PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

RESPONDENTS' REPLY FINDINGS OF FACT & CONCLUSIONS OF LAW

VOLUME I

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VOLUME II

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COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT

I.

WHY THIS MERGER MAY LESSEN COMPETITION

1. "Mergers are motivated by the prospect of financial gains." *Merger Guidelines* § 0.1.[1] The *Merger Guidelines* "focus on the one potential source of gain that is of concern under the antitrust laws: market power." (*Id.*) "Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." (*Id.*) "The unifying theme of the [*Merger Guidelines*] is that mergers should not be permitted to create or enhance market power or to facilitate its exercise." (*Id.*; Simpson, Tr. 2985).

Response to Finding No. 1:

Complaint Counsel's finding number 1 is an incomplete recitation of the Merger Guidelines and the principles embodied in the Guidelines. The Merger Guidelines note that "[t]he possible sources of the financial gains from mergers are many, and the Guidelines do not attempt to identify all possible sources of gain in every merger." Further, the Guidelines note that "[b]ecause the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, mechanical application of those standards may provide misleading answers to the economic questions raised under the antitrust laws. Moreover, information is often incomplete and the picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines." Introduction, *Merger Guidelines.* Section 0.1 sets forth the full purpose and underlying policy assumptions of the Guidelines. *Merger Guidelines* § 0.1.

2. By acquiring Pitt-Des Moines, Inc.'s Water and EC Divisions ("PDM"), Chicago Bridge & Iron Company ("CB&I") has eliminated an important restraint on its ability to raise prices and margins. Other firms cannot replace the competitive void left by PDM's demise. CB&I's dominant position in highly concentrated markets increases the likelihood that CB&I has achieved, and will be able to exercise, market power, either in coordination with other firms or

[1] U.S. Dept. of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (1992 rev'd 1997).

unilaterally. Indeed, there is evidence that without PDM to discipline it, CB&I has in fact raised prices and margins in the relevant markets. CCFF 750-1221.[2]

Response to Finding No. 2:

Complaint Counsel's finding number 2 is entirely false, unsupported by evidence, and contrary to the weight of record evidence. First and foremost, the evidence is overwhelming that there has been both actual entry and that there is potential entry constraining CB&I's prices. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Second, there is no evidence that CB&I has in fact raised its prices and margins; Complaint Counsel's purported examples of price increases are based on inappropriate comparisons, conjecture, and fabrication. (*See* FOF 7.1-7.41, 3.597-3.641, 5.182-5.211, 7.164). Complaint Counsel has not and cannot provide a single instance where CB&I has raised prices on a firm fixed bid or where a customer has paid a higher price for a product than prior to the Acquisition.

3. It is undisputed that the relevant product markets in which to analyze the merger are large, field-erected: (1) liquefied natural gas storage tanks ("LNG"); (2) LNG import terminals; (3) LNG peak shaving plants; (4) liquid nitrogen, oxygen and argon storage tanks ("LIN/LOX"); (5) refrigerated liquid petroleum gas storage tanks ("LPG"); and (6) large (over 20 feet in diameter) thermal vacuum chambers ("TVC"). CCFF 50-94.

Response to Finding No. 3:

Complaint Counsel's finding number 3 is incorrect because Respondents have clearly disputed the LIN/LOX market as defined by Complaint Counsel: the liquid nitrogen, oxygen and argon storage tanks ("LIN/LOX") market should not include spheres, which are an

[2] "CCFF" refers to Complaint Counsel's Proposed Findings of Fact.

entirely different technology and are not a substitute for LIN/LOX tanks. (Harris, Tr. 7301-02). There is no basis for including spheres in the LIN/LOX market. (Harris, Tr. 7301-02)

4. It is undisputed that the relevant geographic market in which to analyze the CB&I-PDM merger is the United States. CCFF 95-98.

Response to Finding No. 4:

Complaint Counsel's finding number 4 is misleading because while Respondents do not dispute that the antitrust market in this proceeding should be the United States, evidence relating to competition in the Western Hemisphere and elsewhere in the world is useful for the purposes of analyzing the CB&I-PDM Acquisition because CB&I's domestic competitors are also worldwide competitors offering identical products and services in nearby countries under similar competitive conditions, and could do so in the United States. (*E.g.* Harris, Tr. 7214-20).

5. In the LNG and TVC markets, the merged entity's market share is 100%. In the LIN/LOX and LPG markets, the merged entity's market share exceeds 70%. CCFF 148-193.

Response to Finding No. 5:

Complaint Counsel's finding number 5 is false. For example, in the LNG market, CB&I lost the Dynegy LNG project; thus CB&I does not have anything approaching a 100% market share in the LNG market. (Puckett, Tr. 4547**; [XXXXXXXXXXX]**) (FOF 3.68). AT&V presently dominates the LIN/LOX market. (Harris, Tr. 7308). Since the Acquisition, CB&I has won only about 18% of the dollars available in the relevant product markets. (Harris, Tr. 7223). Further, this proposed finding is irrelevant because the market shares, as calculated by Complaint Counsel, are not predictive of future competition; Complaint Counsel calculates market shares over a span of 13 years, using the same time period across all four markets regardless of admitted changes in those markets. Importantly, Complaint Counsel completely ignores entry, which negates the significance of these market shares, had they been appropriately calculated. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113)

(*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

6. CB&I's acquisition of PDM creates a dominant firm in highly concentrated markets. In the LNG market, the merger increases the HHI by at least **[xx]** to **[xx]**; in the LIN/LOX market, the merger increases the HHI by at least **[xx]** to **[xx]**; in the LPG market, the merger increases the HHI by **[xx]** to **[xx]**; and in the TVC market, the merger increases the HHI by **[xx]** to 10000. CCFF 146, 160, 180, 193.

