UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

To: Commission

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' PETITION TO RECONSIDER

Summary

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

Liability Issues

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

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

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

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

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

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

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

Glenn, Tr. 4380:14-25. CB&I's predicted decision to maximize profits rather than maximize the number of projects it performs is neither grounds for reconsideration nor a reason to reopen the record.

Further, what respondents offer, to the extent it is proof of anything, is evidence that tends to suggest that initial steps toward entry have been taken, as was to be expected. Entry in this business is not getting one contract, but having the capacity profitably to manage and fulfill several contracts. Entry on a scale that will restore the pre-merger status quo requires even more than that, as the Commission's opinion clearly recognized.

No new questions are raised by respondents' petition.[1] Both the Administrative Law Judge ("ALJ") and the Commission already have considered and rejected respondents' arguments that foreign entry is a meaningful constraint on CB&I and that divestiture is inappropriate. Indeed, the market dynamics outlined in the Commission's decision anticipate the market changes on which respondents' petition is partially based.[2]

(3) The Commission cannot re-open the record today without assuming that the record must be continuously and indefinitely reopened.

If respondents' petition is sufficient to reopen the record on liability, then as soon as any other firm receives another LNG contract, it will be time to reopen the record again. Moreover,

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[1] The only issue that respondents have not previously argued before this Tribunal relates to its rights to the "CB&I" and "Chicago Bridge" names. Respondents affirmatively support the clarification of the Order proposed in Complaint Counsel's Petition for Reconsideration to Clarify Respondents' Obligations as to the Pitt-Des Moines and CB&I Corporate Names, filed January 31, 2005. Respondents' Petition at 17.

[2] As respondents made no effort to inform the Commission of these developments before the Commission issued its decision and order, "respondent[s are] now hard pressed to argue that the [decision and] order raises questions upon which [they] had no earlier opportunity to argue before the Commission." *Indiana Federation of Dentists*, 101 F.T.C. 718 (1983) (interlocutory order). *See Sterling Drug, Inc.*, 102 F.T.C. 1329 (1983) (petitioner is "not entitled to a second opportunity to raise [its] arguments now" when it failed to act with due diligence).

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

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

Remedy Issues

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

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

A. Legal Framework

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

opportunity to address the issue in a meaningful way earlier in the case. *American Medical International, Inc.*, 104 F.T.C. 617, 619-21 (1984). The issue had never been briefed or raised at trial and had only been mentioned, in general terms, at oral argument. *Id.* At the same time, the Commission denied reconsideration of the prior approval provision of the Commission's order, where the petition "reasserts an argument already presented to, and rejected by, the Commission." *Id.* at 622; *see Holiday Magic, Inc.*, 85 F.T.C. 19, 20 (1975) (a motion for reconsideration "entirely fails to meet the requirements" of Rule 3.55 where respondent had "ample opportunity . . . to brief the issues now raised" and "the Commission has fully considered in reaching its final decision the arguments raised by counsel in the motion to reconsider").[3]

Where a petitioner has an earlier opportunity to introduce recent factual developments, the Commission will not permit the record to be reopened. *Novartis Corporation, et al.*, 128 F.T.C. 1 (1999) (Order Modifying Order, Denying Petition for Reconsideration, and Denying As Moot Application for Stay) (denying petition to reconsider additional evidence where the petitioner "could have introduced the recent factual developments upon which it now relies before this late stage."). *See Sterling Drug, Inc.*, 102 F.T.C. 1329 (1983) (interlocutory order) (denying respondents' petition to reconsider Commission's order where respondents had adequate opportunity to argue the issue during appeal).

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[3] In *Nat'l Ass'n of Women's and Children's Apparel Salesmen*, respondents sought further hearings under Rule 3.55, alleging that the industry had changed. The Commission denied the petition, noting that respondents had raised this issue already at oral argument before the Commission, and in respondents' brief. "Accordingly, respondents have had opportunities and have made use of such opportunities to raise this point. We were not, and are not now, persuaded that respondents have made a showing on alleged changes such as would justify holding further hearings in this case or reconsideration of the Commission's decision and order." *Nat'l Ass'n of Women's and Children's Apparel Salesmen, Inc.*, 78 F.T.C. 1584, 1587 (1971) (interlocutory order).

