondents have presented evidence on numerous fronts to rebut Complaint Counsel's case. Respondents have proven that actual entry has occurred, that entry barriers are nonexistent, that potential entrants are eyeing the market, and that customers in this market are sophisticated. *See Baker Hughes*, 908 F.2d at 988-89. Further, while not required to do so, Respondents have presented compelling evidence regarding the sufficiency of entry in this market. Current customers are satisfied with prices received and choices available to them, and evidence shows that new entrants are severely disciplining CB&I's activities. Complaint Counsel has not carried its ultimate burden of persuasion in this case. Accordingly, the Complaint as it relates to the LPG market must be dismissed.

V. RESPONDENTS HAVE SUCCESSFULLY REBUTTED COMPLAINT COUNSEL'S PRIMA FACIE CASE IN THE LIN/LOX MARKET.

Field-erected LIN/LOX/LAR tanks store liquid nitrogen, liquid oxygen, and liquid argon at cryogenic temperatures. (Patterson, Tr. 340-41; V. Kelley, Tr. 4596; Stetzler, Tr. 6312) (FOF 5.1). These tanks consist of an outer carbon steel shell and an inner tank, with insulation between the two shells. (Stetzler, Tr. 6312; Kistenmacher Tr. 833-34) (FOF 5.3). The outer shell is generally made from A-36 carbon steel, while the inner shell of a LIN/LOX/LAR tank is generally made from 304 stainless steel. (Stetzler, Tr. 6315) (FOF 5.4).

The market for field-erected LIN/LOX tanks in the U.S. is extremely small and in decline. The average price of a LIN/LOX tank is approximately $1 million. (Scorsone, Tr. 5016). In the two years since the Acquisition, the total value of all commerce in this market has been just $5.8 million. (*See, e.g.*, Harris, Tr. 7308). Only five such tanks have been awarded during this time: Midland, North Carolina (BOC); Hillsboro, Oregon (BOC); Freeport, Texas (Air Liquide); New Johnsonville, Tennessee (MG Industries); and Kirkland, New Mexico (Praxair). (Scorsone, Tr. 5017) (FOF 5.77). Because of this low demand and the relatively small size of these tanks, LIN/LOX tanks are a very small part of CB&I's business. (*E.g.*, Glenn, Tr. 4088; Scorsone, Tr. 5016-17) (FOF 5.20, 5.21). Since the Acquisition, CB&I has won only two of five projects awarded, resulting in a total of less than $5 million in revenue. (*See* Scorsone, Tr. 5015-16; Glenn, Tr. 4088) (FOF 5.20).

Respondents have successfully rebutted Complaint Counsel's prima facie case. The evidence shows that entry in this market has been timely, and that current entrants are qualified, capable, and respected by many of the small number of U.S. LIN/LOX tank customers. Evidence also shows that entry to this market is easy, that current customers for these projects are sophisticated, and that entry is sufficient to constrain CB&I's pricing in this market.

A. ENTRY HAS ALREADY OCCURRED IN THE U.S. MARKET FOR LIN/LOX TANKS.

1. AT&V has entered the U.S. market for LIN/LOX tanks.

a. AT&V is a capable LIN/LOX tank supplier.

AT&V is a maker of cryogenic storage tanks. (Cutts, Tr. 2393) (FOF 5.26-5.30). AT&V has all the necessary equipment and personnel to build field-erected LIN/LOX tanks. It has developed a "clean bay" facility dedicated to the fabrication of stainless steel for cryogenic projects. (Cutts, Tr. 2331-32) (FOF 5.29). It also employs engineers and other employees experienced in designing and constructing LIN/LOX tanks, including former CB&I and Graver employees. (Cutts, Tr. 2426-27, 2454, 2570-71) (FOF 5.222). AT&V has developed standards and spent time on engineering, testing cryogenic materials, and preparing LIN/LOX marketing plans. (Cutts, Tr. 2501-02, 2503-04) (FOF 5.33). AT&V has a good reputation for quality and schedule. AT&V's quality in construction (as measured by ATV's extremely low x-ray rejection rate) is far superior to CB&I and other U.S. tank vendors. (Cutts, Tr. 2491-93) (FOF 5.38). AT&V also has one of the best completion schedules in the industry. Last year, it completed 163 of 164 projects on time. (Cutts, Tr. 2510-12) (FOF 5.39).

AT&V is committed to pursuing LIN/LOX tanks in the U.S.; it believes that it has an advantage over CB&I and can sell those tanks at a lower price. (Cutts, Tr. 2332, 2572) (FOF 5.35). Prior to entering the market, AT&V spent an initial $50,000 on marketing to LIN/LOX purchasers. (Cutts, Tr. 2429-30, 2502) (FOF 5.36). After this initial effort, AT&V won and constructed two LIN/LOX tanks for BOC in Midland, North Carolina. (Cutts, Tr. 2330, 2435-36) (FOF 5.31). While AT&V did not make a significant profit on this job, it viewed this opportunity as a long-term investment in the market. (Cutts, Tr. 2429-30) (FOF 5.36). AT&V continues to pursue LIN/LOX work in the U.S. (Cutts, Tr. 2533) (FOF 5.35, 5.37). It has submitted budget pricing to approximately six customers, and has been prequalified by several customers. (Cutts, Tr. 2452-53; *see also* Cutts, Tr. 2550-52) (FOF 5.35).

b. Many LIN/LOX tank customers have accepted AT&V as a potential supplier of LIN/LOX tanks.

AT&V is becoming an accepted supplier of LIN/LOX tanks. In fact, AT&V has bid on three of the four LIN/LOX tanks competitively bid since the Acquisition and has won all three bid contests, beating out CB&I all three times. (Scorsone, Tr. 5017-18) (FOF 5.78). BOC, AT&V's first LIN/LOX customer, was extremely satisfied with the price it paid and AT&V's performance on the Midland, North Carolina job. (V. Kelley, Tr. 5287, *see also* V. Kelley, Tr. 4600-01) (FOF 5.96, 5.97). In actuality, BOC "was quite satisfied [with ATV] in all aspects." (V. Kelley, Tr. 5287) (FOF 5.97). Specifically, BOC praised AT&V for being proactive in solving problems as they arose on the job site, as well as its turnover package and schedule execution. (V. Kelley, Tr. 5268, 5283-84, 5287-89).[19] BOC believes that AT&V has "certainly distinguished themselves as being capable LIN/LOX tank providers." (V. Kelley, Tr. 5281-82; *see also* V. Kelley, Tr. 5285) (FOF 5.113). Further, BOC would hire AT&V again on its next LIN/LOX project. (V. Kelley, Tr. 4601, 5289-90) (FOF 5.113). In fact, BOC Edwards has already selected AT&V to construct a LIN tank in Oregon because AT&V had the low bid. (V. Kelley, Tr. 5291-92; *see also* Cutts, Tr. 2419).

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[19] The testimony of BOC is corroborated by the testimony of AT&V. After the construction of the Midland project, BOC told AT&V that their "quality was exceptional, the schedule was good, and that the safety was exceptional." (Cutts, Tr. 2453) (FOF 5.32). AT&V believes that BOC has spoken to other LIN/LOX tank customers and recommended AT&V's construction abilities. AT&V believes that Air Liquide was influenced by a positive reference from BOC. (Cutts, Tr. 2453-54, 2504-06, 2523) (FOF 5.115).

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(xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] Evidence also shows that CB&I found Air Liquide to be a very difficult customer during the bidding of this project, and CB&I generally has found Air Liquide to be a relatively "difficult and demanding customer." (Scorsone, Tr. 5035-36) (FOF 5.136). Air Liquide tends to ask for more appurtenances, require specific standards for their piping systems, and at times has difficulty defining project scope. (Scorsone, Tr. 5037) (FOF 5.137). These difficulties extended to the Freeport project. CB&I's salespeople were frustrated with Air Liquide because it was unable to define the exact scope of the project. (*See* Scorsone, Tr. 5037-38) (FOF 5.139). Although CB&I requested a meeting with Air Liquide to discuss project details to ensure that CB&I was bidding properly, this meeting never occurred. (*See* Scorsone, Tr. 5038) (FOF 5.139).

Third, there is no evidence that other customers will **[xxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

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Three other customers have not yet solicited bids from AT&V.[20] However, these customers are willing to consider AT&V as a supplier. For example, Air Products would

[20] Each of the six major customers, with the exception of Praxair, testified in this case. Complaint Counsel planned to call Michael Poli of Praxair on November 14, 2002. Complaint Counsel informed Respondents that morning that Mr. Poli would not testify. There is no evidence in the record regarding whether Praxair would, or would not, accept AT&V as a supplier. PDM entered into a three-year alliance agreement for domestic non-union cryogenic tank projects with Praxair in 1998, which provided open book pricing with a 4 percent margin. PDM would also be given preferential treatment on union cryogenic tanks or for tanks built outside of the U.S. (RX 87; Scorsone Tr. 5018-19) (FOF 5.166). In 2001, PDM and Praxair agreed to renew the agreement for another three years. The agreement was assumed by CB&I after the Acquisition. (Scorsone, Tr. 5018-19) (FOF 5.166). Under the agreement, Praxair cannot award a LIN/LOX tank to anyone else if it is a merit-built or non-union built project. (Scorsone, Tr. 5018-19) (FOF 5.166).

consider prequalifying AT&V, and has no reason to believe they would not qualify. (Hilgar, Tr. 1509-11) (FOF 5.172). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

Evidence regarding Linde Process Plants is less clear. Hans Kistenmacher characterized AT&V's reputation for building LIN/LOX tanks as "poor," because it has only completed one LIN/LOX tank job. (Kistenmacher, Tr. 862). However, Linde has not yet assessed AT&V's capabilities and experience in the market. (Fan, Tr. 1018). Despite its concerns, Linde has accepted budget pricing from AT&V for LIN/LOX projects on the Gulf Coast and in New Mexico. (Kistenmacher, Tr. 854, 857-58) (FOF 5.178). While AT&V's low price has caused some concerns for Linde, there has been pressure within Linde to use AT&V because "the low price make it very interesting." (Fan, Tr. 1016-18) (FOF 5.178).

2. Matrix has entered the U.S. market for LIN/LOX tanks.

a. Matrix is a capable LIN/LOX tank supplier.

Matrix Services Corporation ("Matrix") is based in Tulsa, Oklahoma. It is an accomplished tank construction company with average annual revenues over $200 million. (RX 135 at 6). Matrix began pursuing LIN/LOX opportunities in 1998 and has experience bidding on projects for Praxair, Air Products, and Linde (formerly known as Lotepro). (RX 135 at 8-9) (FOF 5.47-5.55). Matrix has produced promotional materials to advertise its capabilities as builders of cryogenic tanks in an effort to win more cryogenic projects. (RX 137).

Matrix has entered the market for field-erected LIN/LOX tanks, and has the capability to build those tanks. It has hired employees with experience in building cryogenic storage tanks, including a project manager, foreman, and field crew. (Newmeister, Tr. 2188)

(FOF 5.43). It has also tested materials, established welding procedures, and created engineering standards. (Newmeister, Tr. 2213-14) (FOF 5.44). These moves have allowed Matrix to increase customer confidence in its qualifications and demonstrate to buyers that it can meet the requisite API specifications. (Newmeister, Tr. 2189-90).

Matrix has already constructed field-erected LIN/LOX tanks. It has built four tanks for Air Products and Praxair in a variety of locations, including Tennessee, Delaware, and Indiana. (Newmeister, Tr. 2173, 2173-74, 2176-77) (FOF 5.47-5.50). Matrix has continued to participate in this market, post-Acquisition. As of August 2002, Matrix had three outstanding bids on LIN/LOX tanks for two different customers. (Newmeister, Tr. 2178) (FOF 5.52). **[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**; Scorsone, Tr. 5032) (FOF 5.149). Further, Matrix plans to continue bidding on LIN/LOX tanks. It believes that it is a competitive force in the LIN/LOX market, and that it can compete with CB&I. (Newmeister, Tr. 2166-67).

b. Customers have accepted Matrix as a potential LIN/LOX tank supplier.

All six LIN/LOX tank customers agree that Matrix is a viable supplier. Praxair has used Matrix in the past, and was satisfied with their work. (Newmeister, Tr. 2176-77) (FOF 5.46). Similarly, Air Products awarded Matrix a LIN/LOX project in 1997 as the low bidder. Matrix successfully completed the project, and Air Products would seek a bid from them in the future. (Hilgar, Tr. 1511-13; *see also* Newmeister, Tr. 2174) (FOF 5.45). **[xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

(FOF 5.149). Air Liquide also believes that Matrix is a qualified supplier. It has accepted LIN/LOX bids from them in the past, and would consider hiring Matrix on future jobs. (Kamrath, Tr. 2005-06) (FOF 5.53). Despite their lack of recent activity in the market, Linde is familiar with Matrix. Linde believes that Matrix is a qualified tank supplier, and has accepted bids and budget pricing from Matrix "many" times. For example, Linde recently sought pricing from Matrix for jobs in the Gulf Coast area and in New Mexico. (Kistenmacher, Tr. 857-58; Fan, Tr. 1018).[21]

3. CB&T has entered the U.S. market for LIN/LOX tanks.

a. CB&T is a capable LIN/LOX tank supplier.

Chattanooga Boiler & Tank ("CB&T") builds API 650 storage tanks, API 620 storage tanks, and low pressure tanks. (Stetzler, Tr. 6308-09) (FOF 5.56). For CB&T, construction of a field-erected LIN/LOX tank is not particularly difficult; there is no question that CB&T has the ability to design and build those tanks. (Stetzler, Tr. 6312-13) (FOF 5.58). CB&T has all the necessary equipment to build them. CB&T has its own fabrication facility with all the necessary equipment to fabricate a LIN/LOX tank. (Stetzler, Tr. 6314-16, 6384-85) (FOF 5.59, 5.63). It also acquired "quite a bit of . . . equipment" from Graver -- a former competitor in the LIN/LOX tank market -- when it went out of business in 1999. (*See* Stetzler, Tr. 6317-19) (FOF 5.59).

CB&T has the personnel necessary to construct LIN/LOX tanks. CB&T employs individuals with LIN/LOX tank experience, including salespeople, project managers, boilermaker superintendents, and boilermakers. (Stetzler, Tr. 6314-16, 6319-21, 6324-27) (FOF 5.59-5.65). CB&T has the requisite field crews and welders to construct LIN/LOX tanks. In

[21] Linde has never used Matrix because it believes "their price for the non-union tank was always high." However, their prices on union jobs may be a "different story." (Fan, Tr. 1019).

fact, it has superior quality field crews with productivity as good as or better than most of its competitors. It enjoys a high retention rate, a good safety record, and a good record for quality work. (*See* Stetzler, Tr. 6323-29) (FOF 5.62, 5.66). Many CB&T field workers have experience working for CB&I and PDM. In fact, 30-40 percent of CB&T's field workers have worked for CB&I or PDM at some point. (Stetzler, Tr. 6322) (FOF 5.61). CB&T has also hired two former Graver employees and opened an office in Houston in order to expand into the oil and LIN/LOX markets. (Stetzler, Tr. 6318-19) (FOF 5.59). Rex Robinson was a senior Graver project manager with experience in building LIN/LOX tanks and dealing with LIN/LOX tank customers. (Stetzler, Tr. 6317-19; *see also* RX 273 (FOF 5.59). Robinson now works for CB&T as Manager of Texas Operations. (Stetzler, Tr. 6320) (FOF 5.59). Robinson's past experience as a LIN/LOX project manager and familiarity with LIN/LOX sales has enabled CB&T to use much of Graver's experience with LIN/LOX tanks in order to promote CB&T's experience in the cryogenic tank market. (Stetzler, Tr. 6319-20) (FOF 5.59.

CB&T's prior experience has prepared it well for the LIN/LOX tank market. It has constructed tanks and structures significantly more difficult to build than LIN/LOX tanks. (Stetzler, Tr. 6337-39) (FOF 5.56). For example, CB&T has constructed shop-erected LNG tanks for customers such as Lotepro and Nikkiso. (Stetzler, Tr. 6331-34). This experience is directly relevant to field-erected LIN/LOX tanks, because the ability to fabricate components in a clean environment and the ability to weld materials of certain quality are skills used in fabrication of both types of tanks. (Stetzler, Tr. 6336-37) (FOF 5.57). CB&T is also familiar with API standards and has a bonding capacity of tens of millions of dollars, more than sufficient to build LIN/LOX tanks. (Stetzler, Tr. 6385-87, 6391) (FOF 5.56, 5.64).

