UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9300

PUBLIC VERSION

IN THE MATTER OF

CHICAGO BRIDGE & IRON COMPANY N.V.,

CHICAGO BRIDGE & IRON COMPANY,

and

PITT-DES MOINES, INC.

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The following abbreviations and citation forms are used:

ID-	Initial Decision
IDF-	Initial Decision Finding of Fact
CCPFO	Complaint Counsel's Proposed Final Order
CCACB-	Answering and Cross-Appeal Brief of Counsel Supporting the Complaint, filed September 10, 2003
CCPTB-	Complaint Counsel's Pre-Trial Brief, filed October 21, 2002
CX	Complaint Counsel exhibit
RX	Respondents exhibit
CPF-	Complaint Counsel's Proposed Findings of Fact, filed February 14, 2003
CRF-	Complaint Counsel's Corrected Proposed Reply Findings of Fact, filed March 14, 2003
RPF-	Respondents' Corrected Proposed Findings of Fact, filed March 27, 2003
RAB-	Respondents' Appeal Brief, filed August 4, 2003
RRCRB-	Respondents' Reply and Cross-Appeal Response Brief, filed October 10, 2003

Citations to the trial transcript include the witness name and page number: Neary, Tr.1420.

Pages of exhibits are referenced by bates number: CX212 at CB&I-PL031718.

References to investigational hearing or deposition transcripts that have been included in the trial record as exhibits include the exhibit number, the transcript page(s), the witness name, and the designation "IH" or "dep": JX 23a at 89 (Cutts, Dep.).

In camera material is bracketed and appears in bold.

INTRODUCTION

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

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

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

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

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

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

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

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

Misciting the *Microsoft* case, Respondents revive their attempt, rejected by the ALJ, to impose on Complaint Counsel the burden of proving that the proposed divestiture relief is better than some other remedy – like Respondents' proposed remedy to teach others to work in the industry if they want. Unlike in *Microsoft*, Respondents here had a full opportunity to present evidence on relief, and they did just that, as they acknowledge in their motion for directed verdict: "[i]n this proceeding, the mat[t]er of remedy was an important part of the trial on liability. Respondents

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

Nonetheless, in a new argument not presented before, Respondents now contend they were denied due process because they were not provided an opportunity to present evidence against specific provisions of Complaint Counsel's Proposed Final Order ("CCPFO"). Respondents' due process argument is without merit. Contrary to their claim of unfairness and surprise, Respondents have been afforded precisely the process due them on this issue under the Commission's Rules. Respondents knew that Complaint Counsel would seek relief to reestablish "two distinct and separate, viable and competing businesses, one of which shall be ***divested*** by CB&I," **including, *inter alia*, . . . the "replacement and reconstitution by CB&I, of all assets, . . . customer contracts, . . . personnel**, . . . and such other arrangements as necessary or useful in restoring viable competition in the lines of commerce alleged in the complaint."[1] Indeed, specific provisions of CCPFO, now objected to by Respondents, address many of the very concerns Respondents raised at trial.

Finally, Respondents argue that CCPFO is overbroad and unsupported by the evidence. As explained in CCACB and below, each provision in CCPFO is supported by the record, tailored to

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

and required by the factual circumstances of this case to ensure effective relief, and supported by Commission precedent or its institutional experience with merger remedies.

A. Complete and effective divestiture is the presumptive remedy for the illegal 2-to-1 Acquisition.

Respondents assert that divestiture is not appropriate in this case. RRCRB-45. However, as the ALJ recognized in rejecting this argument (ID-118-21), the plain language of Section 11(b) of the Clayton Act mandates that the "Commission . . . ***shall*** . . . issue and cause to be served on such person an order requiring such person to . . . ***divest*** itself of the . . . assets, held."[2] 15 U.S.C. § 21(b) (emphasis added). It is well-established that divestiture is the presumptive remedy for an acquisition found to be illegal under Section 7 of the Clayton Act. *United States v. E.I. du Pont de Nemours Co.*, 366 U.S. 316, 326-27 (1961); *United States v. Greater Buffalo Press,* 402 U.S. 549, 556 (1971); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). The Supreme Court in *du Pont* describes divestiture as "the most important of antitrust remedies. It is simple, relatively easy to administer, and sure." 366 U.S. at 330-31. Following Supreme Court precedent, the Commission has held that "it is our obligation to order divestiture of assets" to remedy illegal mergers. *Retail Credit Co.,* 92 F.T.C. 1, 164 (1978).

The Supreme Court has also stated that "**[c]omplete** divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws." *Ford Motor Co.,* 405 U.S. at 573 (emphasis added). Consistent with this precedent, the Commission has specifically held that "a presumption should favor total divestiture" versus partial divestiture "in merger cases," and that "the burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress

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[2] The Supreme Court has held that under Section 11(b), the Commission has the "duty" to order divestiture in a Section 7 case. *California v. American Stores Co*, 495 U.S. 271, 284-85, n.11 (1990).

any violation which is found." *Fruehauf Corp.*, 90 F.T.C. 891, 892 (1977) (emphasis added). Accordingly, based on the record evidence in this case and consistent with the Commission's holding in *Olin Corp.*, 113 F.T.C. 400, 619-20 (1991), the ALJ ordered divestiture of the former PDM Water Division along with the EC Division to "ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success." ID-121.