Here, respondents' assertions that recent developments in the LNG tank market are sufficient to restore competition are identical to the arguments the Commission has considered extensively in its Opinion, and has rejected. Opinion and Order of the Commission ("Op.") at 63-66 (Jan. 5, 2005). *Accord Ash Grove Cement Co.*, 86 F.T.C. 606, 607 (1975) (denying petition for reconsideration where respondent "had an opportunity, which it exercised" to argue the same issues it addressed in its petition for reconsideration). Moreover, although the developments now recounted by respondents extend over a two-year period since close of the record, respondents have provided no justification for their delay in notifying the Commission of these developments until only after the issuance of the Commission's decision unfavorable to them. Respondents fail to meet the legal standard for demonstrating that reconsideration is warranted. Accordingly, respondents' petition must be denied.

B. Respondents' Petition Raises No New Questions.

Respondents have already argued previously in this proceeding that demand for LNG projects is increasing. Indeed, Complaint counsel acknowledged that there has been an increase in new LNG projects.[4] Both parties elicited testimony at trial that numerous LNG tank projects were in various stages of planning or development to serve the United States.[5]

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

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

Respondents have already argued that, as demand for LNG increases, foreign conglomerates and other competitors have entered the LNG market. One of the examples of entry offered by respondents at trial is the Freeport LNG project.[6] In their appeal brief to the Commission, respondents asserted repeatedly that "the relevant markets have changed dramatically, as numerous strong competitors have entered the relevant markets."[7] Respondents again argued that "the market has changed" at oral argument: "There's been more demand, particularly in LNG. There's been demand that global companies with the huge reputations and the huge backing would come in, and they've been accepted by these customers." OA Tr. 27:14-20.

The Commission considered respondents' arguments and rejected them, finding that, even if global companies were able to win one LNG project, such entry was not a meaningful constraint. Moreover, the developments relied on by respondents in their petition confirm the accuracy of the Commission's market findings. Indeed, these developments were predicted by

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

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

Complaint counsel's economic expert Dr. Simpson, who testified:

> If you have an anticompetitive merger where you have the two strongest competitors in a market merge, then that merged firm could increase price until firms that previously had been fringe competitors begin to serve as a constraint. When it increases price, some of these fringe competitors begin to make sales, but ... the fact that the fringe competitors make sales at the higher price is not sufficient to restore the premerger competitive environment.[8]

Simpson, Tr. 3151-2; CPF 296.

The alleged award of a few contracts to LNG tank suppliers other than CB&I is not evidence that CB&I lacks market power; rather, it is the result of CB&I's exercise of market power following the Acquisition. *See* Complaint Counsel's Answering and Cross Appeal Brief ("CCACB") at 8-10, 35, 49-56, 58-60 (filed Sep. 16, 2003). CB&I can outbid other suppliers, but maximizes profits by exercising self restraint.[9] CB&I's CEO outlined this profit maximization strategy during a report to CB&I's investors:

> And we think that, short of somebody coming in, which they do, and just taking a big dive on the price, that we can win the work every time technically. And if they want to dive in and take the work for less than they can execute it for, that's fine, we'll just sit and watch them go out of business too.

Glenn, Tr. 4380:14-25.

Even a monopolist does not maximize profits by setting its price at a level that assures that it will win every award.[10] Instead, CB&I has adopted a strategy of tying its engineering

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[8] Professor Posner has observed that "the fact that there may have been a number of new entrants into a market in the recent past may indicate only that the sellers in that market were charging such a high price that they attracted firms which would not have entered the market at the competitive price." Richard Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 50 (1976).

[9] Studies of dominant firm strategy have observed that most dominant firms find it more profitable to share the market with new entrants rather than lowering price to the competitive level to drive out entrants. Richard Posner, ANTITRUST LAW 73, n.31 (2d ed. 2001).

[10] D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION 89 (3rd ed. 2000) ("A monopoly maximizes its profits rather than its revenues (just as a competitive firm does).

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

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

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

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

C. Respondents Had Ample Opportunity to Present Factual Developments to the Administrative Law Judge and to the Commission.