CB&T has made efforts to enter the LIN/LOX market. It bid on a LIN/LOX tank for BOC in North Carolina. It also submitted a budgetary proposal to MG Industries for the New Johnsonville project. (Stetzler, Tr. 6351) (FOF 5.70). CBT believes that the Acquisition has created an opportunity for it to become involved in the LIN/LOX market, and CB&T plans to take advantage of that opportunity in the future. (*See* Stetzler, Tr. 6367-68) (FOF 5.68). CB&T believes that it has competitive advantages over CB&I, because it is a smaller, more responsive company with a lower overhead structure. (Stetzler, Tr. 6369). (FOF 5.66, 5.67).

b. Customers have begun to accept CB&T as a potential LIN/LOX tank supplier.

Customers know that CB&T has made efforts to enter the LIN/LOX market and would consider using CB&T in the future. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Similarly, in 2000, BOC accepted a bid from CB&T for its Midland project. (V. Kelley, Tr. 4598-99) (FOF 5.87). Air Products has had some involvement with CB&T in the past, and would consider prequalifying it for a field-erected LIN/LOX tank job in the future. Air Products has no reason to believe that they would not qualify as a bidder. (Hilgar, Tr. 1509-11, 1513).

B. THERE ARE NO SIGNIFICANT ENTRY BARRIERS TO THE LIN/LOX TANK MARKET.

There are no significant entry barriers to the LIN/LOX market. As discussed above, Matrix has successfully built LIN/LOX tanks for Praxair and Air Products, and was able to enter without any prior experience. In 2001, AT&V and CB&T entered the LIN/LOX market, bidding on a job for BOC. In fact, AT&V has won all three jobs it has bid on since the

Acquisition despite having no prior experience. As this entry occurred within two years of the Acquisition, there should be no dispute that entry is "timely" in this market. (See 1922 Horizontal Merger Guidelines, RX 844 at 11-21). With respect to potential future entry, companies capable of building standard flat-bottom storage tanks are capable of building field-erected LIN/LOX tanks. (Hilgar, Tr. 1520-21 (FOF 5.221).

1. Subcontracting is not an entry barrier to the LIN/LOX tank market.

Complaint Counsel has argued that subcontracting is an entry barrier. For the reasons discussed in Part III, *supra*, this argument is generally flawed. Further, LIN/LOX tank construction does not require a significant number of subcontractors. For example, AT&V used only three subcontractors for BOC's Midland job. (Cutts, Tr. 2521-22) (FOF 5.219, 5.220).

2. Welding is not an entry barrier to the LIN/LOX tank market.

Complaint Counsel has argued that welding is an entry barrier. The evidence presented is to the contrary. For example, AT&V was able to hire experienced welders merely by placing newspaper ads. (Cutts, Tr. 2427-28) (FOF 5.221). Further, AT&V's welding systems were sufficient to successfully construct LIN/LOX tanks for BOC. (Cutts, Tr. 2565) (FOF 5.31).

3. Assembling of sales staff and engineering forces is not an entry barrier to the LIN/LOX tank market.

The ability to hire necessary sales staff and engineers is not an entry barrier. AT&V's current sales staff enabled it to sell the LIN/LOX projects to BOC and Air Liquide. (Cutts, Tr. 2568-69) (FOF 5.222). Further, AT&V has developed its own technical specifications for LIN/LOX tanks which enabled AT&V to successfully construct a LIN/LOX tank to BOC's satisfaction. (Cutts, Tr. 2563-64) (FOF 5.29).

C. CUSTOMERS FOR LIN/LOX TANKS ARE SOPHISTICATED.

Evidence demonstrates that LIN/LOX tank customers are sophisticated consumers. For example, BOC is a sophisticated customer. It has been the most active tank purchaser since the Acquisition, building two tanks in Midland, North Carolina and planning another in Hillsboro, Oregon. (V. Kelley, Tr. 4599-4601) (FOF 5.87, 5.116). BOC has the expertise to develop new suppliers of LIN/LOX tanks. For example, BOC hired engineering consultants to assist it and AT&V in working through the Midland project. (V. Kelley, Tr. 4619-20) (FOF 5.81). BOC has also purchased a number of LIN/LOX tanks in the past, and develops budgets for LIN/LOX tank purchases as part of the planning process. (*See* Kelley, Tr. 4622).

MG Industries is also a sophisticated customer. MG has experience purchasing LIN/LOX tanks in the past; it purchased 14 such tanks during the 1990s. (Patterson, Tr. 478-79) (FOF 5.82). MG has a demonstrated ability to manipulate vendors to secure good tank prices. For example, during the 1990s, MG would often drive tank costs down by informing vendors that they were higher-priced (even though they were not). These tactics created additional competition. (*See* Patterson, Tr. 350) (FOF 5.82).

Air Liquide is also a sophisticated customer. Air Liquide is a U.S. subsidiary of a large French corporation. (*See* Kamrath, Tr. 1979-80) (FOF 5.83). It has purchased LIN/LOX tanks in the past, both domestically and overseas. (*See* Kamrath, Tr. 1983-85) (FOF 5.83). **[xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (Kamrath, Tr. 2235-36) (FOF 5.83). **[xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

Air Products is a sophisticated customer. Air Products purchased several field-erected LIN/LOX tanks during the 1990s, both in the U.S. and overseas. (Hilgar, Tr. 1390-91)

(FOF 5.84). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx]** (*See*, *e.g.*, **[xxxxxxxxx],** Tr. 488-89) (FOF 5.55).

Although not a current customer, Linde is certainly sophisticated. Linde is a U.S. subsidiary of a large German corporation. (*See* Kistenmacher, Tr. 822-23; 830) (FOF 3.85). Linde has extensive experience with LIN/LOX experience in the U.S. and overseas. (Kistenmacher, Tr. 830) (FOF 5.85). In the past, Linde was also involved in other projects involving cryogenic tanks, such as the LNG peakshaving facility at Memphis. (Kistenmacher, Tr. 884, 886) (FOF 3.673).

Praxair is a sophisticated customer. At one time, Praxair owned CB&I in its entirety. (*See* Glenn, Tr. 4062-63) (FOF 5.86). Praxair has also negotiated a sole-source arrangement with PDM (and later with CB&I) that was designed before the Acquisition ever took place, presumably to obtain a lower overall price on LIN/LOX tanks. (*See* Scorsone, Tr. 5018-19) (FOF 5.166). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Patterson, Tr. 488-89) (FOF 5.55).

D. ENTRY IN THE LIN/LOX TANK MARKET IS SUFFICIENT.

As discussed in Part II, *supra*, Complaint Counsel has failed to make its prima facie case. Assuming the existence of a prima facie case, the case is weak at best. Respondents need not make a strong showing to rebut it. *See Baker Hughes*, 908 F.2d at 986. Nevertheless, Respondents have rebutted it with strong evidence that entry in the U.S. market will constrain CB&I's pricing in the LIN/LOX market. Accordingly, Complaint Counsel must present additional evidence showing that lessening of competition is likely, including evidence regarding the sufficiency of entry outlined by Respondents. *See id.* at 983.

Although Respondents are under no duty to do so, they have presented evidence regarding sufficiency of entry. Since the Acquisition, five LIN/LOX tank projects have been awarded -- two by BOC, one by Air Liquide, one by MG Industries, and one by Praxair. Of these, four were competitively bid. Results of these bid contests demonstrate that the Acquisition has not substantially lessened competition in the LIN/LOX market. To the contrary, evidence shows that customers have received competitive bids on post-Acquisition projects and that CB&I's behavior has been constrained by its competitors. (*See, e.g.*, Harris, Tr. 7302, 7324) (FOF 7.124, 7.127).

1. Customers receiving pricing after the Acquisition are satisfied with prices received.

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The facts surrounding this project support Dr. Harris' views regarding competition in the LIN/LOX market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (xxxxxxxxxxxxxx). [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

[23] Had he done so, he would have learned that CB&T gave him a budgetary quote, not a fixed, firm price. (*See* Stetzler, Tr. 6351) (FOF 5.70).

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(xxxxxxxxxxxxxxxxxxxxxxxxxxx). This data confirms Dr. Harris' analysis of competition and debunks Complaint Counsel's argument that CB&I has cost advantages in this market. (Harris, Tr. 7389-90) (FOF 7.126). The bid amounts were also significant in supporting Dr. Harris' conclusion regarding competition, because it showed that Matrix was a viable competitor to CB&I and that AT&V could effectively discipline CB&I's pricing. (*See* Harris, Tr. 7322-23, 7385) (FOF 7.127).

c. BOC received a good price for its Midland project.

BOC was extremely satisfied with AT&V's price at Midland, primarily because it was less than the amount BOC budgeted for the tank. (V. Kelley, Tr. 4601, 5272) (FOF 5.96). Kelley believes that BOC can get a competitive price for a LIN/LOX tank with just two bidders. (V. Kelley, Tr. 5285) (FOF 5.94). While BOC would, to some extent, prefer more bids rather than less, it does not want an unlimited number of bids. Excess bids flood the process and some contractors would choose not to bid because there were too many bidders. (V. Kelley, Tr. 4674-75) (FOF 5.94). Further, CB&I's loss on this project led Dr. Harris to conclude that competition was not affected by the Acquisition because CB&I bid on the projects at a negative margin and still lost. This contradicts claims that CB&I has cost advantages in this market. (Harris, Tr. 7319-21).

d. Other market participants do not believe the Acquisition has substantially lessened competition.

Other market participants believe that the Acquisition has not affected the ability to purchase LIN/LOX tanks at a competitive price. Joseph Hilgar observed that Air Products has more potential bidders for prequalification today than it had in the past, and that it has a sufficient competition to ensure that it will receive reasonable prices on its next project. (Hilgar, Tr. 1540-41) (FOF 5.169). Similarly, Jerry Stetzler of CB&T, based on his experience in the tank market, believes that prices for LIN/LOX tanks will not be affected by the Acquisition because there are enough suppliers to ensure competitive prices for these tanks. (Stetzler, Tr. 6366) (FOF 5.215). In fact, CB&T sees the merger as creating an opportunity to compete in this market. CB&T bid on BOC's Midland job to capitalize on that opportunity. (Stetzler, Tr. 6368) (FOF 5.69). CB&T has competitive advantages over CB&I. It is a small company better able to respond to certain jobs. It has a lower overhead structure, and can respond to immediate market conditions more quickly and efficiently than CB&I. (Stetzler, Tr. 6369) (FOF 5.67).

Linde Process Plants has expressed some concerns regarding the effect of the Acquisition on the LIN/LOX tank market. However, Linde does not have recent experience in this market; it has not purchased a tank since 1999. (Kistenmacher, Tr. 927-28) (FOF 5.176). Further, Linde is not familiar with pricing of any LIN/LOX tanks purchased since the Acquisition, nor has it seen any evidence that CB&I has raised its prices on LIN/LOX tanks post-Acquisition. (Kistenmacher, Tr. 931-32; Fan, Tr. 1006) (FOF 5.181, 5.185).

2. Entry in the LIN/LOX market has constrained CB&I's behavior.

CB&I perceives current competition in LIN/LOX as "very intense," and does not believe that CB&I can implement a price increase post-Acquisition. (Scorsone, Tr. 4881-82, 5038-39) (FOF 5.212, 5.213, 5.216). CB&I believes that if it increases prices on field-erected LIN/LOX tanks, it will lose work to its competitors. In fact, CB&I sees a need to cut its prices in order to remain competitive in this market. (*See* Scorsone, Tr. 5030-31) (FOF 5.217). Other evidence corroborates Mr. Scorsone's view of the market and shows that CB&I has been disciplined by AT&V, Matrix and CB&T. The following e-mail is illustrative:

> To follow-up on LOX/LIN competitors, I just spoke to BOC and they have awarded the Midland, NC to ATV out of Houston. BOC says . . . ATV has picked up Graver and Brown Minny people over the last couple of years with the experience to do the work. Our final price to BOC was $1,520,000 at 2% profit and they bought the tank for approximately $1,325,000 which is about 2% below our total flat cost.

(RX 273) (FOF 5.72, 5.213). From this information, CB&I concluded that AT&V had a "very strong commitment to entering into this market and that they made the proper new move to gain experience in the market" and that they have lower costs than CB&I. (Scorsone, Tr. 5026) (FOF 5.40, 5.72).

In fact, after CB&I learned that CB&I lost the LIN/LOX project for BOC in Midland, North Carolina to AT&V despite bidding at a margin level of negative 5 percent, a company document concluded CB&I has "a very hard time competing on these [LIN/LOX] tanks." (RX 208) (state of mind) (*See also* Scorsone, Tr. 5029-30) (FOF 5.212). Company documents show that CB&I was learning about its new LIN/LOX competitors, stating that CB&T may "have picked up Rex Robinson who ran the LOX/LIN group for Graver and has been in the business for many, many years. Lud says that along with Rex, CBT has picked up enough other engineering project management and field people from Graver to give them 'credibility' in this market." (RX 273) (FOF 5.59, 5.73). This information warned CB&I that CB&T planned to enter the market. (Scorsone, Tr. 5026-28) (state of mind) (FOF 5.59, 5.72, 5.73). RX 273 also contained recent intelligence that Matrix was also entering this market: "I also asked about Matrix, as I knew they had build [sic] the Kingsport, TN for them in 1999. He says they did a good job for Air Products and they definitely consider them a player in the market . . . Based on this, it appears that Air Products considers CBT and Matrix viable competitors in the LOX/LIN tank market." (RX 273) (FOF 5.54). Because Air Products is a sophisticated customer, and because they are apparently considering these companies, CB&I believes that they are real competitors. CB&I makes pricing decisions on LIN/LOX tanks with this in mind. (Scorsone, Tr. 5028-29) (state of mind) (FOF 5.72, 5.216, 5.217).

In connection with the New Johnsonville job, CB&I realized that it had competition and acted accordingly. MG made CB&I aware that there was competition for the New Johnsonville tank. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (xxxxxxxxxxxxxxxxxxxxxxxx) (FOF 5.153). Awareness of this competition caused CB&I to drop its price. Originally, CB&I submitted a bid with a 4 percent margin. (Scorsone, Tr. 5022-23) (FOF 5.151). MG "said that [CB&I's] price was a little high. There was another tank that he wanted to award. He asked for a combined price from us, and we subsequently submitted that price and reduced our margin on the job." (Scorsone, Tr. 5023) (FOF 5.151). CB&I cut its margin to approximately .5 percent and won the job. CB&I cut its margin because it was threatened by competition. (Scorsone, Tr. 5023-24) (FOF 5.151, 5.152).

Evidence regarding Air Liquide's Freeport project further corroborates CB&I's state of mind. CB&I originally bid on this job at a 2 percent margin. (Scorsone, Tr. 5032-33; *see also* RX 627 at 2) (FOF 5.128). Steve Knott -- a CB&I sales executive -- related a conversation with an Air Liquide purchasing employee who informed CB&I that they were "in a 'competitive situation' (Scorsone, Tr. 5033-34; RX 627 at 2) (FOF 5.129). To deal with this competitive situation, Mr. Knott proposed the following:

> We would like to contract for this work. In order to avoid a loss of this work to the competition, we should be prepared to cut the Florida margin to 1% and but leave the Texas margin the same as a first response to their pressure. In the end, in order to get both jobs, it may be necessary to go to 0% margin on both. That would be as low as we would go on this work unless you and I talk again.

(RX 627 at 2) (FOF 5.130). In response, CB&I lowered its margins to zero percent on both tanks. (Scorsone, Tr. 5033-36) (FOF 5.130). Despite this move, CB&I lost the Freeport job to AT&V. (Scorsone, Tr. 5034-35) (FOF 5.130). The AT&V/Air Liquide dispute has not affected CB&I's state of mind regarding AT&V, because "CBI was confused by the specifications and requirements for the final bidding, and I imagine ATV was as well. ATV is dealing with these issues. They may have taken a rather harsher contractual position with Air Liquide and maybe decided, maybe rightly so, that this is a project that they shouldn't be pursuing." (Scorsone, Tr. 5038) (FOF 5.131, 5.136).