Respondents repeat their argument, rejected by the ALJ, that divestiture of the PDM Water Division is inappropriate because there is no evidence that its inclusion would assist any acquirer in being "competitively viable." RRCRB-29 & n.33. Contrary to this assertion, the ALJ found that record evidence supports inclusion of the Water Division given the close pre-Acquisition interrelationship between the PDM EC and PDM Water Divisions, and the necessity of divesting enough assets to re-create the combined divisions for the resulting entity to be competitively viable. IDF-503, 566-72; ID-121. Indeed, Respondents' counsel even conceded this very point during closing argument:

> Here, the companies have been fully integrated at the management level, at the engineering level, at the fabrication level, at the field erection level, every level, purchasing, estimating, and CBI and PDM[,] before [the Acquisition,] makes [sic]a lot more than just the tanks made by these relevant products, and if you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business.
>
> * * * *
>
> So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff. You would have to give it enough personnel so that everybody would have the expertise to do every kind of tank.

Leon Tr.8311; *see* Simpson, Tr.5706-07 ("Q. [The] company created would have to have the ability to make not just the relevant products in this case but a lot of other products; correct? A. Yes.")

Finally, divestiture relief must be ***effective*** to fully restore pre-Acquisition competition, for anything less would be a "Pyrrhic victory." CCACB-65-67. As the Supreme Court observed, "if

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

B. Respondents have not presented credible or substantial evidence that a remedy other than divestiture would be appropriate.

The Supreme Court in *du Pont* supports the conclusion that the government's choice of a divestiture remedy should prevail: "We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." 366 U.S. at 334 (emphasis added). The Commission has held that respondents' proof to rebut the presumption that total divestiture is appropriate must be "clear and convincing." *Diamond Alkali Co.*, 72 F.T.C. 700, 742 (1967). Indeed, Respondents can point to ***no case*** in the history of Section 11(b) (since 1914), where the Commission failed to order divestiture when a likelihood of harm to competition has been found. Yet, Respondents want this Commission to create a special burden for Complaint Counsel to prove every aspect of why divestiture is absolutely necessary in each case. This not only makes no sense, but it is completely contrary to case law and the plain language of Section 11(b). See, e.g., *Diamond Alkali*, 72 F.T.C. at 742 (the Commission "need not justify its order beforehand by showing" that a divestiture "will unquestionably restore competition"); Section 11(b) (Commission "shall . . . order

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

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

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

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

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

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

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

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

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

CCACB-66-68. In *Ekco Products Co.,* 65 F.T.C. 1163 (1964), confronting the issue of whether commercial meat-handling assets that the acquirer had dismantled and scrapped prevented the Commission from ordering effective divestiture, the Commission stated:

> [T]he Commission is not, as a matter of power, limited to an order divesting the precise assets acquired in an unlawful merger . . . . It may be necessary and proper to forbid acts lawful in themselves or to **compel affirmative acts** of compliance; and, if so, the Commission has the power and the duty to provide such relief.

Id. at 1215-16. (citations omitted) (emphasis added). Since divestiture of what was acquired was not a practical option (the assets had "disappeared"), the Commission held that Ekco could be ordered to "reconstitute" one of the acquired companies as a "going concern" by providing it with all the assets it would need to "be an effective competitor" in the market – Ekco would then be ordered to "divest" the reconstituted entity.[4] *Id.* at 1228-1229. In *Retail Credit Co.,* 92 F.T.C. at 163, the Commission ordered respondent to provide a suitable purchaser with copies of its current files for a period of three years, even though these records obviously were not part of the original acquisition:

> An industry does not remain frozen during the period of unlawful retention of the acquired company and divestiture of an outmoded firm with no chance of survival makes neither technological nor competitive sense. The Commission may properly order that the acquired firm be recreated in such form as would reflect the firm's probable growth, including improvements it may have added itself.

Id. at 166 (citations omitted). As in *Ekco*, the Commission determined not only that it had the power, but indeed, held that "it is ***our obligation*** to order divestiture of assets necessary to assure the viability and attractiveness to would-be purchasers of the divested entity." *Id.* at 164 (emphasis added).

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[4] *See also Crown Zellerbach Corp.*, 54 F.T.C. 769, 807 (1957)("[C]learly, the broad purpose of the statute cannot be thwarted merely because respondent has commingled its own assets with those of the acquired firm.")