Most of the extra-record facts now asserted by respondents were known to them long ago and could have been presented previously by a simple motion to reopen the record. Respondents had the opportunity to file a motion to reopen the record, pursuant to Rule 3.51(e),[12] before the ALJ issued his Initial Decision on June 12, 2003. Respondents acknowledge that "[s]hortly after [February, 2003] CB&I learned that Sempra had been unable to complete the negotiations for the [Hackberry] EPC contract with Skanska, and would re-bid for an EPC contractor to perform on a turnkey basis." Declaration of Michael E. Miles ("Miles Dec.") ¶ 5. Instead of filing a motion with the ALJ to reopen the record to reflect the news that CB&I had been given yet another chance to bid for the Hackberry LNG EPC contract, respondents remained silent and stuck with their argument that CB&I had already lost the Hackberry project to Skanska Whessoe.

Respondents had another opportunity to move to reopen the record prior to the oral argument before the Commission on November 12, 2003. Respondents could have filed a

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services, because Freeport LNG was unwilling to accept CB&I's condition that it negotiate a contract exclusively with CB&I for the entire project. Mr. Glenn accurately predicted that CB&I's choice not to provide FEED engineering services increased the likelihood that if the Freeport project proceeded, it might be contracted to someone other than CB&I. Glenn, Tr. 4232:23-4233:2. Respondents acknowledge that Zachry's involvement in the FEED and EPC stages of the Freeport LNG Project gave Tachnigaz/Zachry an advantage in the tank bid for the project that Technigaz/Zachry would not otherwise have had. Miles Dec. ¶ 15. Respondents further acknowledge in their petition that CB&I conditioned provision of FEED technical services for Cheniere's Corpus Christi and Sabine Pass, Texas, LNG import terminals on "Cheniere's commitment to negotiate exclusively with CB&I for the full EPC contract for each project." Respondents' Petition at 9.

[12] Rule 3.51(e) expressly provides: "At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence." 16 C.F.R. § 3.51(e).

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

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

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

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

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

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

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

] Attachment A.[16] [

] Shortly thereafter Skanska sold Skanska Whessoe to Al Rushaid Investment Group of Saudi Arabia. Attachment B.

Even after oral argument, but prior to issuance of the Commission's Decision and Order, respondents could have applied, under Rules 3.51(e) and 3.54(a), to supplement the record to add specific probative and non-cumulative evidence, provided they acted with due diligence.[17] However, respondents again passed on the opportunity to inform the Commission of developments concerning the LNG tank market, the Hackberry project, and Skanska Whessoe's competitive significance.

Not wishing to disturb the impression left in the record that CB&I was out of the running for the Hackberry LNG project, respondents instead sat silent for two years following close of the record and gambled that the Commission would be persuaded by respondents' story that CB&I "lost" the Hackberry LNG project to Skanska Whessoe. Only after the Commission

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

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

issued its Decision and Order did respondents decide to seek to reopen the record to present their selective account of competitive developments in the LNG tank market since the close of the record over two years ago.

II. EVEN IF RESPONDENTS HAD TIMELY FILED THEIR PETITION, THE ADDITIONAL EVIDENCE IS NOT PROBATIVE AND IS PREJUDICIAL.

A. The Additional Evidence Is Not Probative.

The Commission explicitly considered the possibility that foreign LNG constructors would gain some U.S. LNG projects in the post-merger market. The Commission nonetheless found, considering the totality of circumstances, that the Acquisition substantially lessened competition in the market. Respondents' "new" evidence establishes nothing unexpected, and nothing that refutes the Commission's finding of a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Four years after the Acquisition, contracts to construct an LNG tank in the United States have been awarded to suppliers other than respondents for the first time, but it will be several more years before the tanks are completed and the suppliers can determine whether the project was profitable or unprofitable. And several more projects must be completed before any of these suppliers can credibly claim to have a demonstrated track record in the United States LNG tank market.[18]