Other pricing contests have given CB&I additional evidence regarding the viability of its competitors. CB&I submitted budget pricing for a BOC LIN/LOX project in Oregon. (Scorsone, Tr. 5031) (FOF 5.116). CB&I never had an opportunity to submit a firm fixed bid to BOC for this project because it was awarded to AT&V. (Scorsone, Tr. 5031) (FOF 5.120). Since AT&V has been awarded a second LIN/LOX tank by BOC, CB&I has concluded that BOC is pleased with AT&V's performance as a LIN/LOX tank supplier. (Scorsone, Tr. 5032) (state of mind) (FOF 5.121).

E. SUMMARY: APPLICABLE LAW REQUIRES DISMISSAL OF THE COMPLAINT AS IT RELATES TO THE LIN/LOX MARKET.

Applicable law compels dismissal of this action with respect to the LIN/LOX market. As discussed in Part II, *supra*, Complaint Counsel's prima facie case is weak. Accordingly, Respondents need not present a strong showing to rebut it. *Baker Hughes*, 908 F.2d at 991. Nevertheless, Respondents have presented evidence on numerous fronts to rebut Complaint Counsel's case. Respondents have proven that actual entry has occurred in this market, that entry barriers are nonexistent, and that customers in this market are sophisticated enough to receive good pricing with a minimum of competition. *See id.* at 988-89. Further, while not required to do so, Respondents have presented compelling evidence regarding the sufficiency of entry in the LIN/LOX market. Most current customers are generally satisfied with prices received and choices available to them, and the evidence demonstrates that new entrants are severely disciplining CB&I's activities in this market. Complaint Counsel cannot carry its ultimate burden of persuasion in this case. Accordingly, the Complaint as it relates to the LIN/LOX market must be dismissed.

VI. RESPONDENTS HAVE SUCCESSFULLY REBUTTED COMPLAINT COUNSEL'S PRIMA FACIE CASE IN THE TVC MARKET.

A field-erected thermal vacuum chamber ("TVC") is a stainless steel pressure vessel used to test satellites and satellite components prior to launch. (Gill, Tr. 179-83; Neary, Tr. 1423-24) (FOF 6.1). TVC's simulate the atmospheric and thermal conditions found in space. (Gill, Tr. 183; Proulx, Tr. 1722-23; Thompson, Tr. 2039-40; Higgins, Tr. 1264) (FOF 6.2). A TVC has two basic components. First, a TVC has a large vacuum envelope (or chamber) constructed of stainless steel shaped roughly like a horizontal cylinder with a front door that may swing on a hinge or slide laterally on a rail. (Scully, Tr. 1098-99) (FOF 6.4). Second, a TVC contains a "thermal vacuum system," which is the process equipment that goes inside a thermal vacuum chamber to simulate extreme heat and cold. (Higgins, Tr. 1263) (FOF 6.5). The thermal vacuum system includes one or more shrouds, vacuum insulated pipe, and cryo pumps or other pumping equipment, which are all controlled by a thermal control unit. (Higgins, Tr. 1263) (FOF 6.5). CB&I is not capable of designing or building the thermal vacuum system portion of a TVC. (Scully, Tr. 1225) (FOF 6.53, 6.56).

Complaint Counsel has failed to make a prima facie case with respect to the TVC market. The market concentration statistics on which it relies are virtually meaningless, as they were generated using a total of two data points over an eleven-year period -- one of those two data points was for a project never built -- and cannot dislodge the fact that CB&I has not built a field-erected TVC since the first Reagan administration. The failure of market concentration statistics to provide any meaningful information regarding the competitiveness of the TVC market is a symptom of a greater problem -- there is virtually no demand for thermal vacuum chambers. Because of a lack of demand, there is no way that the Acquisition could have substantially affected competition in this case. Even if Complaint Counsel did make a prima facie case, Respondents have effectively rebutted it. The evidence demonstrates that CB&I is not a player in the TVC market (as it has not built a TVC since 1984), and that entry barriers in this market are low. Further, even if the Acquisition has caused any problem in this market, available remedies short of a breakup would encourage competition without damaging customers in this market or other markets.

A. DEMAND IN THE TVC MARKET IS SO *DE MINIMIS* THAT IT IS NOT A LINE OF COMMERCE THAT HAS BEEN SUBSTANTIALLY AFFECTED BY THE ACQUISITION.

Complaint Counsel has failed to carry their burden in the TVC market. This so-called "market" is extremely thin. (*See*, *e.g.*, Harris, Tr. 7325) (FOF 6.11). Complaint Counsel presented extensive evidence regarding TVCs. From this evidence, two major points arise: First, the only TVC built in the U.S. since 1992 was the C-1 project built by PDM and Chart Industries for Hughes in 1997. (*See* CX 1048). Second, only one TVC is being contemplated by customers in the next ten years. For example**, [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 6.14). The Spectrum Astro project, discussed extensively during this trial, has been scrapped due to "government action." (Thompson, Tr. 2097, 2103) (FOF 6.15). Overall, demand is decreasing for field-erected TVCs because of: 1) consolidation in the aerospace business; 2) the miniaturization of electronic components in satellites; and 3) the change in the economy since the 1990s. (Scully, Tr. 1199-1204) (FOF 6.12). This decline in demand is expected to last at least a few years. (Scully, Tr. 1205-06) (FOF 6.13).

Given the miniscule demand, Complaint Counsel has not met its burden of proof because it has failed to show that the commerce affected in the TVC market is substantial. *United States v. Baker Hughes, Inc*., 731 F. Supp. 3, 9 (D.D.C. 1990). In *Baker Hughes*, the district court noted that "[t]he minuscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" *Id.* (citing *United States v. Dupont & Co.*, 353 U.S. 586, 595 (1957)). The size of the *Baker Hughes* market is instructive; the district court was concerned about a market in which 20-45 items were purchased each year. 908 F.2d at 986. As noted above, one TVC is purchased approximately every five to ten years, making this market *less than 1 percent* of the size of the *Baker Hughes* market. To call this a substantial effect on commerce would be to read the word "substantial" out of Section 7 itself. Second, as discussed in Part II, *supra*, Complaint Counsel's market concentration statistics are virtually meaningless. Over an 11-year period, the statistics as presented by Complaint Counsel's expert witness contain *two* data points. (*E.g.*, Simpson, Tr. 3493). There can be no inference drawn from this analysis, other than that market concentration statistics are meaningless.

B. CB&I IS NOT A PLAYER IN THE TVC MARKET.

Even if the TVC market were a viable line of commerce, there is no evidence that the Acquisition has substantially lessened competition. Indeed, there is a substantial question whether CB&I would have the necessary expertise to construct TVCs absent the Acquisition. (Scully, Tr. 1214) (FOF 6.36). CB&I is not particularly experienced as a fabricator of TVCs. It last constructed a TVC in 1984. (Scully, Tr. 1187-89, 1193; Scorsone, Tr. 5055-56; Higgins, Tr. 1276-77; Glenn, Tr. 4089, 4160) (FOF 6.26). On its second-to-last TVC job in 1981, the chamber was so flawed that it was never put into operation. (Thompson, Tr. 2113; Scully, Tr. 1188) (FOF 6.45). Importantly, CB&I has never constructed a mailbox-shaped TVC -- the type that customers currently prefer. (Higgins, Tr. 1277-78; Scully, Tr. 1193, 1192-93; Scorsone, Tr. 5056; Neary Tr. 1467) (FOF 6.27). Mailbox-shaped TVCs are much more difficult to design and more costly to build than traditionally-shaped TVCs. (Scully, Tr. 1106-07; Higgins, Tr. 1277; Neary, Tr. 1467) (FOF 6.28)..

In the future, CB&I will not continue to invest in marketing for TVC opportunities, nor will it actively engage and pursue these projects. (Scorsone, Tr. 5053) (FOF 6.62). Preparing TVC bids is expensive and these projects often do not end up being built. (Scorsone, Tr. 5054) (FOF 6.59). CB&I has taken steps to cut spending on its marketing in the TVC business, including reassigning Dave Lacey to a project construction role. (Scorsone, Tr. 5053-54) (FOF 6.63). The number of CB&I's employees with relevant TVC experience is dwindling as they age, and they are not being replaced as they retire. Likewise, PDM did not replace aging employees with TVC experience. (Scorsone, Tr. 5054-55) (FOF 6.60). Currently, CB&I does not have an engineering staff that is dedicated solely to building TVCs. (Scorsone, Tr. 4887) (FOF 6.61).

C. BARRIERS TO ENTRY IN THE TVC MARKET COULD BE OVERCOME WITH MENTORING.

With some training and instruction, U.S. companies such as Matrix, Nooter, and Puget Sound Fabricators can build field-erected TVCs. (Scully, Tr. 1229-30) (FOF 6.108). Market participants believe that access to a cost-free license to the combined TVC technological know-how of CB&I and PDM would assist these companies in entering the market. (Scully, Tr. 1228-30; Higgins, Tr. 1275-76; Proulx, Tr. 1755; Cutts, Tr. 2391-92) (FOF 6.106). Market participants also believe that it would further help competition if CB&I were to mentor a company like Matrix, Nooter or PSF on CB&I's next field-erected TVC project by integrating that company's engineering, fabrication and field-erection crews into the entire process. (Scully, Tr. 1230-31; Higgins, Tr. 1275-76) (FOF 6.107). In fact, the newly-mentored company could have more current experience in constructing a field-erected TVC than CB&I, as CB&I has not actually built one since 1984. (Scully, Tr. 1231) (FOF 6.107). Customers would consider using a TVC supplier that had gained its experience by working as a joint venture partner with CB&I on each phase of the construction process of a TVC project. (Proulx, Tr. 1756-57) (FOF 6.109).

D. ANY COMPETITIVE PROBLEM CAN BE SOLVED WITH A REMEDY OTHER THAN A BREAKUP OF CB&I.

Respondents contend that the Acquisition has not substantially affected competition in TVC market. This market is virtually nonexistent, and CB&I is not a player in the market. To the extent this Court finds a competitive problem in this market, CB&I has prepared a package of behavioral constraints in the form of a proposed Consent Decree. (Glenn, Tr. 4162-66; RX 925) (FOF 6.99). The terms of this offer are as follows: First, CB&I promises to build TVCs for the government at cost. (Glenn, Tr. 4165) (FOF 6.100). In addition, CB&I will build TVCs for commercial customers on a cost-plus-four-percent profit basis, or at any other profit deemed reasonable by the Court. (Glenn, Tr. 4165) (FOF 6.101). *Second*, CB&I will mentor another vendor as part of CB&I's next TVC project, involving the other vendor in all phases of design and construction. Third, CB&I will license all of it's Red Book TVC engineering standards and any necessary additional licenses on a royalty-free basis, as well as provide training for fabrication, procurement, design, field installation, and welding procedures. (Glenn, Tr. 4165-67) (FOF 6.102, 6.103). Fourth, CB&I would agree to not act as an EPC contractor for any TVC project for seven years, and to not purchase any company owning thermal shroud technology. (Glenn, Tr. 4166) (FOF 6.105).

Customers and competitors believe that this package would improve competition. CB&I's offer to provide free technology to all interested parties would assist companies such as Matrix and Puget Sound Fabricators in competing for TVCs. (Scully, Tr. 1229-30) (FOF 6.108). For example, Kent Higgins of Chart Industries noted that transfer of this technology to a company such as Matrix would help Matrix become a properly qualified field fabricator of TVCs. (Higgins, Tr. 1275-76) (FOF 6.107). Similarly, Greg Proulx of Boeing agreed that competition would benefit if CB&I licensed this technology to others. (Proulx, Tr. 1755) (FOF 6.106).

Similarly, CB&I's offer to provide free mentoring to companies such as Matrix, Nooter or PSF on CB&I's next TVC project by integrating that company's engineering, fabrication and field-erection crews into the entire process has met with approval. (Scully, Tr. 1230-31; Higgins, Tr. 1275076) (FOF 6.107). In fact, the newly-mentored company would possibly have more current experience in constructing a TVC than CB&I had as a competitor prior to the Acquisition. (Scully, Tr. 1231) (FOF 6.107). Importantly, customers would consider using such a newly-trained supplier. For example, Boeing would consider using a TVC supplier that had gained experience by working as a joint venture partner with CB&I on each phase of the construction process of a TVC project. (Proulx, Tr. 1756-57) (FOF 6.109).

CB&I's offer to provide TVCs at a 4 percent margin has also met with approval from competitors and customers. Ron Scully of XL noted that customers receiving this deal would be getting a good price. (Scully, Tr. 1231-32) (FOF 6.110). Patrick Neary of TRW also acknowledged that 4 percent is a "good deal," and that CB&I would be acting responsibly in making this offer. (Neary, Tr. 1482) (FOF 6.110, 6.111). Competitors also agree. John Gill of Howard Fabrication stated that if a customer purchased a TVC for a 4 percent fixed margin, it would be getting a good value. (Gill, Tr. 261) (FOF 6.110).

CB&I's sale of XL and its offer to refrain from purchasing another technology supplier has also been well received. Boeing believes that CB&I's sale of XL benefits competition in the TVC market. (Proulx, Tr. 1757-58) (FOF 6.112). John Gill of Howard agrees that this sale is "better for business," and that it would help competition if CB&I were to promise not to purchase another company such as XL for a period of five to seven years. (Gill, Tr. 258-60) (FOF 6.112).

E. SUMMARY: THE COMPLAINT AS IT RELATES TO THE TVC MARKET MUST BE DISMISSED.

Dismissal of the Complaint as it relates to TVCs is required. Because there is no substantial market for TVCs, Complaint Counsel cannot, under any circumstances, make a prima facie case. Complaint Counsel's effort to do so emphatically drives home this point. As discussed above, its market concentration statistics contain two data points in 11 years; one of those points relates to a project that will never be built. Accordingly, Respondents need not make any showing. Assuming *arguendo* that Complaint Counsel has established a prima facie case, Respondents have presented compelling evidence that CB&I is not a player in the market, that there is a significant question as to whether it could even participate in this market, and that entry barriers to this market are minimal. Even if, despite all this evidence, this Court finds a competitive problem in the TVC market, CB&I has prepared a remedy package that will resolve any concerns without imposing the draconian remedy advanced by Complaint Counsel.

VII. COMPLAINT COUNSEL HAS NOT MET ITS BURDEN TO SHOW THAT ANTI-COMPETITIVE EFFECT IN ANY MARKET IS LIKELY.

Under *Baker Hughes*, "[i]f the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes*, 908 F.2d at 983. It has not done so. Although not required to do so, Respondents have presented extensive evidence regarding the sufficiency of entry in the relevant markets. In an effort to carry its burden in the face of this evidence, Complaint Counsel has pointed to budget pricing as evidence of post-Acquisition anticompetitive effects. Complaint Counsel has also alleged that CB&I has implemented price increases in the relevant products post-Acquisition, and that the Acquisition has created opportunities for use of market power. Finally, in an effort to support its claims of anticompetitive effects, Complaint Counsel presented extensive expert testimony. As discussed below, these efforts are misguided and insufficient to carry Complaint Counsel's ultimate burden of persuasion.

A. BUDGET PRICING DOES NOT CONSTITUTE EVIDENCE OF POST-ACQUISITION PRICE INCREASES.

Complaint Counsel relied heavily on "budget pricing" to demonstrate that CB&I has raised its post-Acquisition prices in the relevant markets. (*E.g.*, Robertson, Tr. 8218-19). Such reliance is misplaced, as it ignores the nature and the accuracy of budget prices. Evidence presented at trial conclusively demonstrates that "budget pricing" is not reflective or predictive of firm, fixed price bids that customers have received or will receive in the future. Customers simply do not purchase products based on budget prices. For example, Jerry Stetzler of CB&T explained that a budget price is "not anything you are submitting a bid that you are going to select a contract from" (Stetzler, Tr. 6380) (FOF 7.9). Nigel Carling, formerly of Enron, testified similarly and added that a firm, fixed price (unlike a budget price) is based on detailed designs. The company providing a firm, fixed price is expected to "stand up to their price and do the work for that price." (Carling, Tr. 4472) (FOF 7.3).