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

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

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

The Supreme Court in *du Pont* made clear that in ordering relief from an illegal merger, the public interest is paramount, and the interest of the violator is not to be weighed against the public interest even if that means the violator would suffer some loss as a result:

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

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

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

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[5] "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *du Pont*, 366 U.S. at 326-27 (citations omitted).

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

RRCRB-45, 57-58. These costs would primarily be "sunk" (non-recoverable) costs: CB&I may need to make lump-sum payments to induce some employees to work for the newly created firm, and CB&I may need to make lump-sum payments to induce some customers to agree to the transfer of contracts to the new firm. RRCRB-57. However, since sunk costs do not affect pricing decisions, these divestiture costs should *not* affect the price paid by customers of CB&I or the acquirer.[7] Respondents' claim that CBI would need to raise prices in order to fund the costs of the proposed divestiture relief is also undercut by the fact that the Acquisition has been extremely profitable for CB&I: CB&I's income from continuing operations in the first nine months of 2002 increased by 73.7% over the same period in 2001. CX1588 at 3.

Having decided to fully integrate and rationalize the combined workforce of CB&I and PDM following the Acquisition, Respondents express concern that the financial incentives to convince the merged firm's employees to work for an acquirer would be so successful that this might "drain CB&I's workforce to the point that it could no longer compete in the relevant markets." RRCRB-51. Both Respondents and the acquirer may need to hire and train some replacement personnel as a result of the divestiture, but the Commission can assure, through the divestiture process,[8] that the divestiture is accomplished in a manner that assures the viability and competitiveness of both companies.

Respondents also speculate that divestiture could harm competition *if* the result is that the acquirer would be a higher-cost competitor or lack the financial strength necessary to undertake large

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

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

projects, including the ability to post performance bonds and provide liquidated damages coverages. RRCRB-45, 57-58; RAB-54. Again, the process pursuant to which the Commission supervises a divestiture assures that the acquirer has sufficient financing to operate the divested assets and maintain their competitive viability in the markets at issue, thereby achieving the goal of restoring competition.[9]

Respondents' arguments that divestiture would harm competition or customers are thus unfounded and speculative.

F. Respondents' claims of unfairness and surprise are without merit.

For the first time, Respondents contend they were denied due process because they supposedly were not given an opportunity to present evidence against specific provisions of CCPFO. RRCRB-47-49, 56. This is simply not true.[10]

As a basic principle, Respondents cannot ignore the plain language of Section 11(b) of the Clayton Act, which puts all respondents on notice that the Commission "shall" order complete divestiture in a merger case once liability is found. Moreover, at the outset of this proceeding, in accordance with Commission Rule 3.11(b)(3), the administrative complaint, issued on October 25, 2001, one year prior to the start of trial, contained a Notice of Contemplated Relief setting forth the essential parameters of divestiture and other relief that the Commission might seek if the Acquisition

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[9] *See id.*

[10] Respondents cite *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), in which the Supreme Court held that the respondent employees had a right to a pre-termination hearing but that "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 545 (citations omitted). Respondents do not claim that they did not receive a full, adversarial proceeding on the issue of their liability for the illegal Acquisition, or that the issue of what relief is appropriate once liability is found is not a matter within "the exercise of the Commission's discretion to create." RRCRB-45.

were found to be illegal. From that point on, Respondents were on notice that, if the Acquisition were found to be illegal, Complaint Counsel might seek as a remedy, and the Commission might order:

> 3. **Reestablishment by CB&I of two distinct and separate, viable and competing businesses, one of which shall be divested by CB&I, engaged** in the design, engineering, construction and sale of the lines of commerce alleged in the complaint, including all improvements to existing products and new products developed by CB&I or PDM, and **in such other businesses as necessary to ensure each of their viability and competitiveness in the lines of commerce alleged in the complaint** and each possessed, **including through divestiture, replacement and reconstitution by CB&I, of all assets,** tangible and intangible, **including but not limited to all** intellectual property, knowhow, trademarks, trade names, research and development, **customer contracts, and personnel**, including but not limited to management, sales, design, engineering, estimation, fabrication and construction personnel . . . .
>
> 4. Such other or additional relief as is necessary to ensure the creation of one or more viable, competitive independent entities to compete against CB&I in the manufacture and sale of any relevant product.

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

Complaint Counsel's Pre-Trial Brief, filed October 21, 2002, contained five pages relating to the issue of remedy, including cites to the Notice of Contemplated Relief and relevant judicial precedent. Complaint Counsel therein put Respondents on notice that they would be required to restore two vigorous and viable competitors: "In order to reestablish two competitors as they would have existed but for the acquisition, CB&I must purchase or rebuild assets and hire personnel sufficient to restore two vigorous and viable competitors in the relevant markets." CCPTB-59.