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[18] Slow entry is not sufficient entry. *FTC v. Elders Grain, Inc.,* 868 F.2d 901, 905 (7th Cir. 1989) (where entry into the industry takes "three to nine years," entry is "slow" enough that "colluding sellers need not fear that any attempt to restrict output in order to drive up price will be promptly nullified by new production"). Entry must be *timely, i.e.*, normally within two years. *Merger Guidelines* § 3.2; *see United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1080 (D. Del. 1991) ("a two year time frame is an appropriate measure of the time period in which significant anticompetitive harm can occur in the absence of entry"); *U.S. v. Ivaco, Inc.*, 704 F. Supp. 1409, 1420 (W.D. Mich. 1989) (three to five years is too long to "pose a significant restraint to price increases"); *FTC v. Bass Brothers Ents.*, 1984-1 Trade Cas. ¶ 66,041 (N.D. Ohio 1984).

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

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

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

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

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

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

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

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

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

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

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

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

CB&I and PDM had continued to compete. A consultant to the Hackberry LNG terminal project testified: "We had concerns that if we do not have a domestic tank price for that project that the prices that the client would receive for those tanks would be higher." Price, Tr. 622:17-20; Op. at 59.

Respondents acknowledge that the Hackberry "tank contract went with the EPC contract" (Miles Dec. ¶ 10), and respondents have presented no information suggesting that CB&I offered to provide its LNG tanks to Aker Kvaerner for inclusion in Aker Kvaerner's EPC bid for the Hackberry Project. Nor did respondents submit information related to the costs and pricing of the LNG tanks for this project; it is possible that the price offered by CB&I for the EPC contract for the Hackberry Project may have exceeded the price offered by Aker Kvaerner/IHI despite CB&I having a substantially lower cost than IHI for the LNG tanks.[22]

In the absence of meaningful competitive pressure from a similarly low-cost competitor, CB&I's cost advantage in supplying LNG tanks does not mean that CB&I will choose to price the LNG tanks below the cost of its next lowest competitors. *See* Glenn, Tr. 4380:14-25; CCAB at 49-60. That is why meaningful competition requires restoration of a low-cost competitor similarly situated to CB&I and PDM.

The facts asserted by respondents do not suggest that "entry into the market is so easy that [respondents], after the merger, . . . could not profitably maintain a price increase above

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

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

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

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

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

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

they authored,[24] and even disavowed Mr. Miles' attempt to coordinate on a bid with an alleged competitor.[25] Now respondents ask the Commission to rely on their competitive insights, claiming that these managers are "intimately involved in the ongoing competition and negotiations for U.S. tank construction projects." Respondents' Petition at 12.

III. RESPONDENTS FAIL TO SHOW NEW QUESTIONS RAISED BY THE FINAL ORDER UPON WHICH THEY HAVE HAD NO OPPORTUNITY TO ARGUE.

The record in this proceeding shows that respondents have had ample opportunity to argue the issues presented by the remedial provisions in the Final Order, which they now request that the Commission reconsider. Substantial evidence, as found by both the Commission and the ALJ, supports the provisions to which respondents object. Respondents thus present no valid grounds to support reconsideration of the provisions of the Final Order, and reconsideration is not warranted.

A. Respondents Present No New Questions Raised by the Final Order upon Which They Have Had No Previous Opportunity to Argue.

Respondents have been on notice from the outset of this proceeding that the ultimate relief contemplated included precisely what is now required by the Final Order. The Notice of Contemplated Relief contained in the Commission's Administrative Complaint makes clear that respondents have been on notice, since service of the Complaint, that:

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

[24] Respondents even berated Complaint counsel's economic expert for relying on competitive analyses prepared by CB&I's business development managers: "Q: Do you know that a business development manager is the lowest-level sales title within the CBI organization? / A: I did not know that." Simpson, Tr. 3942.