When a company such as CB&I gives a customer a budget price, it does so without information regarding many aspects of the particular job. For example, the following information is not usually made available by the customer to a tank vendor at the budget pricing stage:

- An actual design of the tank or structure to be built. (Scorsone, Tr. 4999; Hall, Tr. 1868) (FOF 7.15).

- The actual construction schedule. (Scorsone, Tr. 5000-01) (FOF 7.20, 7.21).

- Whether the construction schedule will be a regular work week or require overtime. (Scorsone, Tr. 5000).

- Actual pricing provided by subcontractors. (Scorsone, Tr. 5000) (FOF 7.17)

- The exact location of the project at issue, including information regarding site conditions. (Scorsone, Tr. 5001-02; Stetzler, Tr. 6351-53) (FOF 7.22, 7.24)

- Intelligence regarding competitors. (*See* Hall, Tr. 1869-70).

These unknowns make it impossible to provide pricing with any level of precision. Further, such precision is not required or even desired at the early stages of a project characterized by budget pricing. Complaint Counsel's own witnesses have recognized this fact. For example, Brian Price of Black & Veatch explained that "we would certainly expect early on getting budget pricing that they would be more conservative. At that point we're not looking for the lowest number we could conceive of." (Price, Tr. 604) (FOF 7.4).

Other customers recognize that budget prices do not accurately represent the price that they will pay for a project. For example, Michael Patterson of MG Industries noted that with respect to formulating budget pricing, a company is "not going to put a lot of time or effort into it." (Patterson, Tr. 374) (FOF 7.25). Patterson also compared budget pricing to fixed, firm price bids, explaining that "those are two different kinds of numbers. One is what you pay for a tank. The other is just putting a quick number together for you." (Patterson, Tr. 374) (FOF 7.12). Similarly, Hans Kistenmacher referred to budget prices as an "orientation," or "numbers that are being used maybe by a client to set up an investment budget." (Kistenmacher, Tr. 925) (FOF 7.2).

Customers recognize that budget pricing is often a "guess." For example, Clay Hall referred to budget pricing that he received from CB&I in 2002 as a "scientific wild assed guess," accurate only to within plus or minus forty percent. (Hall, Tr. 1863-65) (FOF 7.7). Nigel Carling provided similar testimony:

> A budget price is typically based on preliminary knowledge, on preliminary designs, and is basically used just to get an appreciation of how much a job might cost at the beginning of a job, because as an owner you don't want to spend too much money pursuing something that's going to be too expensive so you require a budget price just to get an approximate idea of what it might cost. The firm price is based on very detailed designs, very detailed information about the project, and you expect the person providing that price to stand up to their price and to do the work for that price so he commits to that price. *The budget is just a best-efforts, almost a guestimate in some cases*.

(Carling, Tr. 4472) (FOF 7.1, 7.2, 7.9) (emphasis added).

In addition, reliance on budget pricing is flawed because such pricing is usually the first round of numbers provided by competitors. During a bidding process, competitors learn about the existence of one another, and adjust their prices accordingly. Customers often assist competitors in learning this information. For example, Michael Patterson of MG Industries regularly contacts suppliers in an attempt to play them off each other. (*See* Patterson, Tr. 362-63) (FOF 7.10). Similarly, Clay Hall of MLGW pointed out that budget pricing does not take the competitive situation into account. (*See* Hall, Tr. 1869-70) (FOF 7.10). The evidence shows that the more rounds of bidding and/or pricing that occur, the lower the prices go. For example, in connection with the **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 4.69).

Despite these inherent inaccuracies with budget pricing, Complaint Counsel relies heavily on this evidence, focusing on a line item in CB&I's internal budget price worksheets called "margin." Complaint Counsel attempts to compare margins on post-Acquisition budget prices to margins on fixed, firm price bids given several years prior to the Acquisition. (*See* Robertson, Tr. 8218-19). This attempted analysis fundamentally ignores the purpose of a margin calculation. Margin is not designed, especially at the budget pricing stage, to predict profits or losses. Margin calculations are prepared for internal use only, and in the case of budget pricing cover the many contingencies and unknown risk factors that always exist at the early stages of a project. (*See* Price, Tr. 608-09; Simpson, Tr. 5366; Scorsone, Tr. 5252) (FOF 7.26). When the number of contingencies and risk factors is great, the margins on budget prices are high. (Scorsone, Tr. 5003) (FOF 7.26). In short, high budget prices are an indication of high risk jobs, not of anti-competitive effects, as Complaint Counsel contends.

B. COMPLAINT COUNSEL HAS FAILED TO SHOW THAT PRICES IN THE RELEVANT MARKETS HAVE INCREASED.

In attempting to carry its burden of proof, Complaint Counsel did not present evidence showing that actual transaction prices in the relevant product markets have gone up. Complaint Counsel never presented this evidence, because it simply does not exist. Iin fact, the evidence is squarely to the contrary. Respondents' expert, Dr. Harris, reviewed pricing in the relevant markets post-Acquisition and found that it has not risen since the Acquisition. In support of his conclusion, Dr. Harris pointed to the LNG bid contest in Trinidad and recent activity in the LIN/LOX market. He also noted that most customers who have received pricing post-Acquisition were satisfied with prices received.

Instead, Complaint Counsel has attempted to piece together documents to develop a story of increased prices. These efforts have failed. For example, Complaint Counsel argues that PDM increased its price to Williams in connection with the Cove Point expansion in November 2000 in anticipation of the Acquisition. However, there is not a shred of evidence supporting that assertion, only speculation and conjecture. Similarly, Complaint Counsel also makes much of price changes associated with the Spectrum Astro TVC that was recently cancelled. These changes have nothing to do with competition; or the Acquisition. (Scorsone, Tr. 5048-49; Scully, Tr. 1123-24) (FOF 6.188). Notably, Spectrum Astro did not testify to a belief that the Acquisition caused a higher price for its proposed job. In several instances, such as alleged price increases in connection with the proposed Spectrum Astro and Boeing thermal vacuum chamber, the customer never paid the allegedly higher price. A price never paid is not a relevant price increase in a Section 7 case.

C. THERE HAVE BEEN NO STRUCTURAL CHANGES IN THE COMPETITIVE LANDSCAPE WHICH FACILITATE EXERCISE OF MARKET POWER, NOR HAS CB&I EXERCISED MARKET POWER.

In an attempt to carry its burden, Complaint Counsel argues that the Acquisition has facilitated coordinated interaction, a claim that is meritless. CB&I has not engaged in coordinated interaction or in any exercise of market power, nor has the Acquisition created an opportunity or a heightened ability to do so. This is evident from Complaint Counsel's own Merger Guidelines, which provide that:[24]

> A merger may diminish competition by enabling the firms selling in the relevant market *more likely*, more successfully, or more completely to engage in coordinated interaction that harms consumers.

Merger Guidelines, Section 2.1 (emphasis added). The use of the term "more" is highly relevant. In order for an acquisition to potentially diminish competition, it must be more likely that an exercise of collusion or market power would occur in its wake. The conditions in this industry are not conducive to coordinated interaction, and coordinated interaction has not been made

[24] As discussed in Part II, *supra*, the Merger Guidelines are not controlling. In this case, they provide an illustration of how Complaint Counsel's case is flawed.

more likely the Acquisition. No one company is likely to have an ability to exercise market power. The Merger Guidelines recognize that impediments to exercising market power include product heterogeneity, inability to access incomplete information about rivals' businesses, and differences in vertical integration. These characteristics are hallmarks of the industrial tank business. It is undisputed that each of the relevant products is designed and built on a custom basis. Further, competitors in this industry have highly imperfect knowledge regarding each other's pricing, a fact recognized by both expert economists. (*See* Simpson, Tr. 3073, 3771; Harris, Tr. 7264, 7273, 7358-59) (FOF 7.82, 7.83). There are also differences in vertical integration among the various competitors in this industry, making exercise of market power more difficult. The Acquisition has done nothing to change these industry characteristics. Further, this is not a market that is replete with a history of bid rigging or coordination, unlike the paving contracting industry or bidding on school milk contracts. Customers have testified that they have gained very competitive pricing from bidding to just two or three firms. These are not the types of conditions in which coordinated interaction is likely to occur.

D. ECONOMIC THEORY DOES NOT SUPPORT A CONCLUSION THAT THE ACQUISITION SUBSTANTIALLY THREATENED TO LESSEN COMPETITION IN ANY RELEVANT MARKET.

This Court heard extensive economic testimony from Drs. John Simpson and Barry Harris, expert economists presented by Complaint Counsel and Respondents, respectively. While these gentlemen testified for eleven days, their testimony boils down to three basic economic theories which were applied by Dr. Simpson and criticized by Dr. Harris. Each theory is discussed below.

1. Application of critical loss theory shows that the Acquisition does not threaten to substantially lessen competition in any of the relevant markets.

While Dr. Simpson attempted to apply critical loss theory to define the scope of the relevant product markets in this case, Dr. Harris used it to assist the Court in determining whether the Acquisition can be expected to have any anticompetitive effects. (Simpson, Tr. 3525; Harris, Tr. 7256) (FOF 7.59, 7.60). Critical loss theory holds that the greater the percentage of a company's price represented by fixed costs, the less that company can afford to lose business in order to obtain revenue to cover those costs. (Simpson, Tr. 3529-30). Economists have developed a formula establishing what percent of business lost represents a company's critical loss at various price increase points. (*See* Simpson, Tr. 3529-30) For example, if a company attempted a price increase of five percent, and that price increase is expected to result in a loss of business greater than the maximum critical loss identified by the formula, the company would not be expected to attempt a price increase. (*See* Simpson, Tr. 3529-30). The two critical components of critical loss analysis are the state of mind of the company being analyzed and whether that company believes it can impose a price increase without losing sales exceeding its critical loss. (*See* Simpson 3865; Harris Tr. 7260-61).

The first step in a critical loss analysis is to calculate the contribution margin, which is the difference between fixed and average variable costs, stated as a percentage of price. (Harris, Tr. 7249) (FOF 7.63) In evaluating CB&I's conduct, Dr. Simpson assumed that its variable contribution margin was no greater than 15 percent. (Simpson, Tr. 3017) (FOF 7.67). In formulating this estimate, Dr. Simpson assumed that engineering, drafting, fabrication, project management and field-erection components of CB&I's price are entirely variable. (Simpson, Tr. 3003-17; CX 1641) (FOF 7.67) When the contribution margin is 15 percent, the critical loss formula identifies a critical loss of 25 percent. This means that CB&I could afford to lose up to

25 percent of its business in each relevant market after a 5 percent price increase in each relevant market before any of these increases would become unprofitable. With a 15 percent contribution margin, a loss in excess of 25 percent would exceed CB&I's critical loss and make the imposition of a 5 percent price increase unprofitable for CB&I. (Simpson, Tr. 3003-17; CX-1641; *see* Harris, Tr. 7342) (FOF 7.78).

Dr. Simpson's assumptions are flawed. Engineering, drafting, fabrication, project management and field erection are not entirely variable costs. Each item has a cost that CB&I carries on its books regardless of whether or not a project is built. (Scorsone, Tr. 4902-17; Harris, Tr. 7341-42) (FOF 7.68, 7.71). For all products except for LNG tanks, engineering, drafting, fabrication and project management costs are almost entirely fixed. Further, approximately 20 to 30 percent of field construction costs are fixed costs. (Scorsone, Tr. 4902-17) (FOF 7.72).[25]

In determining whether a cost is variable, it is relevant to consider how the company actually treats these costs, not how they should be treated or would be treated by an economist. In this case, whether CB&I's costs are variable depends on whether CB&I would vary the number of engineers, draftsmen, fabrication personnel, project management personnel and field erection personnel, as well as associated property and equipment, based on a decline in sales. (Simpson, Tr. 3870-72) (FOF 7.246). Dr. Simpson himself acknowledged that whether a cost is variable or not depends on how that cost would be varied in response to a loss of the amount of sales equal to the critical loss. (Simpson, Tr. 3870-72) (FOF 7.247).

[25] Although costs of the fabrication shop are carried whether or not CB&I subcontracts fabrication, fabrication can be considered a variable cost for U.S. LNG projects because fabrication is so frequently subcontracted to overseas mills that make the nine percent nickel steel used in constructing LNG tanks. (Scorsone, Tr. 4891). Fabrication is not so easily subcontracted for the other relevant products.

The evidence shows that CB&I would not vary the number of personnel or the amount of equipment or property in the above categories if it lost 25, 50, or even 100 percent of its work in the four relevant product areas. (Glenn, Tr. 4159-60; Scorsone, Tr. 4902-17). Moreover, CB&I's executives have explained why this is the case. Sales in all four of the relevant products are small. There are no CB&I employees who work only on the relevant products. All employees are trained to work on a wide variety of products, allowing CB&I to have a more flexible workforce, able to deal with both high and low demand for products. (Glenn, Tr. 4058; Scorsone, Tr. 4887; CX 497 at 363 (Leventry Dep.)) (FOF 7.75).

The actual critical loss in this case is small. If costs are properly accounted for as fixed, consistent with the above facts, the applicable contribution margin would be 30 to 33 percent. (Harris, Tr. 7341-44, 7900) (FOF 7.68, 7.69). This means that CB&I can now only afford to lose 12-13 percent of its business as a consequence of attempting a 5 percent price increase. Because CB&I would lose more than 25 percent of its business in any of the relevant product markets by losing just one sale in a given year or two-year period, the real question is whether CB&I believes it will lose 12-13 percent of its sales if it raises prices by 5 percent, because if it believes so, it will not attempt a price increase. (See Harris, Tr. 7266) (FOF 7.79). To answer this question, it is important to understand the state of mind of the company that would be seeking to impose this price increase. Both expert economists agree that state-of-mind evidence is relevant. (Simpson, Tr. 3865; Harris, Tr. 7260-61) (FOF 7.79, 7.69, 7.245, 7.246). Dr. Simpson acknowledged that CB&I's critical loss was unchanged by the Acquisition. (*See* Simpson, Tr. 3820) (FOF 7.248). For his economic theory to be correct, CB&I's state of mind must have changed post-Acquisition, because -- as Dr. Simpson admits -- CB&I would not have attempted a price increase prior to the Acquisition. (Simpson, Tr. 3865) (FOF 7.245).

The evidence demonstrates that CB&I's state of mind would preclude any price increase in the relevant markets. This state of mind is informed by current market developments. CB&I is aware that Dynegy was satisfied with pricing received from new entrants, and that TKK beat CB&I by 5 percent, despite CB&I's advantage in that region. (*See* Part III, *supra*). Given this knowledge, CB&I knows that it cannot successfully impose a price increase for LNG tanks without losing business. (Glenn, Tr. 4093-4109 (state of mind); Scorsone, Tr. 4872) (FOF 3.453). Similarly, CB&I has lost all three jobs it has bid against AT&V in the LIN/LOX market since the Acquisition and has specifically noted in a company e-mail that "we are having a really hard time competing for these types of tanks." (*See* RX 208, discussed at Part V, *supra*). CB&I perceives that it cannot impose a price increase in the LIN/LOX market, and that it must sharpen its pencils for future pricing in that market. (Scorsone, Tr. 4881-82, 5030) (FOF 5.216, 5.217). In the LPG market, CB&I bid on the only post-Acquisition job available and was in last place in the initial bidding round. CB&I won this job only after cutting its costs and margin levels. (*See* Part IV, *supra*). Simply put, CB&I does not possess a state of mind which would lead it to believe it can impose a price increase in any relevant market.[26]

In short, Dr. Simpson makes critical errors in calculating critical loss, and ignores the overwhelming evidence of CB&I's state of mind which indicates that, applying the critical loss formula, CB&I will be constrained in the future from attempting price increases in the relevant markets.

[26] Nor can CB&I get away with a price increase in the thermal vacuum chamber market because it has voluntarily restricted itself to seeking no more than a four percent margin on jobs performed for the private sector and a zero percent margin for jobs performed for the government. *See* Part VI, *supra*.

2. Auction theory does not support Complaint Counsel's position that the Acquisition of PDM EC assets threatens to substantially lessen competition in any of the relevant product markets.