Notwithstanding their protestations, Respondents were well aware of the proposed relief. On November 13, 2002, one day after trial began, CB&I reported to its shareholders: "The FTC is seeking various remedies, including an order that would require the Company to divest sufficient assets and personnel to re-establish two distinct and separate viable competing businesses engaged in the design, engineering, fabrication, construction and sale of the relevant product lines." CX1588

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

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

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

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

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

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

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

On appeal, Complaint Counsel merely narrowed the proposed order presented to the Commission to address concerns raised by the ALJ in the Initial Decision (*e.g.,* ID-122-23; CCPFO ¶ II.F); to incorporate provisions of the ALJ Order (*e.g.,* CCPFO ¶ IV); to address Complaint Counsel's concerns regarding the sufficiency and feasibility of the relief contained in the ALJ Order (*e.g.,* CCPFO ¶¶ I.S. & II.E.; CCACB-77); to conform the requirements of the order more closely to the record evidence (*e.g.,* CCPFO ¶II.C.4.(a); CCACB-71, 73); and to make the order's terms clearer. CCACB-75-78.

For example, the ALJ rejected a provision in the proposed order submitted by Complaint Counsel that sought to transfer 45% of CB&I's full time employees to the acquirer on the grounds that at-will employees are not assets that may be divested. ID-122-23. In response, Complaint Counsel modified the provision to require CB&I merely to take actions necessary to encourage the transfer of sufficient personnel to the acquirer, including, if necessary, the payment of financial

incentives. CCPFO ¶II.F. It is indeed strange that Respondents now claim it is unfair that Complaint Counsel proposes a narrower remedy to address the arguments raised by Respondents during trial. Of course, Complaint Counsel believes that this Commission has the power to simply order a transfer of these employees back to a new PDM, and if Respondents think that is more fair,[12] we would not oppose such a remedy.

In sum, Respondents' due process argument is without merit. All Respondents' arguments on the remedy issue were explored thoroughly at trial.[13]

G. Complaint Counsel's Proposed Final Order is tailored to the facts of this case, supported by the record, and designed to ensure effective relief.

Respondents object to a number of provisions in CCPFO as "overbroad" and "unsupported by the evidence." However, each of these provisions is warranted by the factual circumstances of this case as established by the record evidence, and are included in CCPFO to ensure effective relief.

1. Requirements that CB&I take affirmative steps to assure transfer of employees to the acquirer are tailored to the facts of this case, supported by the record, and necessary for effective relief.

Respondents contend that certain provisions of CCPFO requiring CB&I to take affirmative steps to assure the transfer of employees to the acquirer are unsupported by the evidence. RRCRB-50-52. On the contrary, there is overwhelming evidence that experienced employees are crucial to

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

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

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

As discussed in CCACB, CCACB-74-75, the record demonstrates that the know-how and expertise of the former-PDM personnel contributed to PDM's competitive track record and reputation in the industry. *See, e.g.*, IDF-168, 170-71, 252, 323, 328-31, 334, 415-16, 578-79. The ALJ agreed and found that "educated, experienced, and knowledgeable employees are required to build the relevant products." ID-122. The ALJ also found that "[m]any of the contracts presently held by CB&I contain . . . *key employee provisions that require the customer to approve . . . the replacement of key employees on a project.*" IDF-580 (emphasis added). Mr. Glenn, CB&I's CEO, explained that customers demand these provisions to protect against "bait and switch" marketing practices, reinforcing the importance of experienced personnel to competition in the markets at issue. Glenn, Tr.4168-69. Respondents emphasized at trial the importance of experienced personnel:

> Q. And sir, you would agree that in order for either company to be an effective competitor they would need somebody from each discipline in each of the relevant markets to be competitive?
>
> A. They would need people competent in each of the disciplines.

Simpson, Tr.5713.

Accordingly, CCPFO ¶II.F.3. requires CB&I to provide limited financial incentives to employees to encourage the transfer of sufficient personnel to the acquirer, which will also facilitate the transfer of customer contracts to the acquirer. CCACB-74.

Respondents object that Complaint Counsel's observation that these requirements are similar to those in *MSC Software* and *ADP* is meritless because those were consent decrees, citing the ALJ at ID-123 (quoting *du Pont*, 366 U.S. at 330 n.12), and because, according to Respondents, the requirements in those decrees are less burdensome than what Complaint Counsel seeks in CCPFO.

RRCRB-51. Complaint Counsel have never contended that consent decrees are binding precedent. Rather, our point is that the Commission's institutional experience with merger remedies, including consent settlements, is available to inform the Commission's judgment as to what works in divestiture cases. CCACB-70 & n.37. To suggest otherwise would be contrary to the Commission's mission as an expert agency. Notably, the cited portion of the *du Pont* decision does not support Respondents. Instead, in that case, the Supreme Court rejected the consent decrees relied on by du Pont because the requirements were less burdensome than full divestiture, the relief the Court felt was appropriate: "Appellees rely on several Clayton Act consent decrees granting relief short of divestiture, but the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *du Pont*, 366 U.S. at 330 n.12.