[25] *See* OA Tr. 69:11-17 (Robertson) ("Mr. Mile[s], the same guy -- they walk away from him now. They wouldn't bring him at trial even though I kept pointing my finger at him. They wouldn't bring him in here. Mr. Mile went out there and offered to coordinate on the next bid with the so-called entrant."); CCACB at 48-49.

record and is necessary and appropriate, including, but not limited to:

> 1. An order to cease and desist from any action to effect the acquisition or continued holding by CB&I of *any assets or businesses of PDM*.
>
> * * * *
>
> 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, and such other arrangements as necessary or useful in restoring viable competition in the lines of commerce alleged in the complaint.
>
> 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, October 25, 2001 (emphasis added). Respondents cannot credibly profess surprise that the Commission's Final Order implements the very relief noticed by the Commission at the time the Complaint issued. Indeed, at trial, respondents questioned witnesses regarding the kind of relief now embodied in the Final Order. Bryngelson, Tr. 6155-56 ("Q. Okay. If the FTC is successful in breaking up CB&I into two separate companies"; "Q. If CBI were split in two"). At closing argument before the ALJ, respondents acknowledged that "[n]o one disputes that the FTC has the power . . . to enter an order breaking up CBI." J. Leon, Tr. 8311.

Respondents have had ample opportunity throughout this proceeding to present evidence and argument on the contemplated ultimate relief, and they did just that. Respondents argued against the imposition of the kind of relief now ordered by the Commission in their brief to the

Commission on appeal from the Initial Decision. RAB at 53-54; *see id*. at 56 ("no evidence that creating an independent company from the ribs of CB&I would be practical, desirable or effective"; "any evidence showing that customers would favor disassembly of CB&I."). Respondents revealed that they were well aware of the kind of relief the Commission might order if it found a violation when they argued to the Commission, during oral argument, that "to take the company and break it in half is not the best thing to restore competition . . . . ." OA Tr. 87:16-18.

Respondents have not prevailed in their repeated arguments throughout this proceeding that something less than complete and effective divestiture relief will restore the competition lost from CB&I's acquisition of PDM's Engineered Construction ("EC") and Water Divisions, and they raise no new questions in their petition that were not fully considered by the Commission in its determination to enter the Final Order.

B. The Final Order Appropriately Requires Divestiture Designed to Restore Fully the Competition Eliminated by CB&I's Acquisition of PDM's EC and Water Divisions.

Respondents protest that the Final Order expands on the remedy proposed by the ALJ and requested by Complaint counsel (Respondents' Petition at 13-14), failing to acknowledge the Commission's role as the ultimate fact-finder and decision-maker in this proceeding. The Commission is not bound by the specific form of relief proposed by either the ALJ or Complaint counsel.[26] More importantly, the provisions of the Final Order flow from and are supported by

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

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

the Commission's findings and conclusions, and are consistent with the Notice of Contemplated Relief and with the Initial Decision and relief entered by the ALJ, as augmented by Complaint counsel's proposed order.

Respondents also assert that the remedial provisions of the Final Order are inconsistent with the Commission's discussion of relief in its Opinion. Respondents' Petition at 13. But respondents acknowledge that:

> [t]he Commission repeatedly affirmed that its purpose in creating a remedy was "to replace the competition lost from CB&I's acquisition of PDM." Op. at 93; *see also* Op. at 94 (relief should be designed to "*eliminate the effects* of the acquisition offensive to the statute"); Op. at 97 (monitor trustee must determine whether and to what extent technical services are "necessary to *restore the competition* lost through the acquisition.") (emphasis added); Op. at 99 ("[T]he Order should thus insert a competitive acquirer into the market and help *replicate the competition* lost from the acquisition.") (emphasis added).

Respondents' Petition at 14-15. The remedial provisions of the Final Order to which respondents object in their petition are fully in accord with the standards articulated by the Commission in its decision and supported by substantial record evidence as found by the Commission and the ALJ.

1. "Relevant Business," as defined in the Final Order, replicates the scope of PDM's Engineered Construction and Water Divisions Pre-Acquisition.

Respondents assert that, "in crafting its relief, the Commission assumed without evidence, argument, or specific analysis that an equal division of the broadly defined 'Relevant Business' was necessary to achieve [the remedial] goal." Respondents' Petition at 15. This erroneous assertion overlooks the Commission's express statement at the outset of its decision

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16 C.F.R § 3.54(a) (emphasis added). In other words, the Commission can consider all issues, including remedy, on a *de novo* basis. This is in accord with the provisions of the Administrative Procedure Act. 5 U.S.C. § 557(b) (the agency "has all the powers which it would have in making the initial decision").

that:

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

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

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

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

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

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

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

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

J. Leon, Tr. 8311-8312. In their brief to the Commission on appeal from the Initial Decision, respondents argued that divestiture of PDM's Water Division is not necessary to restore competition, and all but conceded that if divestiture is ordered, it would encompass the EC Division: "Nor is there evidence that a party purchasing the EC Division could [not] compete in the relevant product markets without Water Division assets." RAB at 57.