Dr. Simpson also argues that "auction" or "bid model" theory predicts that competition will be substantially reduced in the relevant markets as a consequence of CB&I's acquisition. Dr. Simpson posits that PDM and CB&I were low cost bidders relative to other actual and potential entrants, and that the exit of PDM from the market leads CB&I to believe it can impose a price increase. (*See* Simpson, Tr. 3077, 3085-90). As discussed above, critical loss theory rebuts this analysis. Further, there is no evidence that PDM and CB&I were the two lowest cost suppliers in the industry. Dr. Simpson conducted no study to ascertain whether this was in fact true. In fact, the evidence presented shows that AT&V is the low-cost producer in the LIN/LOX and LPG market, and that AT&V/TKK is possibly the low-cost supplier in the LNG market. (*E.g.*, RX 208; RX 627 (state of mind); N. Kelley, Tr. 7088; *see also* Part III, *supra*).

Furthermore, the markets at issue are not oral auction markets as at a live auction where the auctioneer tells the participating bidders what price they have to beat. (*See* Simpson, Tr. 3767). The evidence is to the contrary. Competitors in the relevant markets rarely know the prices of the competition, as customers generally do not provide this information. (*E.g.*, Patterson, Tr. 359-64; Scorsone, Tr. 5010; Jolly, Tr. 4761-62; Simpson, Tr. 3073, 3771) (FOF 7.87-88). To the extent this information is available, it is provided by customers in the hopes of gaining leverage. In fact, in some cases, customers provide incorrect pricing information to gain concessions from suppliers. (*See, e.g.*, Patterson, Tr. 359-60) (FOF 7.87, 7.88). In the context of sealed or closed bid auctions where there is imperfect information, a company's state of mind will determine whether it will attempt a price increase, and the evidence concerning state of mind is overwhelming that CB&I would not attempt a price increase.

As a matter of economic theory, bid model theory does not support Dr. Simpson's conclusions. Dr. Simpson cited two articles in support of his application of the theory. However, he has not read the articles in their entirety, nor has he checked the underlying calculations for accuracy. (Simpson, Tr. 3831-38) (FOF 7.206). If Dr. Simpson had read the Dalkir article that he cited, he might have noted that, in the worst cases, only modest price increases of less than 5 percent are predicted by the model as a consequence of mergers in bid model industries where there is sealed bidding and imperfect information. Dalkir, *et al.*, *Mergers in Symmetric and Asymmetric Noncooperative Auction Markets: The Effects on Prices and Efficiency*, 2000 Int'l J. of Industrial Organization 18, p. 397. (*See also* Simpson, Tr. 3842). Bid model theory simply does not predict that the Acquisition will substantially lessen competition in the relevant markets because the relevant markets involve closed or sealed bidding situations with imperfect information and, in fact, disinformation spread by customers.

3. Application of probability theory does not show that the Acquisition threatens to substantially lessen competition in any relevant product market.

Dr. Simpson also applied a probability theory in an attempt to support his hypothesis that the Acquisition would have substantial anticompetitive effects. As Dr. Simpson explained it, probability theory essentially involves flipping coins. (Simpson, Tr. 3393-94). As Dr. Simpson applied it, probability theory determines the probability that, all things being equal, CB&I and PDM would have won all the jobs in the LNG market if other bidders were participating on equal terms. (Simpson, Tr. 3394, 3663, 5753). Dr. Simpson thus assumes that the CB&I, PDM, and the seven new entrants discussed above were participating in all of the bids prior to the Acquisition back to 1990, and then determines what the odds are that CB&I and

PDM would have won all the jobs prior to the Acquisition, given only a 2/9 chance of winning those jobs. (Simpson, Tr. 3400, 3663-64).

Dr. Simpson's analysis is seriously flawed, as he assumes that each of the seven new entrants discussed above were in the U.S. market between 1990 and the Acquisition. This simply is not the case. The evidence demonstrates that these companies entered the market in the past two years. With one exception, they never participated in pre-Acquisition jobs in the U.S. To accept Dr. Simpson's analysis would be to blindly accept market concentration statistics and ignore the possibility that entry could ever occur in the U.S. market. (*See* Simpson, Tr. 3665; Harris, Tr. 7363-64) This would essentially read the relevance of entry out of the antitrust laws. Such an approach stands in stark contrast to *Baker Hughes* and other cases discussing the importance of analyzing entry in a Section 7 case.

VIII. THE ACQUISITION CANNOT SUBSTANTIALLY LESSEN COMPETITION IN A RELEVANT MARKET BECAUSE PDM WOULD HAVE LIQUIDATED THE EC DIVISION ABSENT THE ACQUISITION.

The evidence shows that, absent the Acquisition, PDM would have liquidated its EC Division. (Scheman, Tr. 6952) (FOF 8.115). There is no evidence to suggest that PDM would have taken any other course. No witnesses have testified that they would have purchased the PDM EC Division at pricing above liquidation value, that PDM had sufficient time to find another willing buyer, that different marketing tactics would have found a willing buyer, or that the marketing tactics of PDM's experienced and qualified investment banker were improper. All of the contrary arguments made by Complaint Counsel are completely unsupported by the evidence.

In evaluating whether PDM would have liquidated the EC Division absent the Acquisition, this Court must evaluate two questions: First, is there a high probability that the EC Division would have been shut down? Second, does it have relevance to the current litigation?

The evidence, the law, the economic testimony as well as common sense require a finding that the assets would have been liquidated. This fact is dispositive of this case.

A. THERE WAS A GRAVE PROBABILITY THAT PDM WOULD HAVE SHUT DOWN AND LIQUIDATED THE EC DIVISION IF CB&I HAD NOT CONSUMMATED THE ACQUISITION.

The evidence demonstrates that liquidation was the highly probable alternative to the Acquisition. Rich Byers, the Vice President of Finance of PDM during the time of the Acquisition, was prepared to recommend to the Board in December of 2000 that it should "sell PDM Water as an LBO and liquidate PDM EC" should the CB&I deal have been derailed. (Byers, Tr. 6769-70, 6773) (FOF 8.118). Peter Scheman, PDM's investment banker, testified that if "the CB&I deal had fallen apart there is a high probability that they would have liquidated . . . the EC business." (Scheman Tr. 6952) (FOF 8.115). This testimony is unrebutted, and should by itself be dispositive of whether liquidation would have occurred.

Nonetheless, in order to understand the context in which the decision to liquidate would have been made, it is important to understand the history and circumstances of PDM and what led it to the point where it was selling off all its component parts for cash. (*See, e.g.*, Byers, Tr. 6731-32, 6948-49) (FOF 8.1-8.3, 8.23). It is also important to understand the state of the economy at the time the PDM EC division was being sold, as it explains why no other buyer was likely to purchase the EC division. (*See, e.g.*, Byers, Tr. 6763-64) (FOF 8.83).

1. PDM was irrevocably committed to a course of selling all of its divisions to unlock the liquidity of a thinly traded company whose dominant shareholder was aging.

PDM was founded in 1892 by the Jackson family. (Byers, Tr. 6731; Scorsone Tr. 4791) (FOF 8.1). PDM has for many years been involved in various phases of steel fabrication and construction. (Byers, Tr. 6731). The company went public in 1965, and, by 1999, the founding Jackson Family owned approximately 30 percent of PDM's stock. (Byers, Tr. 6732.)

(FOF 8.1) By the 1990s, PDM operated four lines of business with five divisions: PDM Strocal, PDM Water, PDM EC, PDM Bridge and PDM Steel Distribution. (Byers, Tr. 6731; Scorsone, Tr. 4778-79). The Water and EC Divisions were closely related and shared some assets and personnel. (Scorsone, Tr. 4779) (FOF 8.5). The remaining divisions were wholly separate from each other. (Byers, Tr. 6731).

By the standards of publicly traded companies, PDM was a small company. In fact, PDM stock was very thinly traded and was not attractive to investors, many of whom preferred the high-tech stocks popular in the late 1990s. On some days no shares of stock were traded, while on other days only 100 to 200 shares of stock moved on a given day. (Byers, Tr. 6732-33; Scorsone, Tr. 4791-92) (FOF 8.3). Therefore, an effort to sell even a small quantity of stock could negatively impact share value. (Scheman, Tr. 2916-17, 6909-10) (FOF 8.11). In fact, PDM employees often joked that they needed to make an appointment to sell their PDM stock. (Scorsone, Tr. 4791).

The age of the Jackson Family's patriarch was of growing concern by the end of the 1990s. (Scheman, Tr. 6909-10, 2916-17) (FOF 8.11). There was substantial concern that if the elder Jackson passed away (he was 92 at that time), survivors would need to sell large blocks of stock to address tax and inheritance issues. (Scheman, Tr. 6909-10, 2916-17) (FOF 8.11). Such a sale could have negatively impacted shareholder value on a widespread basis. (Scheman, Tr. 6909-10, 2916-17) (FOF 8.11). PDM was forced to look at several strategic options to address these liquidity concerns, something that it did initially in a special PDM Board meeting in 1999. (Byers, Tr. 6740) (FOF 8.14). Options included making a significant acquisition, taking the company private, or selling off various parts of the business for cash. (Byers, Tr. 6738-40; Scorsone Tr. 4791) (FOF 8.13, 8.14). After initially investigating the prospects of taking the company private, the Board decided in June 2000 to sell off all the company's assets and to return cash proceeds to the stockholders. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907) (FOF 8.16, 8.20, 8.38).

The company set about executing this plan to maximize shareholder value. (Byers, Tr. 6759-61) (FOF 8.24). Goldman Sachs proposed selling PDM in its entirety to another entity who would either operate or liquidate PDM's assets. (Byers, Tr. 6743-45; RX 23) (FOF 8.22, 8.26). Tanner & Company, another investment banking firm, suggested that PDM could obtain a higher shareholder value by selling off the company in its component parts. (Byers, Tr. 6754-55; Scheman, Tr. 6912) (FOF 8.33-8.34). The board ultimately embraced Tanner's approach and retained it as its investment advisor for the purpose of selling all of the company's assets. (Scheman, Tr. 2914-15, 7911-12, 6907-08; Byers, Tr. 6758) (FOF 8.30, 8.38).

Soon thereafter, Tanner and PDM decided to sell the Water and EC divisions together because the two divisions shared resources. (Byers, Tr. 6754-55; Scheman, Tr. 6912, 2926-30; RX 159 at 15; Scorsone, Tr. 4779). Tanner estimated that separating the two divisions for purposes of sale could cost as much as $10 million, and concluded that separation would negatively affect the operation of each business going forward. (Scheman, Tr. 6922-23, 2959-60; RX 163 at 27). The other three divisions of PDM were to be sold as individual business units on an asset transaction basis.

Tanner's marketing approach for the EC and Water Divisions was predicated on finding motivated purchasers who could quickly consummate a transaction. (Byers, Tr. 6777-78; Scheman, Tr. 6944-45) (FOF 8.5, 8.33, 8.34). Speed was critical, as the ultimate disposition of PDM was to occur approximately six months after the board authorized liquidation. (Byers, Tr. 6761-62) (FOF 8.25, 8.39). The ultimate disposition was to be a final rollup transaction. The last remaining division would be sold to an investment company who would, simultaneously at closing, resell it to a third-party purchaser while retaining the PDM corporate structure with no assets except for its reserves. (Byers, Tr. 6759-61) (FOF 8.24). The evidence demonstrates that such a transaction would be made far more difficult if the EC Division's assets were still within the company at the time of the final transaction. (Byers, Tr. 6759-61) (FOF 8.24). PDM and its investment banker were in a race against the clock to sell all of the divisions prior to that final transaction.

In order to ferret out motivated and interested purchasers, Tanner relied on a process of wide dissemination of PDM's intent to sell the company. (Scheman, Tr. 6884-85, 6910-11, 2921-22) (FOF 8.49, 8.50). A press release was published in the *Wall Street Journal* and relevant trade publications. This effort was successful. The fact that PDM EC was for sale was well-known throughout the industry. (Scheman, Tr. 6945-46) (FOF 8.52). As Mr. Scheman noted, "there is a lot of thought and strategy that goes into effectively selling a business, and it's not simply just throwing it out and saying it's for sale." (Scheman, Tr. 6944) (FOF 8.47). By using the press release to spread word of the EC division's availability, Mr. Scheman testified that "we still could get a very -- I think a very good barometer and some might say a better barometer in some respects of who was interested than cold calling." (Scheman, Tr. 6944-55).

Mr. Scheman compiled lists of the many callers who expressed interest in purchasing one or more of PDM's divisions. (Scheman, Tr. 2922, 6911; RX 164-66) (FOF 8.53). Mr. Scheman evaluated the potential purchaser and determined that only one -- CB&I -- had the requisite ability to purchase the EC and Water Divisions at above liquidation value. (Scheman, Tr. 6924-26) (FOF 8.116). Accordingly, at the end of August 2000, PDM and CB&I entered into a letter of intent to sell the EC and Water Divisions to CB&I for $94 million. (Byers, Tr. 6764-66) (FOF 8.105).

Although the letter of intent was signed in August 2000, the transaction did not close until February 7, 2001. (Byers, Tr. 6764-66) (FOF 8.105). What happened in the interim is very telling and important in evaluating whether PDM would have liquidated the EC division. PDM actually was confronted with the prospect of making that choice as a business matter and not in a theoretical context in response to the antitrust issues in the case. (Byers, Tr. 6769-70, 6773) (FOF 8.118). The original letter of intent assumed a year-end 2000 closing. (Byers, Tr. 6765) (FOF 8.105). This time would be sufficient to allow CB&I to perform its due diligence. However, shortly after the letter of intent was signed, it became clear that the PDM EC Division was having a poor year. (Byers, Tr. 6763-64) (FOF 8.83). Losses wiped out a projected $2 million profit, leading to projected losses in the $9 million range by the end of the year. (Scheman, Tr. 6920-21) (FOF 8.87).[27] As these facts became apparent, CB&I wanted to renegotiate the purchase price based on the poor performance of the EC division during fiscal year 2000. (Byers, Tr. 6789).

In addition, after the letter of intent was signed, CB&I attempted to substitute stock for cash in paying for the EC and Water Divisions. (Byers, Tr. 6766-67) (FOF 8.106). The original letter of intent specified an all-cash transaction, critical to the strategy of delivering liquid assets to the shareholders. (Byers, Tr. 6766-67; Scheman, Tr. 6948-49) (FOF 8.23, 8.106). In fact, the inability of many companies to offer cash was a significant factor in their disqualification by Mr. Scheman.

[27] Ultimately, it was determined after closing that the EC Division lost approximately $30 million in fiscal year 2000 on a revenue base of less than $180 million. (Scheman, Tr. 6917, 6921) (FOF 8.87).

In December of 2000, CB&I's efforts to substitute stock for nearly half of the purchase price reached a crisis proportion. (Byers, Tr. 6767, 6768-69) (FOF 8.108). Tanner met with senior PDM management, including Mr. Byers, to discuss PDM's alternatives if the CB&I transaction were to fall apart. (Byers, Tr. 6770, 6773) (FOF 8.118). The parties knew that the clock towards the ultimate disposition transaction was ticking, and that CB&I was in the best position of any interested party to deliver consideration in the form of cash. (Scheman, Tr. 6913-16, 6924-26; Byers, Tr. 6773-74) (FOF 8.35, 8.36, 8.119). Tanner actually wrote down liquidation scenarios reaching a valuation range for liquidating the company. (Byers, Tr. 6877-78) (FOF 8.123).

In December 2000, Mr. Byers became convinced that there would be no other purchaser for the EC division. (Byers, Tr. 6776-77) (FOF 8.55). He was prepared to recommend to the board that the Water division be sold via a leveraged buyout to the management of the Water Division, and that the PDM EC Division be liquidated out of existence by selling off its assets in individual pieces, should the CB&I transaction fall apart. (Byers, Tr. 6769-70, 6773) (FOF 8.118). Mr. Scheman felt that the liquidation of the EC Division was a significant probability given its financial circumstances and the lending environment prevailing at the time. (Scheman, Tr. 6952-53, 6924-26) (FOF 8.115, 8.116).