Respondents' argument that providing incentives to assure that the acquirer obtains a portion of the merged firm's experienced personnel may increase CB&I's cost of doing business, RRCRB-51, is discussed above. However, it is worth pointing out that the requirement to pay an incentive equal to up to twelve months of an employee's base salary contained in CCPFO ¶ II.F.3. is not automatic. It is operative only at the acquirer's request, *i.e.,* if the acquirer experiences difficulties in obtaining transfer of sufficient CB&I employees.

2. The requirements relating to assignment of contracts are tailored to the facts of this case, supported by the record, and necessary for effective relief.

Respondents argue that the provisions of CCPFO ¶ II.C. requiring divestiture of contracts are unsupported by the evidence. RRCRB-52-56. These arguments are refuted by the overwhelming

record evidence relating to the importance of having a back-log of pre-existing work for a new entity to be competitively viable.[14] CCACB-69-73. According to Respondents' counsel:

> In order for this company, new company, to work, it has to have work in the system. You can't just create it and then say, go out and find work, because it takes sometimes six months to a year for a job once you find an opportunity for it to come in. Everybody recognizes that.

Leon, Tr.8316-17. This assessment is confirmed by the witness examination conducted by Respondents' counsel at trial. *See* Glenn, Tr.4168-70 (CB&I would have to obtain customer permission to assign contracts that have a non-assignability clause, but CB&I can subcontract work). Respondents nailed home, in their examination of Dr. Simpson, that incentives may be necessary to obtain assignment of contracts so as to assure the viability of the acquirer:

> Q. And sir, you would agree that this newly created company would have to have a lot of work backlog in order to even be viable in the first instance?
>
> A. I think they would need a number of jobs to be viable.
>
> Q. You couldn't just say here's all the employees, here's all the equipment, here's the fabrication facilities, now go out and find work without any work being already in the system there, could you?
>
> A. . . . the company would be much stronger if they had a volume of business.

Simpson, Tr.5707-08.

> Q. So it could take zero to two years for this new company to get any work in the door if they start with no work backlog; correct?

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[14] The Supreme Court decisions in *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969), and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 138 (1967), stemmed from an initial decision by the Court in 1964 in the related case of *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), where the Court reversed the district court's decision and directed divestiture. The two subsequent decisions relate to the district court's continued failure to carry out the Court's instructions and the Court's further remands "for additional proceedings" consistent with its original instructions to divest. Thus, contrary to Respondents' portrayal, these decisions do not support Respondents' contention that "further proceedings on remedy" are appropriate in this case. RRCRB-52 n.60.

> A. I think that's correct, yes.
>
> Q. And that would greatly impact on the viability of this company; correct?
>
> A. I think it would, yes.
>
> Q. Now, sir, in order to get work backlogged to the new company, customers would need to agree to waive their nonassignability clauses in their contracts and have work assigned to this new entity; correct?

Simpson, Tr.5708-09.[15]

Virtually all of the contracts that CB&I acquired as part of the acquisition have now been performed. CCACB-72. Limiting divestiture to only what remains of the contracts acquired from PDM would render any remedy a divestiture in name only and would leave the new company with almost no ongoing business. The Commission has ample authority to order divestiture of after-acquired contracts, CCACB-65-68, and has done so in numerous past litigated cases.[16] The Commission should do so here as these provisions are necessary for effective relief.

Respondents incorrectly assert that CCPFO requires CB&I to "divest a third of its contracts outside the U.S." RRCRB-48; *see* RRCRB-46. CCPFO does no such thing; it simply requires that the contracts transferred and assigned to the acquirer have a total monetary value of no less than 33% of the combined dollar value of CB&I's tank business customer contracts and no less than 48% of the combined dollar value of CB&I's United States contracts. CCPFO ¶ II.C.4.(a). Respondents may satisfy this obligation entirely from CB&I's United States contracts. Moreover, prior to the

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[15] The last question is a question of law, not answered by Dr. Simpson, but which is answered by CCPFO ¶ II.C.

[16] In *Goodrich* and *Occidental* the Commission ordered respondents to assign to the acquirer supply agreements and sales agreements relating to relevant product produced in, or supplied from the divested plants. *B.F. Goodrich*, 110 F.T.C. at 364; *Occidental Petroleum Corp.*, 115 F.T.C. 1010, 1292 (1992). In *HCA*, the Commission ordered respondent to divest or terminate management contracts. *Hospital Corp. of America*, 106 F.T.C. 361, 521 (1985).

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

Finally, Respondents object to use of Respondents' pre-acquisition respective revenues as a benchmark for determining the portion of the merged firm's current contracts that should be assigned to the acquirer. RRCRB-54-55. In attempting to reestablish the competition that existed prior to the merger it is appropriate to look at CB&I's and PDM's respective positions in 1999, the last full year before Respondents entered into their acquisition agreement. In the summer of 2000, Respondents signed the deal and no longer aggressively competed against one another. Contrary to Respondents' arguments, there is no reason to believe that CB&I and PDM would not have captured similar shares of revenues in subsequent years if the acquisition had not transpired, or if PDM's EC and Water Divisions had been acquired by another entity. As the ALJ properly found, PDM was CB&I's closest and most significant competitor for many years prior to the acquisition. IDF-74, 79-82, 228-232, 269, 277-291, 363, 376-406, 483-487.