Respondents' argument that the divestiture requirement encompassing the "Relevant

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

2. Restoring the Competition Lost from the Acquisition of Pdm May Require Divestiture of Assets and Customer Contracts Relating to Projects Outside the United States.

Respondents object that even though the United States was found to be the relevant geographic market, the Final Order has no express geographical limitation on the Relevant Business or Customer Contracts to be divested. Respondents request that the Commission modify the Order to make clear that the divestiture relief does not reach beyond respondents' domestic business and contracts. Respondents' Petition at 16-17. Respondents made the same objection in their brief to the Commission. Respondents' Reply and Cross-Appeal Response Brief at 46 (filed Oct. 17, 2003). Respondents' argument is without merit.

The record is clear that prior to the acquisition, PDM's EC Division conducted business operations on a global scale from its headquarters in Woodlands, Texas, which today serves as CB&I's own world headquarters.[28] The offering memorandum for the sale of the PDM EC Division described its global capabilities:

> The Engineered Construction Division of Pitt-Des Moines, Inc. ("PDM EC" or the "Division") *is a leading global engineering and construction company* specializing in the design and field erection of bulk liquid terminals, storage tanks, process vessels, low temperature and cryogenic storage facilities and other specialty plate structures and their related systems.

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

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

> [i]n order to effectively participate in the worldwide market, the Division has forged strategic alliances with engineering and construction companies in Mexico, India, China, Australia, South Korea and Saudi Arabia. These alliances provide PDM EC with local capabilities in these regions, including a skilled workforce, that *complement the Division's technology and project management capabilities*. These alliances also allow the Division to pursue global projects and ensure high margins by working with leading local companies that have experience in executing projects under local conditions.

Id. (emphasis added); *see also id.* at 5-6. The record establishes that, prior to its acquisition by CB&I, the PDM EC Division derived substantial revenues both from its United States operations and from its operations outside the United States. *See, e.g.*, CCACB at 71.

The key element that enabled the PDM EC Division's global reach was its human capital in the form of expert employees capable of designing, engineering, erecting and managing projects around the world. The offering memorandum explained that "[t]he Division handles every phase of storage tank construction, from the design and engineering to the actual construction of the facility," and touted PDM EC's "strong global procurement organization that enables it to purchase steel plate and other materials on a competitive worldwide basis," and "world class quality assurance department that ensures that structures and systems are built in accordance to the appropriate quality level including compliance with all international standards." CX 385 at 12-13. The offering memorandum also described PDM EC's global project management services:

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

Id. at 14 (emphasis added).

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

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

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

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

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

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

V. CONCLUSION.

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

DATED: February 11, 2005.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I hereby certify that I today caused:

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

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

One copy to be served by hand delivery upon:

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____
Rhett R. Krulla
Commission Counsel

Dated: February 11, 2005

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

PROPOSED ORDER DENYING PETITION TO RECONSIDER

The Commission issued its Opinion and Final Order in this matter on December 21, 2004, and all parties were served as of January 18, 2005. Pursuant to Rule 3.55 of the Commission's Rules of Practice, 16 C.F.R. § 3.55, respondents petitioned for reconsideration of the Decision and Final Order on February 1, 2005. In the alternative, respondents petition that the Commission reopen the proceeding Pursuant to Rule 3.72(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(a).

Respondents have failed to satisfy the respective requirements of Rule 3.55 and Rule 3.72(a).

The Commission has determined to deny respondents'petition.

Accordingly:

It is ordered that respondents' petition is denied.

ATTACHMENT A

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

ATTACHMENT B

ATTACHMENT C

ATTACHMENT D

ATTACHMENT E

ATTACHMENT F