While PDM EC's financial performance was collapsing, so were the credit markets. (Byers, Tr. 6763-64) (FOF 8.83). In the latter half of 2000, credit markets tightened substantially. (Byers, Tr. 6763-64, 6750) (FOF 8.29, 8.83). Mr. Scheman concluded that asset-based lending was not likely to deliver a purchase price in excess of liquidation value. (Scheman, Tr. 6924-26, 6933-37) (FOF 8.71, 8.116). Lending based on cash flow had been cut from multiples of three to four times cash flow to no more than two times cash flow. Based on this development, Mr. Scheman determined that an alternative purchaser in the tank construction industry would not be able to finance a transaction on an all-cash basis above liquidation value. (Scheman, Tr. 6934-37) (FOF 8.68).

At this point, PDM's board was forced to consider whether it wanted to proceed with CB&I at a reduced purchase price because of the poor performance of the EC Division and with consideration being paid with a significant amount of CB&I stock, or to explore alternative transactions. The Board convened on December 19, 2000 to consider this question. Mr. Bill McKee, the CEO of PDM, told the Board that "there is a thin market and no other serious potential purchaser was identified." (RX 28 at 2) (FOF 8.122). According to the meeting minutes, Mr. Scheman stated "lending standards have tightened considerably in the past six months and that the amounts companies can borrow is down about 33%." *Id.* Ultimately, given the alternatives, and the assurances provided by CB&I in the form of an agreement to repurchase the stock by a date certain at a specified minimum price, PDM decided to proceed with the CB&I transaction. (Byers, Tr. 6775-77). The Acquisition ultimately closed on February 7, 2001 at a purchase price of approximately $84 million. (G. Glenn, Tr. 4079; Byers, Tr. 6789-91) (FOF 8.103, 8.110). The $9 million reduction in the purchase price was solely related to PDM's financial performance. (Byers, Tr. 6788-89) (FOF 8.110). The purchase price was subsequently reduced even further, into the low 70s, as a result of problems with EC Venezuelan operation, which were not discovered until after the date of closing. (Byers, Tr. 6793-94) (FOF 8.112).

These are the real-world conditions under which PDM EC and Water were being sold. The only individuals who testified in this matter were participants caught in the maelstrom of having to move fast, having to get an all-cash transaction, having to sell an asset that was performing very poorly and bleeding money, and having to do it at a time when the credit markets were significantly tightening their credit standards. The unrebutted testimony of the key participants, Mr. Byers and Mr. Scheman, is that there was a very high probability that PDM EC would have been liquidated. (Byers, Tr. 6774-75; Scheman, Tr. 6952-53) (FOF 8.115, 8.126).

2. It was highly unlikely that there would have been another purchaser for the PDM EC division at a price greater than liquidation value.

Complaint Counsel argues that another buyer would have purchased the EC Division at a price greater than liquidation value absent the Acquisition. However, this argument is wholly unsupported by the evidence and is inconsistent with the detailed analysis of other purchasers performed by Mr. Scheman. Further, in the six months between the signing and the letter of intent by CB&I and the closing of the Acquisition, not one other purchaser came forward to declare an interest in purchasing the assets. (Byers, Tr. 6872-73) (FOF 8.122).

Complaint Counsel suggested in its closing argument that it is CB&I's burden to establish that there were no other purchasers, despite the fact that it is very difficult to prove a negative. (Robertson, Tr. 8170-71, 8343). Regardless of who bears the burden, CB&I need not prove with certainty that no other purchasers existed. As *Baker-Hughes* noted, Section 7 cases "deal with probabilities, not certainties." 908 F.2d at 987. Consistent with *Baker-Hughes*, the standard of proof is a preponderance of the evidence; CB&I need only show that it is more likely than not that another purchaser of the PDM EC assets did not exist. As discussed below, none of the purchasers potentially available to purchase the EC Division could have done so at greater than liquidation value. Mr. Scheman conducted this very analysis during the events discussed above and during his testimony in this case.

a. There were no financial buyers for the EC division.

Mr. Scheman concluded that financial purchasers would not have been interested in purchasing the EC Division, and would have had extreme difficulty raising enough capital to make a purchase. (Scheman, Tr. 6930) (FOF 8.61). Mr. Scheman based this conclusion on his many years of experience in buying and selling businesses, as well as on the facts surrounding the sale. (Scheman, Tr. 2910, 6906, 6941-43) (FOF 8.17-8.18). In arriving at this conclusion, Mr. Scheman determined that financial buyers would have been deterred by PDM EC's poor performance in 2000. (Scheman, Tr. 6920, 6929-31). Complaint Counsel argues that PDM was projected to post modest profits in fiscal years 2001-2003. However, this does not mean that PDM EC was not a highly damaged asset. (Scheman, Tr. 6917-18) (FOF 8.88). Mr. Scheman noted that a company that suffers an 80 percent drop in profits from the previous year would be very difficult to sell to a financial buyer. (Scheman, Tr. 6917-18) (FOF 8.88). Further, it is unlikely that financial buyers would give credence to PDM's profit projections, since PDM projected a $2 million profit in 2000 when it lost $30 million. (Scheman, Tr. 6920-21) (FOF 8.84, 8.87).

All available evidence indicates that financial buyers would not have purchased the PDM EC Dvision, let alone at a price greater than liquidation value. (Scheman, Tr. 6929-31) (FOF 8.88). Notably, none of the major financial buyers contacted Tanner after the intention to sell PDM EC was made public. (Scheman, Tr. 6929) (FOF 8.61). Based on these facts, Mr. Scheman concluded that "the EC business was a very -- would have been a difficult and probably impossible sale to a financial based buyer." (Scheman, Tr. 6930).[28]

b. There were no strategic buyers for the EC division.

Strategic buyers are buyers who are in the same or similar line of business and could potentially make use of assets in a synergistic manner. (Scheman, Tr. 6914) (FOF 8.60). The planned sale of the EC Division was well known throughout the industrial tank industry.

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[28] Mr. Scheman did discuss financial buyers who did contact Tanner, and explained in great detail why they would not have been interested in consummating a transaction. (Scheman, Tr. 6929-30).

(Scheman, Tr. 6945) (FOF 8.52). Virtually no one in the industry was interested in purchasing PDM. There is no evidence that any foreign tank construction company contacted Tanner to discuss the possibility of purchasing the EC and Water divisions. In fact, the only evidence on this point is to the contrary. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx).** Domestic tank suppliers were similarly uninterested. For example AT&V was not interested in purchasing the EC division because it did not believe that PDM EC could be turned around. (Cutts, Tr. 2458, 2534) (FOF 8.85).

Complaint Counsel has argued that Matrix was a potential purchaser of PDM EC. Brad Vetal, President of Matrix, testified that his company might have been interested in making a purchase under the right circumstances. (Vetal, Tr. 418-19) (FOF 8.64). However, Mr. Vetal's tepid expression of interest is hardly enough to establish that his company would have wanted to or would have been able to consummate a transaction at greater than liquidation value. *See California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1136 (N.D. Cal. 2001) (finding for defendant in Section 7 case because the alleged alternative purchaser suggested by the State of California "has offered no more than generalized expressions of interest"); *U.S. v. Culbro Corp.*, 504 F. Supp. 661, 668 (S.D.N.Y. 1981) (finding for defendant in Section 7 case because the alleged alternative purchaser suggested by the DOJ made no more than a "vague generalization of 'intense interest'").

The evidence shows that Mr. Vetal lacked information about PDM EC and how PDM wanted to sell its business. Mr. Vetal never saw the unconsolidated balance sheet of the EC Division, and was unaware of its recent financial losses. (Vetal, Tr. 420) (FOF 8.77, 8.78).

Knowledge of these basic financial facts would be critical to any purchaser. Further, Mr. Vetal was not interested in purchasing the package of assets that PDM was selling. Matrix did not want to purchase PDM's Water Division. (Vetal, Tr. 419) (FOF 8.64). However, PDM was selling the Water Division and the EC Division as a single unit. (Byers, Tr. 6754-55, 6757-58; Scheman, Tr. 6912) (FOF 8.33, 8.34, 8.38, 8.70). Similarly, Mr. Vetal was interested in purchasing fabrication facilities located in Clive, Iowa and Warren, Pennsylvania as part of a purchase of PDM EC, but was not interested in purchasing the Provo, Utah facility. (Vetal, Tr. 441-42) (FOF 8.69). However, the Clive and Warren fabrication facilities were controlled by the Water Division. The Provo facility was under the control of the EC Division. (Byers, Tr. 6781-82) (FOF 8.69). To work with Mr. Vetal, PDM would have had to essentially liquidate the Water Division because it would be taking away the assets that the Water Division used to perform its work. PDM would not have sold the EC Division to Matrix in this manner and configuration. (Byers, Tr. 6780-82) (FOF 8.70). The Water Division was consistently earning a 10 percent annual profit, even in fiscal year 2000. (Byers, Tr. 6786) (FOF 8.89). It would have made no sense to sell the foundering EC division and then liquidate the Water Division.

Further, the evidence shows that Matrix could not have engineered a purchase of PDM EC. Mr. Scheman analyzed this possibility in August of 2000 after speaking with Matrix's financial advisor. (*See, e.g.*, Scheman, Tr. 6931-39) (FOF 8.67). Mr. Scheman noted that Matrix had stock even more illiquid than PDM's, a limited cash flow for purposes of borrowing, and was itself a participant in an industry severely hurt by the same economic circumstances that were holding down the profits of both CB&I and PDM in fiscal year 2000:

> I don't see how Matrix could have financed, even in -- even in July, let alone February 2001, but even in July, August of 2000, I don't see how they could have financed a good purchase price. I don't think they had neither the earnings or necessarily the balance sheet to do it, number one, and number two, if they

> wanted to offer us stock, it didn't necessarily fit in with a plan to liquidate. At the time we hadn't really thought through and didn't see it -- not liquidate, fit though with a plan to get the money to shareholders of PDM, but more appropriately, it was a stock that was smaller than PDM's, so in fact it would be, from some perspectives, worse than owning PDM stock and would not accomplish the goals that we set out to accomplish, so they were, in my view, yes, it was very good that they were interested, but a very unlikely -- a very unlikely ability to get a job -- to get a transaction done.
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> I don't think they could have borrowed a lot of money. I don't think that their stock was attractive, number one, from a valuation standpoint, because you would have the same issue, that if you want to sell it, it becomes worth less, and number two, it might have done more harm than good in the overall scheme to sell the company, because ultimately someone would have had to have bought that stock from us and/or distributed it to shareholders, and so we did not view them as really having the financial wherewithal or I think the words we used earlier were -- I don't think that they really had the ability -- the strength to consummate an attractive transaction or a competitive transaction.
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> * * *
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> I don't believe that Matrix, at the time of February 7th, could have raised $20 million for an acquisition of EC, and the reason I say that is you would take the way the banks would look at it, and we go back to 416, you would take Matrix earning $9 million of EBITDA, you would then -- the bank would look at what is the new cookie, combining the two. Well, we discuss that EC lost $8 million in 2001, so they would take $9 million, subtract $8 million, and in fact, they would now have EBITDA pro forma or a combined of $1 million. So I think their borrowing capacity might have been zero at that time. Excuse me, they would not have been able to borrow to finance that deal, so I highly doubt that they could have raised enough money to -- well, I think the only way they could have raised money was to look at the liquidation value themselves and see if a bank would finance against that, and my experience and intuition suggests that the banks would focus on the lowest possible value for the liquidation and would only lend a fraction of that.

(Scheman, Tr. 6932-33, 6937-38, 6938-39) (FOF 8.67, 8.68, 8.71). In short, the evidence demonstrates that Matrix was not a viable purchaser, would not have been able to finance a transaction above liquidation value, and was not in any event interested in purchasing the package of assets that PDM would have been selling as part of an EC division-only transaction.

(*E.g.*, Scheman, Tr. 6931-32, 6934-38, 6780-82) (FOF 8.67, 8.68, 8.70). Mr. Scheman also discussed some smaller tank manufacturers such as Pasadena Tank, another company that had contacted Tanner to inquire about the availability of the EC division. (Scheman, Tr. 6939-40) (FOF 8.79, 8.80). As Mr. Scheman explained, Pasadena was far too small to consummate a cash transaction of the necessary size. (Scheman, Tr. 6940-41).

There is no evidence to contradict Mr. Scheman, who based his analysis on his many years of experience as an investment banker. (Scheman, Tr. 6941-43, 6945) (FOF 8.18, 8.48). Mr. Scheman had an incentive, both because he owed a fiduciary duty to PDM shareholders and because he was being paid a percentage of the revenues derived from the sale of the PDM assets, to get the highest purchase price for those assets. (Scheman, Tr. 6946-47, Byers, Tr. 6881-82) (FOF 8.42, 8.44). Mr. Scheman's analysis indicating that neither financial nor strategic buyers would have been interested in or able to consummate a transaction above liquidation value establishes that there were no alternative purchasers.

Complaint Counsel cannot credibly argue that PDM should have attempted to negotiate with one or more of the purchasers that Mr. Scheman determined to be not viable. It is the job of an investment banker to weed out purchasers without the ability to consummate a transaction at the desired price. (Scheman, Tr. 6944-45, 6948) (FOF 8.47, 8.57). There is an expense from negotiating a potential disposition with a purchaser that ultimately fails. (Scheman, Tr. 6923-24, 6916) (FOF 8.117). In addition, it would have damaged the viability of the assets to spend time negotiating with a potential buyer without the ability to purchase the assets. As discussed above, PDM simply did not have another three to six months to carefully assess whether another buyer would have been able to purchase the assets above liquidation value. (Byers, Tr. 6773-74, 6777-78; Scheman, Tr. 6924) (FOF 8.55, 8.116, 8.119). It would have ultimately been damaging to the shareholders and to the assets' value to engage in such a quixotic effort.

The above evidence is compelling, and more than meets a preponderance of the evidence standard. It is telling that, despite over two years of investigation and discovery, Complaint Counsel could not find anybody other than Mr. Vetal to testify about their interest in purchasing the EC Division. If there were purchasers out there, Complaint Counsel would have found them. Given the strong unrebutted evidence put forth by CB&I concerning the lack of alternative available purchasers, it would be incumbent upon Complaint Counsel to produce other such purchasers to establish that there were in fact other purchasers.

3. The liquidation of Graver constitutes a natural experiment which supports the evidence that PDM EC would have been liquidated.

One way to test Complaint Counsel's hypothesis that there would have been another purchaser for PDM EC is to examine what happened to other businesses similar to PDM EC when they were for sale. Graver was a very experienced tank manufacturer with decades of experience. It had constructed 40 percent of the LIN/LOX tanks built in the U.S. from 1997 to 2001, and was marketed to be sold in 1999 and early 2000 -- at a time when the credit markets were much more liberal. (Simpson, Tr. 5673; Harris, Tr. 7312; Byers, Tr. 6750, 6763-64) (FOF 8.29, 8.83). Despite Graver's valuable experience, employees, and its U.S.-based fabrication shop, Graver was unable to find another purchaser to buy it as a going concern. (Simpson, Tr. 5672-74) (FOF 8.131). Accordingly, its assets were liquidated out of the market. (Simpson, Tr. 5673, 5674; Kamrath, Tr. 1991) (FOF 8.129, 8.130).

In analyzing the facts of this case, it is instructive to note that Graver was not able to find a purchaser even at a time when credit was more readily available and companies had more money to spend. Graver thus constitutes a natural market experiment of what would happen if a tank construction company similar to PDM EC were to be sold. (Harris, Tr. 7335) (FOF 7.140). The answer to the experiment is entirely consistent with the testimony of Mr. Byers and Mr. Scheman in this case: liquidation of PDM EC was the only alternative to the Acquisition. (Byers, Tr. 6770; Scheman, Tr. 6952-53) (FOF 8.118, 8.115).

B. EXITING OF THE PDM ASSETS VIA LIQUIDATION IS RELEVANT BECAUSE PDM EC WOULD NOT HAVE BEEN A COMPETITOR TO CB&I EVEN IF CB&I HAD NOT PURCHASED THE PDM EC DIVISION.

Both economists who testified in this case agree that, in order to determine whether the Acquisition has anticompetitive effects in violation of Section 7 of the Clayton Act, post-Acquisition Competition must be compared to competition as it would have been had the Acquisition not been consummated. (Simpson, Tr. 5677; Harris, Tr. 7186-87) (FOF 7.255). Thus, competition is not compared to what it was before the Acquisition.