Respondents also argue that to the extent the merged firm's current revenues exceed Respondents' combined 1999 revenues, the acquirer should not share in this growth. RRCRB-55. But there is no reason to believe that the sales growth enjoyed by the merged firm since the Acquisition would not have been experienced by the two firms if they had continued to compete. The law is clear that the Commission's divestiture order may take into account a firm's probable growth that would have occurred, absent the merger. *Ekco Products,* 65 F.T.C. at 1217.

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

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

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

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

Waiver of non-compete and confidentiality agreements may be necessary to facilitate transfer of employees to the acquirer, and is very similar to provisions contained in the *MSC Software* and *ADP* consents.[17] An expert Monitor would be of invaluable assistance in helping Complaint Counsel *and* Respondents assure that the scope of such a waiver is appropriate to accomplish its purpose.

4. Transitional assistance and a monitor are necessary for effective relief.

Respondents argue that provision of transitional technical assistance to the acquirer is unnecessary and can be obtained elsewhere. RRCRB-57. Respondents' objections miss the point, explained in CCACB: PDM's know-how resides in the PDM personnel that have now been absorbed into CB&I's combined workforce. Consequently, CB&I is in a unique position to provide to the acquirer short-term technical and administrative assistance as may be requested by the acquirer. CCACB-75-76.

Further, Respondents argue that appointment of a Monitor to oversee the divestiture is unnecessary. RRCRB-57 n.66. Respondents' counsel dispelled this assertion during the trial:

> 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] trustee to oversee splitting up CBI into two companies . . . [must have] competence to act as the person who would need to look at all the practical factors and realities in order to accomplish [the split]?

CB&I Counsel, Tr.5715. As Respondents appear to acknowledge, the need for a Monitor is particularly great in this case given the commingled assets and operations Respondents must divest

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[17] *MSC Software Corp.*, Docket 9299, Decision and Order ¶ V.C.3., November 1, 2002 ("Respondent . . . shall eliminate any confidentiality restrictions that would prevent employees who accept employment with the Acquirer from using or transferring to the Acquirer any information or Intellectual Property that is in the employee's memory or that is part of the Licensed Rights."); *Automatic Data Processing, Inc.*, 124 F.T.C. 456, 475-76 (1997) (Order ¶ VI) ("Respondent . . . shall remove any non-compete or confidentiality restrictions with respect to employment of such employees by the Acquirer.").

and the difficulty of assuring that CB&I provides to the acquirer all intellectual property to which it is entitled. Thus, a Monitor is necessary to assure effective relief.

II. CREDIBLE AND PROBATIVE EVIDENCE DEMONSTRATES ACTUAL ANTICOMPETITIVE EFFECTS OF THE ACQUISITION.

Substantial evidence of post-acquisition anticompetitive effects presented by Complaint Counsel reaffirms the ALJ's conclusion that "CB&I has the ability to exercise market power as a result of its acquisition of the only other competitor that had constrained CB&I." ID-114. This evidence, detailed in Complaint Counsel's briefs and findings, shows that on separate TVC projects for Spectrum Astro and TRW, CB&I communicated with PDM or another competitor regarding the customer's request for a bid, and in each case CB&I officials proposed coordinating on the bid. CPF-1165-1180 and CCACB-53 (TRW); CPF-1119-1164 and CCACB-52-53 (Spectrum Astro). Further, examination of pricing on at least eight different projects shows that customers have incurred higher prices for the relevant products as a result of the Acquisition. CPF-777-830 and CCACB-53 (Williams); CPF-1181-1220 (**[ ]**); CPF-831-928 and CCACB-55-56 (BP); CRF-7.106 and CCACB-53-55 (CMS Energy); CPF-929-954 and CCACB-55 (MLGW); CPF-1053-1086 and CCACB-56-58 (Praxair (2 projects) and Linde). The harm to competition is not limited to those customers who were forced to pay the higher price, but even more significantly is reflected in the dead weight loss resulting from customers such as **[ ]** and Linde who were forced to do without the product because the merged firm's price, following the Acquisition, was too high,[18] and

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[18] Judge Posner "identifies the cost of monopoly with the output that the monopolist does not produce, and that a competitive industry would." Richard A. Posner, ANTITRUST LAW 13 (2001); *see id* at 12.