In many merger cases, competition before the acquisition is the same as competition would have been had the acquisition not taken place. The selling company typically either continues to operate the assets or finds another buyer. However, this is a unique case because PDM was irrevocably committed to selling all of the assets. (Byers, Tr. 6742, 6762-63) (FOF 8.20). It was not going to continue to operate the EC Division. (Byers, Tr. 6757-58) (FOF 8.38). Thus, the only way PDM EC could have continued as a competitive force would have been for it to have been sold to another purchaser. (Simpson, Tr. 5675). As indicated above, there was no other purchaser to buy the PDM EC Division. (Scheman, Tr. 6952-53, 6924-26) (FOF 8.55, 8.106). Under these unique circumstances, competition if CB&I had not bought PDM EC is exactly the same as competition after CB&I's actual Acquisition of PDM EC. By itself, these facts establish that there has been no risk of substantial lessening of competition as a result of the Acquisition. *See U.S. v. General Dynamics*, 415 U.S. 486, 507 (1974) ("the effect on competition . . . will be less if a company continues to exist even as a party to a merger than if it disappears entirely from the market. It is, in a sense, a 'lesser of two evils' approach. . . .").

Complaint Counsel ignores the evidence, economics and logic by arguing that this Court must ignore evidence of PDM EC's likely liquidation because it does not neatly comply with the elements of something called the failing firm defense. However, CB&I does not assert the failing firm defense as it has classically been described, which requires a showing that the acquired company is "so depleted and the prospect of rehabilitation so remote" that it is at risk of "the grave possibility of business failure" and that "the company that acquires the failing company . . . is the only available purchaser." *Citizen Publishing Co. v. U.S.*, 394 U.S. 131, 138 (1969). CB&I is merely trying to show how competition would have been absent the Acquisition. If PDM EC was liquidated instead of sold to CB&I, it would still not have been a competitor in these relevant markets. (Simpson, Tr. 5678).

Complaint Counsel asserts that whether the EC Division will be liquidated is irrelevant because PDM EC would likely have returned to some level of profitability if PDM had continued to operate the EC Division. It argues that, since PDM EC was not on the brink of insolvency or a bankruptcy filing, it fails to comply with the first prong of the *Citizen Publishing* test. This argument applies a too-narrow reading of the *Citizen Publishing* test and ignores the fact that PDM was *not* going to continue to operate the EC Division. The question, then, is whether PDM would have found another buyer to operate the EC Division, because if there was no other buyer, "the prospect of rehabilitation was remote" and there was a "grave possibility of business failure" because PDM EC would have been liquidated. In this unique case, given PDM's uncontradicted commitment to sell or liquidate the EC Division come hell or high water, the second prong of the *Citizen Publishing* test -- whether there was another purchaser -- supplies the answer to the first prong question as to whether there was a "grave possibility of business failure." Under circumstances such as those presented by this case, "the financial condition of a firm is neither necessary nor sufficient for a *per se* defense for a merger. Rather, analysis should . . . presume that preservation of the assets in the market, even by a leading firm, is preferable to exit from the market." Kwoka and Warren-Boulton, *Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis*, 31 Antitrust Bull. 431, 450 (Summer 1986).[29]

Complaint Counsel's position is form over substance and ignores the evidence in this case. It is not the typical case that a conglomerate, multi-division company is liquidating all of its assets, has to do so quickly, has to do so in a tightened lending environment, and has to sell the assets that are the subject of the antitrust complaint at a time when those assets are having a year in which they lost $30 million. The relevant question is not whether PDM EC would have been a viable ongoing business if PDM had continued to operate, because the evidence is undisputed that PDM would not have continued to operate the PDM EC Division. That fact, entirely unrebutted, renders superfluous Complaint Counsel's argument that CB&I must first establish that PDM EC would not have been viable in the long run. This is a unique circumstance, and it requires a recognition of the unique facts of this case.

To do otherwise would allow Complaint Counsel to reap a windfall. As logic and economics dictate, this Court has to compare competition as it was after the Acquisition to

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[29] Complaint Counsel has argued that a "failing firm" defense such as that proposed by Messrs. Kwoka and Warren-Boulton has been previously rejected by the FTC in *In the Matter of Olin Corporation*, 113 F.T.C. 400, (1990). Complaint Counsel's argument is a bit of an overstatement. In *Olin* the Commission held that the selling company FMC had not "made the decision to close the isos business in the near future" and that there was no evidence of an effort to find other purchasers. *Id*. Based on these factual findings, the Commission concluded "[i]n short, the facts would not support the description of the proposed defense, even if we adopted the defense, and we decline to do so in this case." *Id*. That is the full extent of the Commission's analysis, and no elaboration was provided. This hardly constitutes the rejection claimed by Complaint Counsel. Further, and more operatively, the Commission said it declined to adopt the defense "in this case" which was decided twelve years ago. It does not mean that the Commission would not adopt this defense in a more appropriate case, and there has been no case since Olin asserting the defense until this case was tried.

competition *as it would have been* absent the Acquisition in order to determine whether the Acquisition threatens to substantially harm competition. Complaint Counsel would have this Court ignore the fact that PDM EC would not have been a competitor in the market if the Acquisition had not occurred. Complaint Counsel cannot escape this ineluctable fact by hiding among the weeds of the standards for a failing firm defense which is not directly applicable here.

C. EVEN IF PDM EC HAD BEEN SOLD AS A GOING CONCERN, IT WOULD NOT HAVE BEEN THE SAME COMPETITIVE FORCE THAT IT WAS PRIOR TO THE ACQUISITION, MEANING THAT THE CONSEQUENCE OF THE LOSS OF PDM EC AS A COMPETITOR IS NOT AS GREAT.

Even if this Court finds that there was a possibility that PDM EC would have been purchased as a going concern by another purchaser (a conclusion Respondents maintain is firmly inconsistent with the evidence), this Court must still consider whether PDM EC would have been an effective competitor under that new ownership. This analytical focus is required by the economic analysis agreed upon by both Dr. Simpson and Dr. Harris, which maintains that competition as it has been after the Acquisition has to be compared to competition as it *would have been* had CB&I not purchased PDM EC, and not compared to competition as it was prior to the Acquisition. (*See* Section VII, *infra*). Because PDM EC was not going to continue to be operated by PDM in any event, the proper analytical focus for purposes of determining whether competition has been lost is to look at what sort of a competitor PDM EC would have been under prospective new ownership.

PDM EC benefited from being part of the larger PDM corporation, which had revenues in excess of $600 million, only a quarter of which came from revenue generated by the EC Division. (Byers, Tr. 6734) (FOF 8.7). PDM EC would have been sold, if at all, to a purchaser with a substantially smaller revenue base than PDM had as a corporation. Such a smaller company would have a harder time obtaining bonding for larger projects. In fact, as Mr.

Byers explained, the Bridge Division of PDM, the last division owned by PDM before the company was liquidated to its stockholders, had a harder time obtaining bonding because it was no longer associated with the larger revenue base of the four other PDM divisions which had already been sold. (Byers, Tr. 6738) (FOF 9.25).

The evidence is uncontradicted that the ability to obtain bonding is a function of the revenue base of the company. (Byers, Tr. 6738; Bryngelson, Tr. 6127-28; Izzo, Tr. 6511) (FOF 9.4, 9.22, 9.25, 9.26). A company such as Matrix would have a far more difficult time obtaining bonding or making parent company financial guarantees for larger projects as compared to PDM prior to the Acquisition. In fact, prior to the Acquisition, PDM was the smallest of the LNG tank competitors, and at least one witness testified that PDM had had trouble making parent company financial guarantees prior to the Acquisition. (Izzo, Tr. 6488-89). Given that the trend in the U.S. LNG projects is for larger and more expensive tanks and facilities, it is questionable whether PDM under the ownership of Matrix or an even smaller company would have been able to effectively participate in the LNG markets. (*See* Part III, *supra*). Had PDM EC been sold as a going concern, it is highly probable that it could not have bid for the majority of LNG and TVC projects. Accordingly, CB&I's acquisition of PDM EC can be adjudged to have had little competitive effect in those markets as compared to post-Acquisition competition.

Nor is bonding and the ability to make financial guarantees the only consequence this Court must consider in evaluating what sort of a competitor PDM EC would have been in the unlikely event that it had been sold as a going concern. For example, the acquiring company could be so burdened by debt that it could not afford to make necessary investments or pay vendors. The purchasing entity could have managed the assets in a manner that is less effective than PDM's management. In fact, Graver's performance began to degrade along with its financial picture after it was purchased by ITEQ. (Kamrath, Tr. 1991, 2026-27) (FOF 8.128, 8.129). Although many of the same people may have gone to work for the acquiring company, there is little evidence to suggest that PDM EC would have been able to exert the same competitive influence as it did pre-Acquisition. In short, there would be little (if any) difference in competition between the world of today, when PDM EC does not exist as a competitor, as compared to the world that would exist with a PDM EC operating under different ownership.

IX. EVEN IF THE ACQUISITION HAS CREATED AN ISSUE REGARDING COMPETITION, A BREAKUP OF CB&I IS NOT AN APPROPRIATE REMEDY.

During trial and throughout the course of this litigation, Complaint Counsel has continually sought the most draconian of remedies possible -- a breakup of CB&I. During opening statements, Complaint Counsel requested that "[r]elief in this matter must re-establish two independent viable and competitive entities." (Krulla, Tr. 101) (FOF 9.2). Such a remedy is unnecessary under the law and unsupported by record evidence. In its pursuit of a breakup remedy, Complaint Counsel ignores substantial evidence in the record showing that its proposed remedy would: 1) be potentially harmful to consumers; and 2) not be successful in enhancing competition in the relevant markets.

A. COMPLAINT COUNSEL IS REQUIRED UNDER THE LAW TO SHOW THAT ITS PROPOSED RELIEF IS APPROPRIATE.

1. Complaint Counsel has a burden to present evidence regarding its proposed remedy.

Divestiture is effectively injunctive relief. In a Section 7 case, the plaintiff (in this case Complaint Counsel) bears the burden of proof regarding injunctive relief every bit as much as the plaintiff in a private damages proceeding bears the burden of proving the amount of damages. *See Blue Cross & Blue Shield United v. Marshfield Clinic*, 883 F. Supp. 1247, 1263

(W.D. Wis. 1995). In *Marshfield Clinic*, the district court found that, despite its findings that the acquisition at issue constituted an antitrust violation, the plaintiff had presented insufficient evidence to support its requested divestiture remedy. *Id.* at 1263-64. The court held that its liability finding, standing alone, did not meet the burden of proving a need for equitable relief. *Id.* at 1264. The district court did not order divestiture because it "would have a large impact on third parties such as patients, Marshfield doctors and others that have not been before this Court to protect their interests." *Id.*

In order to win its proposed relief, Complaint Counsel must carry its burden by presenting evidence related to its effectiveness. The D.C. Circuit recently made this clear in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). There, the Government sought to break up Microsoft into separate companies. *Id.* at 46. The *Microsoft* district court imposed the Government's proposed break-up remedy without taking any evidence concerning the feasibility, desirability or effectiveness of the remedy. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64 (D.D.C. 2000). Although *Microsoft* is a Section 2 case, as opposed to a Section 7 case, it is instructive because it is the first case in many years to consider issues involved in breaking up a company, as compared to the more common remedy of requiring remedial, divestiture before a deal is given permission to close. The concerns expressed in *Microsoft* are the same concerns a finder of fact must evaluate in this case.

In *Microsoft*, the D.C. Circuit reversed, based in large part on the district court's failure to take evidence concerning remedy. 253 F.3d at 46. In so doing, the court recognized that "relief-specific" evidence was necessary if there were contested issues of fact regarding relief, and that a "full exploration of the facts" was necessary to drawing an appropriate decree in an antitrust case. *Id.* at 101. (citing *United States v. Ward Banking Co.*, 376 U.S. 327, 330-31

(1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 22 (1945)). In fact, the Court specifically noted that a "remedies decree must be vacated whenever there is "a bona fide disagreement concerning substantive items of relief which could be resolved only by trial." *Id.* at 46. In *Microsoft*, those issues included "the feasibility of dividing Microsoft, the likely impact on consumers, and the effect of divestiture on shareholders." *Id.* at 101. An inquiry concerning these issues is squarely a factual issue which requires informed speculation of future events based on the evidence:

> A prediction about future events is not, as a prediction, any less a factual issue. Indeed, the Supreme Court has acknowledged that drafting an antitrust decree by necessity "involves predictions and assumptions concerning future economic and business events." *Ford Motor Co. v. United States*, 405 U.S. 562, 578, 92 S. Ct. 1142, 31 L.Ed. 2d 492 (1972). Trial courts are not excused from their obligation to resolve such matters through evidentiary hearings. . . .

Id.; *see also Ford Motor Co.*, 405 U.S. at 571 (affirming antitrust merger injunctive relief after "nine days of hearing on remedy").[30] The fact that a remedy must be supported by record evidence is not disputed by Complaint Counsel. In its Complaint, Complaint Counsel acknowledged that "the Commission may order such relief against respondents *as is supported by the record* and is necessary and appropriate . . . ." (*See* RX 79 at 8) (emphasis added).

2. Section 7 does not require Complaint Counsel's proposed remedy when other, more suitable remedies are available.

In examining the issue of remedy, this Court has significant discretion in fashioning appropriate relief when other options are available. Indeed, the Commission itself has acknowledged this fact:

[30] In fact, CB&I proposed to Complaint Counsel this spring to bifurcate these proceedings into a liability and remedy phase. That proposal was rejected by Complaint Counsel as unworkable and inconsistent with the Commission's *de novo* review. Respondents' Counsel have separately been told that the purpose of the proceedings before this Court is to make a complete evidentiary record for further review. Complaint Counsel knows that this trial is its one and only chance to present remedy evidence. It has not done so.

> It is. . . well settled that the normal remedy in cases where Section 7 violation is found is the divestiture of what was unlawfully acquired. . . . *This is not to say that divestiture is an automatic sanction, mechanically invoked in merger cases. In cases where several equally effective remedies are available short of a complete divestiture, a due regard should be given to the preservation of substantial efficiencies or important benefits to the consumer in the choice of an appropriate remedy.*

In the Matter of Retail Credit Company, 92 F.T.C. 258-59 (1978) (emphasis added).

The United States Supreme Court in *United States v. E.I. DuPont de Nemours*, 366 U.S. 316 (1961) has held that divestiture is not a required remedy under Section 7 of the Clayton Act. In *DuPont*, the Supreme Court reversed the lower court ruling that there had been no violation of the Clayton Act, and remanded with the observation that "the District Courts, in the framing of equitable decrees, are clothed with 'large discretion to model their judgments to fit the exigencies of the particular case.'" *United States v. E.I. DuPont de Nemours*, 353 U.S. 586, 607-08 (1961) (quoting *International Salt Co. v. United States*, 332 U.S. 392, 400-01). The district court fashioned a remedy after several weeks of hearings that required partial divestiture. *See United States v. E.I. DuPont de Nemours*, 177 F. Supp. 1 (D.C. N.D. Ill. 1959). The Government appealed based on its contention that anything less than full divestiture was inadequate to redress the violation and the Supreme Court again granted *certiorari* to "review. . . the District Court's discharge of the duty delegated by [the Court's] judgment to formulate a decree." *United States v. E. I. DuPont de Nemours*, 366 U.S. 316, 321-22 (1961). The Court specifically noted that it had previously "alluded to the 'large discretion' of the District Courts in manners of remedy in antitrust cases." *Id.* The Court noted that "[t]hese expressions are not, however, to be understood to imply a narrow review here of the remedies fashioned by the District Courts in antitrust cases." *Id.* at 323. The Court noted its previously announced criteria for fashioning remedy in antitrust cases:

> In considering the subject … three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.

Id. at 327-28 (quoting *United States v. American Tobacco Co.,* 221 U.S. 106, 185 (1911)). Notably, the Court did not hold that divestiture is the only available remedy. In fact, it specifically rejected the Government's assertion to the contrary, reasoning that "Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent." *Id.* at 331 n.9.