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

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

A. Following the Acquisition, CB&I asked Howard Fabrication to coordinate on a bid to TRW for a TVC.

Credible trial testimony from the president of Howard Fabrication, a manufacturer of small thermal vacuum chambers, establishes that although Howard's president informed him that Howard had presented a proposal to TRW for the job, CB&I's Business Development Manager ("BDM")[20] nevertheless asked Howard to coordinate on making a bid or a price quote to TRW.[21] IDF-449-50; Gill, Tr.247, 374; CPF-1173-77. Prior to the meeting between CB&I's BDM and Howard's president, TRW sought bids from both CB&I and Howard for its new TVC to "help maintain the competitiveness . . . within the marketplace." Neary, Tr.1444-45. At the meeting, Howard's

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

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

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

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

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

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

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

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

But harm to Spectrum Astro did not end with the Acquisition. Following the Acquisition, CB&I took advantage of project delay to increase the price of the project by 11.7%. CPF-1140-1154. The customer agreed with Respondents' counsel's assessment that CB&I simply saw an opportunity to "stuff some extra profit into the work," because, following the Acquisition, CB&I was not satisfied with the margin it had included in its pre-acquisition bid. Thompson, Tr.2119-121; Scully, Tr.1179-81; CPF-1154-58. Respondents' revised claim that the price increase was "based on scope changes in the project" (RRCRB-37), is not supported by the record. CPF-1146-164.

C. CB&I increased price to [ ] following the Acquisition.

None of Respondents' TVC customers escaped a price increase following the Acquisition.

simply asked CB&I, following the Acquisition, to restate the price for the same TVC for which, prior to the Acquisition, PDM had provided a fixed, firm price. CPF-1207-220. As successor to PDM, CB&I had all the files and data relating to PDM's fixed, firm bid, and the same personnel who worked at PDM now worked for CB&I. However, because PDM's bid had expired, CB&I was not obligated to honor the price quoted by PDM, and CB&I could adjust the price to account for inflation. CPF-1211-12. Instead, CB&I increased the price by **[ ]**, seizing on yet

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

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

D. Respondents repeatedly increased the price and margin of the Cove Point LNG tank after signing the Acquisition agreement.

Respondents concede that the Cove Point LNG margin increased substantially following the Acquisition, but attempt to explain this as variously attributable to the difference between projected margin and actual margin, the difference between margin and profit, cost savings realized by CB&I from project delay, and the difference in the size of the tank purchased by the customer and that specified in the initial bid. RRCRB-38. Respondents' excuses for the margin increase fail to explain why, in the post-acquisition competitive environment, instead of passing through to the customer the cost savings CB&I realized from the project delay, CB&I used the project delay as an excuse to increase the price and the margin. CPF-812-13, 910. Respondents' distinction between price and margin does not explain Respondents' price increases. Respondents' escalation of price, profit ***and*** margin of the Cove Point LNG tank, since they signed the Acquisition agreement, is well documented. *See* CPF-825-830.

The fact that the customer elected to purchase a larger tank than that for which Respondents submitted competing firm bids in March 2000 (CPF-779-788, 887-897) does not explain the increase in margin. PDM's analysis of the two tanks showed no difference in percent margin and only a 9% difference in price.[23] CPF-792-94, 900-01. In fact, PDM increased the price and margin of both size

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

tanks immediately after signing the Acquisition agreement with CB&I. CPF-788-795, 907-08. Respondents' only explanation for PDM's September 2000 price increase is that it was characterized by PDM as a budget estimate and therefore is irrelevant. But PDM had in September 2000 the same information regarding the smaller tank that it had in March 2000 when it submitted its firm bid. The only change was that Respondents had signed the Acquisition agreement and that change in ownership of the Cove Point facility gave Respondents an opportunity to rebid. CPF-788-793. Moreover, Respondents offer no explanation for PDM's further increase in price and margin when it submitted its firm, final bid to the customer in November 2000, a bid that even PDM's account manager for the project characterized as "fat" and "excessive." CPF-796-811, 823, 825-26, 909.

E. Following the Acquisition, Respondents used the inflated Cove Point price to increase the margin and price quoted to MLGW.

Respondents argue that the price quoted to MLGW, following the Acquisition, cannot be compared to the price paid by MLGW when Respondents competed for a similar LNG tank at the same site, because the earlier price was competitively bid, and the budget price might be revised based on project details the customer would later provide.[24] RRCRB35-36. Respondents' assertions fail to explain why CB&I included a **[ ]** profit margin in the its post-Acquisition quote although CB&I knew from experience that it only got an **[ ]** margin when it competed against PDM. CPF-930-954. Further, Respondents fail to dispel the fact that just before giving the 2002 price quote to the customer, CB&I increased the price and margin **[ ]** to conform to the inflated price

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[24] The customer requested the price quote from CB&I because "[it is] the only one who can give a reliable answer to the question, how much [the new LNG tank] would cost." Hall, Tr.1827-28. CB&I had substantial information regarding the proposed tank because it had built the same size tank at the site and had detailed costs for the previous tank.

PDM obtained for the Cove Point LNG tank, notwithstanding that CB&I determined that it could have done the job for less with a **[ ]** margin. CPF-929, 948, 805-07, 816-821.