The Commission has also recognized that Section 7 does not require divestiture as the only available remedy. It has observed that divestiture can be so drastic in some cases that "the cure would be worse than the disease," and that in such cases, it would not be an appropriate remedy. *See In the Matter of Ekco Prods. Co.*, 65 F.T.C. 1163, 126 (1964). This is especially true in a case involving multiple product markets. The Commission has noted that, "[i]n multiple market cases, this may result in all elements being proven as to all alleged markets, as to some markets but not to others, or as to none of the alleged markets. A case falling into the second category may entail more narrow relief (e.g., partial rather than complete divestiture). . . ." *In the Matter of The Grand Union Company*, 102 F.T.C. 812, 503 (1983).

B. COMPLAINT COUNSEL HAS NOT MET ITS BURDEN OF PROOF WITH RESPECT TO REMEDY.

During its case-in-chief, which lasted 18 trial days, Complaint Counsel presented testimony of 24 witnesses (live and by deposition) who are customers or competitors of CB&I.

Remarkably, Complaint Counsel failed to ask any of these witnesses questions regarding the feasibility, desirability or effectiveness of its proposed remedy, nor did any of these witnesses volunteer a shred of evidence regarding this issue. The only "testimony" presented by Complaint Counsel in support of its remedy was provided by their expert economist -- Dr. Simpson. Despite the fact that Dr. Simpson gave over 600 pages of testimony, he testified regarding the issue of remedy for only eight pages. This paucity of testimony is not surprising. None of the 24 witnesses on which Dr. Simpson relied for his opinions discussed this issue. Further, Dr. Simpson is not a fact witness, he has no background in breaking up companies, and did not have any fact evidence available to him to offer any opinions regarding remedy. (Simpson, Tr. 5715) (FOF 9.3).

These eight pages do not carry Complaint Counsel's burden. When asked the question "Do you believe that customers would benefit by reconstituting a competitive company," Dr. Simpson simply answered, "Yes, I do," without any further elaboration. (Simpson, Tr. 3611) (FOF 9.4). He offered no evidence showing that creating an independent company from the ribs of CB&I would be practical, desirable or effective, nor could he cite any evidence showing that customers for whose benefit remedy would be imposed would favor disassembly of CB&I into two separate companies. He also failed to cite any testimony from any customer to support his "opinion," and he presented no evidence that a breakup would actually establish a viable second company, would not hurt CB&I's ability to service industry customers, would result in lower pricing or better quality, or would in any way accomplish the objectives of Complaint Counsel's proposed remedy. In fact, when asked to "name one customer that's testified in this proceeding that they think that CB&I should be broken up into two companies," Dr. Simpson stated "None come to mind." (Simpson, Tr. 5718) (FOF 9.4).

In addition to failing to provide any evidence regarding the appropriateness of Complaint Counsel's contemplated remedy, Dr. Simpson has also admitted that he does not even know how the remedy would be implemented and that he is not qualified to oversee such a breakup:

> Q. Sir, are you qualified -- and I should back up. You know that if a remedy, the remedy you propose, is implemented, there will have to be some sort of a trustee appointed to implement it; correct?
>
> A. I don't know exactly how it would be implemented.
>
> Q. You don't even know how the remedies are implemented, sir?
>
> A. No, I do not.
>
> Q. Sir, are you qualified to act as a trustee to oversee splitting up CB&I into two companies?
>
> A. I don't believe I am.
>
> Q. Yet, sir, you've testified that it's feasible to do that, split CBI into two companies, you've testified to that?
>
> A. I don't recall exactly what I said on that point.
>
> Q. Sir, do you think it's feasible to split CBI into two companies or not?
>
> A. I believe it is.

(Simpson, Tr. 5715) (FOF 9.5). To make matters worse, Dr. Simpson never considered the possibility that Respondents might win a liability trial in only one or two of the four markets at issue in this litigation. (Simpson, Tr. 5586) (FOF 9.32). In fact, Dr. Simpson expressly admitted that, if Complaint Counsel won less than its entire case, the question of whether a breakup would be an appropriate remedy "would actually require quite a bit of thought." (Simpson, Tr. 5586) (FOF 9.32).

In short, Dr. Simpson's testimony regarding remedy is conclusory and wholly unsupported by record evidence. It cannot carry Complaint Counsel's burden of proof as a matter of law. This case, should it ever get to the Court of Appeals, would surely be reversed if any remedy were to be imposed based upon the case put on by Complaint Counsel, which is as bereft of remedy evidence as was the initial decision in *Microsoft*. It is noteworthy that after remand from the D.C. Circuit, Judge Kollar-Kotelly held a hearing solely on the issue of remedy that lasted longer than this entire proceeding. *See New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 87 (D.D.C. 2002).

C. EVIDENCE SUGGESTS THAT COMPLAINT COUNSEL'S PROPOSED REMEDY WILL NOT CREATE COMPETITION, AND THAT IT WILL HARM CONSUMERS.

The purpose of an antitrust remedy is not a punitive one. *See Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.,* 429 U.S. 477, 485-86 (1977) (finding that the primary purpose of antitrust damage remedies is remedial, not punitive). Any remedy in this case should be fashioned to encourage competition and improve customers' ability to receive quality goods or services at a competitive price. The evidence presented in this trial suggests that a break-up of CB&I will not improve the state of competition in the relevant markets, and that such a remedy could actually harm CB&I's customers. For example, Joseph Hilgar of Air Products noted that the Acquisition has created some benefits for Air Products, and that a divestiture would "be bad for Air Products and the industrial gas business in general." (Hilgar, Tr. 1540) (FOF 9.10). Further, the evidence shows that it would be difficult to implement Complaint Counsel's proposed remedy. As one of Complaint Counsel's own witnesses observed, breaking up CB&I "would be pretty difficult." (Outtrim, Tr. 808-09) (FOF 9.11).

1. Evidence shows that provisions in CB&I's contracts would make Complaint Counsel's proposed breakup unworkable.

Complaint Counsel asks this Court to order a breakup without considering the effects of such a remedy on contractual relationships between CB&I and its customers in the relevant product areas and customers unrelated to this litigation. Many such contracts have "non-assignability" clauses. (Glenn, Tr. 4168-69) (FOF 9.16). Such a clause is common in the construction industry. Gerald Glenn explained their meaning:

> If you qualify for a project, and CB&I's experience and qualifications are the basis for that award, the customer expects CB&I to execute that project the way that they have promised to do that and the basis for their selection. So they have a clause there that you are not able to assign any or all of the requirements under that contract to a third-party without their permission.

(Glenn, Tr. 4168-69) (FOF 9.16). Similarly, many contracts also contain a "key employee" provision, which protects the customer against a "bait and switch" by CB&I. (Glenn, Tr. 4168-69) (FOF 9.17). If a customer awards CB&I a contract with the expectation that a certain group of people will work on the job, such a clause prevents CB&I from removing those personnel from the job. (Glenn, Tr. 4169) (FOF 9.17). Some customers have indicated that they would be reluctant to agree to assignment clauses allowing a new company to assume control of its job. (*See* Izzo, Tr. 6508) (FOF 9.16).

2. Evidence shows that Complaint Counsel's proposed breakup remedy would create two companies incapable of competing for jobs in the relevant product areas.

Evidence demonstrates that a breakup of CB&I would not enhance competition. In fact, such a remedy is likely to reduce competition because it will reduce the number of competitors with sufficient financial might to compete for large LNG import terminals. Financial size of a competitor can affect its ability to meet customers' bonding requirements.

(*E.g.*, Izzo. Tr. 6511-12) (FOF 9.22). For many customers, financial viability of a prospective bidder is important to a pre-qualification process. (Rapp, Tr. 1313) (FOF 9.24).

Several customers have expressed concern that a divestiture could result in fewer qualified bidders for LNG projects. For example, Larry Izzo of Calpine noted that breaking up CB&I could result in two companies lacking the "bonding or guarantee ability to make our bid list." (Izzo, Tr. 6511-12) (FOF 9.24). Izzo explained that foreign companies, such as Skanska, Technigaz, and TKK had the financial strength to guarantee a large LNG project. (Izzo, Tr. 6511-12) (FOF 9.22). By contrast, the two "residual" companies left by a divestiture could have difficulty in this area:

> I'd be concerned about whether either of the two residual companies would have the bonding or guarantee ability to make our bid list, and unless a company could guarantee what we were asking them to do, which I feel comfortable with with the Skanskas and Technigazes and TKKs, I don't know -- I seriously doubt PDM's ability being able to backstop a large enough project as we're talking about. I don't even think PDM would make my bid list, and whether a split company -- whether CBI would make it would depend on what was left of the company. I think they would be disadvantaged compared to the other companies I'm talking about from an ability to guarantee the work to the owner.

(Izzo, Tr. 6511-12) (FOF 9.24). Similarly, Rob Bryngelson explained that El Paso considers a company's ability to post performance bonds and provide necessary liquidated damages coverages in order to determine if "they're a strong enough company, [so that] we can go and get some money to cover our damages." (Bryngelson, Tr. 6127-28) (FOF 9.9, 9.26). Mr. Bryngelson added that the Acquisition has given "some comfort in the bid process" because CB&I is a "larger company now, with more assets to go after if they do fail in the process of constructing a tank." (Bryngelson, Tr. 6154) (FOF 9.9). Mr. Bryngelson noted that a breakup would rob El Paso of this comfort:

Q. Okay. If the FTC is successful in breaking up CB&I into two separate companies, would that concern El Paso?

A. It would concern me, yes.

Q. Why would it concern you?

A. It would be, as I mentioned before, a smaller company, and in that situation, I would be less inclined to do any more than maybe one or two jobs with them total.

* * *

Q. If CBI were split in two, would you be concerned that both of the newly created companies as a result of the breakup might not have a sufficient size to satisfy El Paso that they could back up, you know, the necessary work to be done?

A. Yes. That would concern me.

(Bryngelson, Tr. 6155-56) (FOF 9.23). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx]**

The sale of PDM's assets provides an instructive example of how financial size can affect a company's ability to compete. During 2001 and 2002, various divisions of PDM were sold off (CB&I acquired the Water and EC Divisions.) The last division sold by PDM was PDM Bridge, which sometimes required bonding to perform its projects. PDM Bridge's ability to obtain necessary bonding was recently reduced because it was no longer associated with the four other divisions of PDM that had already been sold. (Byers, Tr. 6738) (FOF 8.25).

3. Evidence shows that Complaint Counsel's proposed breakup remedy would disrupt projects already in progress.

A breakup could result in disruption of projects already in progress. Some customers have expressed this concern. For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Such a concern is well founded, as PDM, EC and Water were integrated divisions with shares resources prior to the acquisition. Richard Byers, formerly of PDM, explained that the PDM Water and EC divisions were sold together because "they shared many services. They shared human resources, they shared physical plant. It was -- at that time it was considered impossible to split the two." (Byers, Tr. 6780-81) (FOF 9.30).

4. Evidence shows that Complaint Counsel's proposed breakup remedy would leave two companies without sufficient resources or personnel to service their customers.

The evidence in this case demonstrates that a breakup could create two companies without sufficient personnel to compete in some or all of the relevant markets. For example, Jeffrey Sawchuck of BP expressed concern regarding the effect of a breakup on CB&I's engineering capabilities:

> Q. And if that engineering design department were instantly cut in half, would they have enough people in your judgment to service customer needs?
>
> A. We would have some real concerns about that actually. If the design department was split in half, because they are a small group of people, and they have -- they are a fairly expert group, it's real difficult to split one

> person in half when they may have one or two -- only have one or two people in certain disciplines.
>
> Q. And I take it the same would be true for the other company that received the other half of the CBI design and engineering group, that the half that remained with CBI would give up PDM and that the half that would go would not be big enough to meet all of BP's needs either on its own?
>
> A. Yeah, I would have to say we would have some concerns about that.

(Sawchuck, Tr. 6077-78) (FOF 9.9).

The same concern exists in the TVC market. Ron Scully of XL noted that the market for TVCs is not large enough to support the existence of two suppliers, and that a divestiture would only reduce the amount of competition available for these jobs. (Scully, Tr. 1226-27, 1236-39) (FOF 6.97). A breakup would result in two smaller companies that would each be substantially weaker than the current CB&I. (Scully, Tr. 1239-40) (FOF 6.96). Customers benefit from having a merged CB&I and PDM with the combined wisdom of CB&I and PDM employees working together. (Scully, Tr. 1240) (FOF 6.98).

5. Evidence shows that Complaint Counsel's proposed breakup remedy would affect several hundred pending projects.

A breakup would affect jobs in the relevant product areas, as well as hundreds, perhaps thousands, of other contracts between CB&I and its customers. During 2001, CB&I completed 700 contracts. Currently, CB&I has over 2,000 contracts. (Glenn, Tr. 4170) (FOF 9.27).

6. Expert economic testimony supports the conclusion that divestiture is not necessary and is ill-advised because it will not result in two lowest companies.

Unlike Dr. Simpson, Dr. Harris -- Respondents' expert-considered the testimony of customers regarding the potential effects of a divestiture on their businesses. Based on his review of the entire record, Dr. Harris concluded that divestiture is "unsupported in the record."

(Harris, Tr. 7375-76) (FOF 7.141, 7.143). Dr. Harris explained that the goal of any divestiture should be to create "two low-cost companies," and observed that a divestiture may well create higher-cost companies, which would "hurt competition in all four markets." (Harris, Tr. 7375-76) (FOF 7.143). Dr. Harris correctly observed that there is no evidence in the record to suggest that a divestiture could create two low-cost companies:

> It does no good to create two new competitors with both of them having higher costs and it also does no good for one low cost and one higher cost. That's, according to the FTC, that's what we have now, we have a low-cost CB&I and a bunch of new competitors that are high cost. So for this relief to have any impact you must have confidence that the two firms that will be the result will both, not one but both, be low-cost producers in the markets. And you know, there's no evidence in the record that I've seen to suggest that's true.

(Harris, Tr. 7367-68).

D. SHOULD THE COURT FIND LIABILITY, OTHER REMEDIES SUPPORTED BY THE EVIDENCE ARE STILL AVAILABLE.

Should the Court find liability in one or more of the markets at issue in this case, it is not powerless to solve competitive problems. The record contains ample evidence that any competitive problems in the markets at issue can be solved through remedies short of divestiture. For example, if the Court were to find that the LIN/LOX market has been affected by the Acquisition, there are many ways to encourage competition. For example, a current or potential competition could receive assistance from CB&I in entering the LIN/LOX market.

W.T. Cutts of AT&V, indicated that he could fully compete against CB&I on all fronts and, if he were able to obtain the following: CB&I's customer lists, technical specifications of LNG applications, cryogenic welding systems, CB&I's name and reputation, and a few of CB&I's cryogenic marketing employees, employees and equipment for four additional field crews, more financial strength and bonding capacity, and CB&I's standard operating procedures. (Cutts, Tr. 2371-74, 2391) (FOF 9.36).

E. CB&I HAS OFFERED A SOLUTION TO ANY COMPETITIVE ISSUE ASSOCIATED WITH THE TVC MARKET.

Even if this Court finds that the Acquisition has substantially lessened competition in the TVC market, Respondents have proposed a remedy that would resolve any concerns associated with this reduction. The Court has the power to impose remedies such as this proposed remedy, as opposed to ordering a divestiture. *See In the Matter of Retail Credit Company*, 92 FTC 1, 258-59 (1978). This remedy, and the ramifications of divestiture in this market, are discussed more fully in Part VI, *supra.*

F. SUMMARY: A BREAKUP OF CB&I IS NOT APPROPRIATE IN THIS CASE.

Because Section 7 has not been violated, this Court need not impose any remedy. Should the Court find that a violation has occurred, it should not order a breakup of CB&I as Complaint Counsel has requested. Complaint Counsel bears the burden of proving that its proposed remedy is appropriate. It has not done so; in fact, Complaint Counsel has made no significant effort to address the issue of remedy in its case-in-chief. The evidence in this case demonstrates that a breakup of CB&I would not assist competition in any of the relevant markets, and would in all probability harm competition in some or all of those markets. In the face of this possibility, it would be irresponsible to order a breakup of CB&I, especially when other, less drastic means of encouraging competition in the relevant markets are available.

CONCLUSION

For all of the reasons fully set forth above, the Complaint as to all product markets should be dismissed with prejudice.

Dated: March 19, 2003

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I, Greg J. Miarecki, hereby certify that on this 19th day of March, 2003, I served a true and correct copy of Respondents' Correct Post-Trial Brief -- Public Version, by hand delivery upon:

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