F. The BP projects provide credible evidence of anticompetitive effects.

BP's decision to sole-source with CB&I its three proposed LNG tank projects in the United States confirms the loss of competition resulting from the Acquisition. CPF-831-82. Inexplicably, Respondents' economic expert elected to exclude from his "critical loss" analysis these CB&I wins as well as the other sole-source agreements awarded to CB&I since the Acquisition. CPF-636, 638. Respondents' reliance on Mr. Sawchuck's testimony is misplaced (RRCRB40); the testimony is at odds with BP's internal documents (IDF-112-13) and merely confirms that BP values its relationship with CB&I. Following the Acquisition, CB&I's CEO Gerald Glenn made a personal request to BP's senior executive, for United States LNG, to provide the very statement made by Mr. Sawchuck in his deposition. CX691 at BP 01 033; CPF-864-67. In forwarding Glenn's request to Mr. Sawchuck, BP's executive noted that the request is "a sticky one." *Id*.

Respondents urge the Commission to discount **[ ]** analysis of CB&I's, PDM's and Whessoe's price quotes because the document, RX157, does not explain the circumstances under which the price quotes were provided. RRCRB-40-41. However, Respondents elected to offer no other documents or other evidence to further explain CB&I's and PDM's price quotes to **[ ]**, and Mr. Scorsone testified that BP's pricing model is "very, very accurate." Scorsone, Tr.4995-96.

G. The Acquisition enabled CB&I to increase price to CMS.

Contrary to Respondents' assertion (RRCRB-38), CB&I's price increase to CMS was presented in detail to the ALJ. CRF-3.470-3.483, 7.106 and record evidence cited therein. Despite Respondents' reassertion, the margin cited by Respondents for the overall project (RRCRB-39 n.45), does not account for whatever profit CB&I loaded into the inflated $35 million price tag for the LNG

tank. CRF7.106; CCACB-54. Respondents question the very comparisons [

] – the final price paid to CB&I for the Cove Point LNG tank and [ ]. CRF-7.106. But Respondents themselves argued that [

] performing these same comparisons. RPF-3.473-75; CRF-3.473-75. In addition to documenting a price increase by CB&I following the Acquisition, the [ ] compare actual prices and budget prices in making purchase decisions.

H. CB&I increased price to Linde and Praxair following the Acquisition.

Linde concluded that CB&I's price quote following the Acquisition was 8.7% higher than what PDM would have charged, based on Linde's highly accurate model, which it routinely used to distinguish between reasonable and unreasonable price quotes from tank suppliers. CX-1584; Fan, Tr.965-66,1002-05, 1009-012; CPF-1058-070. This difference was statistically significant (Fan, Tr.1005, 1009-011) and cannot be explained by any alleged difference between budget prices and firm prices because Linde's model took into account corresponding price quotes from PDM and CB&I. Fan, Tr.965-67, 970, 983-84, 1023; *see* CX1584. Respondents' observation that CB&I's price was higher than PDM's price both before and after the Acquisition (RRCRB-37 n.43) says little about the loss of competition. Prior to the Acquisition, Linde and Praxair bought from PDM because it offered the best value. The Acquisition eliminated this alternative. Respondents' argument that the price CB&I quoted to Linde should be ignored because it is merely a budget price overlooks the fact that Linde requested a "close to firm" price (CPF-1061) and that two months later CB&I provided, in a firm bid to Praxair, virtually the same price for essentially the same size tank for the same location. CPF-1071-76.

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

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

Complaint Counsel ask that the Commission consider Complaint Counsel's pedagogical-device summaries, their underlying exhibits, and the proposed findings based thereon: CPF-801, 825, 826, 827, 828, 829, 830, 869, 882-896, 902-911, 912-928, 935, 1043-1052, and CRF-7.106. The graphs include detailed citations to the record for the data contained therein. Certain proposed demonstrative exhibits corresponding to some of the graphs were used during the cross examination of Dr. Harris and some of these were marked or modified by Dr. Harris. CX1760, corresponding to CPF-882, was received in evidence after Dr. Harris substituted the abbreviation "WGT" for the name "Whessoe" appearing in the legend of the graph. RX 157 at **[ ]** 02 002; see Harris, Tr.8035-42. Based on this difference between CPF-882 and CX 1760 (*e.g.,* "WGT" instead of "Whessoe"), Respondents argue that CPF-882 is misleading and should be stricken. RRCRB 42, n.50. After CX1760 was received in evidence, Dr. Harris refused to acknowledge that the prices recorded in CX1761, corresponded to the prices on CPF-826. Harris, Tr.7837-47, 8043-8109. As alluded to by Respondents (RRCRB-42), the ALJ rejected CX1761 because "[t]he witness does not agree with what's depicted on this exhibit." Chappell, Tr.8108. This is not a basis for disregarding graphs that accurately depict numbers contained in cited record evidence.

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

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

III. CONCLUSION

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

Dated: October 24, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Dated: October 24, 2003