Response to Finding No. 6:

Complaint Counsel's finding number 6 is misleading and/or inaccurate. First, the assertion that "CB&I's acquisition of PDM creates a dominant firm in highly concentrated markets" is contrary to the weight of the evidence that entry prevents any "dominance" by CB&I. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113). Second, CB&I has won less than 20% of the available dollars in the relevant markets since the date of the Acquisition; clearly CB&I is not a "dominant firm." (Harris, Tr. 7223). Third, the HHIs as calculated by Complaint Counsel are misleading and are not "the best indicator of firms' future competitive significance" as required by section 1.41 of the Merger Guidelines. (*Merger Guidelines* § 1.41; Harris, Tr. 7221-29, 7286-87, 7311-13; *see United States v. Baker Hughes*, 908 F.2d 981, 984 (D.C. Cir. 1990); *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974)).

7. The *Merger Guidelines* provide that where "the post-merger HHI exceeds 1800, it will be **presumed** that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." *Merger Guidelines* § 1.51(c) (emphasis supplied). In all of the relevant markets, CB&I's acquisition of PDM increases the HHI by a minimum of 3200 and, by a wide margin, above the 1800 threshold necessary to trigger the presumption of illegality.

Response to Finding No. 7:

Complaint Counsel's finding number 7 is misleading because the HHIs as calculated by Complaint Counsel are not predictive of future competition and therefore do not trigger the presumption of illegality. (Harris, Tr. 7227; *Merger Guidelines* § 1.41) (FOF 7.116). First, new competitors have entered the U.S. market since the Acquisition. (*See* Harris, Tr. 7219-21, 7307-08, 7311-12). (FOF 7.108, 7.127, 7.130).

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

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

Fourth, Complaint Counsel chose to calculate statistics in all four markets using data from the same starting point -- 1990 to the date of the Acquisition. Complaint Counsel's expert witness, Dr. John Simpson, acknowledged on cross-examination that he had no principled basis for choosing this date, other than the fact that 1990 was the earliest data he had available. (Simpson, Tr. 3704-05). There is no principled basis for selecting twelve years of data for purposes of concentration statistics as compared to fifteen or five. Sales in these markets are sporadic, and a single sale can represent a large percent of market share in any given year. Thus, as the Merger Guidelines note, "[t]ypically, annual data are used, but where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time." (*Merger Guidelines*, § 1.41).

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

Finally, while the Merger Guidelines use HHIs as an evaluative tool for mergers, the Merger Guidelines are not law and the courts have expressed a high degree of skepticism regarding this use of HHIs. *See* Respondents' Conclusions of Law 7-22; *Merger Guidelines* §§ 1.52, 1.521 (noting that market shares are only a starting point).

8. CB&I and PDM were each other's closest competitors. Respondents' ordinary course of business records repeatedly and consistently identify each other, to the exclusion of all other firms (foreign and domestic), as each other's main competitive threat. CCFF 204-231. The testimony of industry participants confirms this intense rivalry. CCFF 232-251.

Response to Finding No. 8:

Complaint Counsel's proposed finding number 8 is irrelevant. The documents referred to by Complaint Counsel predate the actual entry and announcements of planned entry made by competitors indicating planned entry in the relevant markets. (*See* FOF 3.56).

9. The record of projects won in the United States by CB&I and PDM reflect their positions as the leading firms and closest competitors. Since 1990, CB&I or PDM was the firm chosen by nearly every United States customer to build the relevant products. CCFF 146, 151, 172, 192.

Response to Finding No. 9:

Complaint Counsel's finding number 9 is inaccurate because since the Acquisition CB&I has won less than 20% of the dollars available in the alleged product markets. (*See* Harris, Tr. 7342-43). Even prior to the Acquisition, this statement would be false. For example, in the LIN/LOX market Graver tank had the second highest market share. (Harris, Tr. 7312). In the thermal vacuum chamber ("TVC") market, there has been virtually no demand whatsoever since 1990; thus this finding is irrelevant with respect to the TVC market.

10. Since 1990, no foreign firm has beaten CB&I or PDM in head-to-head competition for a project in the United States. CCFF 146, 151, 172, 192. Since 1990, domestic firms have beaten CB&I or PDM in head-to-head competition in only a small handful of projects in the United States. CCFF 146, 151, 172, 192.

Response to Finding No. 10:

Complaint Counsel's finding number 10 is false. First, it is inaccurate to characterize CB&I's defeats by domestic firms as a "handful" of projects. In the LIN/LOX market, for example, AT&V has won three of the five post-Acquisition LIN/LOX projects and all three of the LIN/LOX projects on which it bid. (Harris, Tr. 7308). Further, CB&I lost the Dynegy project on both the EPC and tank portions of the project to foreign competition. (*See* Harris, Tr. 7209-13, 7239-47; Puckett, Tr. 4547) (FOF 3.68). Additionally, Graver tank had the second greatest market share in the LIN/LOX market through the 1990s. (Harris, Tr. 7312). Clearly, CB&I has been beaten by a foreign firm in head-to-head competition in the United States and has lost more than a handful of projects to domestic firms.

11. The competition between CB&I and PDM benefitted customers in the form of, *inter alia*, lower prices. In order to beat the other, CB&I and PDM strived to lower costs, reduce prices aggressively and accept lower margins. CCFF 252-291. This vigorous competition caused CB&I and PDM to quote prices to customers at comparatively low margins, including at times negative margins. CCFF 252-291.

Response to Finding No. 11:

Complaint Counsel's finding number 11 is irrelevant since there has been entry or will be entry sufficient to maintain competition in the alleged product markets. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Complaint Counsel has presented no valid evidence indicating that CB&I has in fact raised prices. (FOF 3.597-3.641, 5.182-5.211, 7.164).

12. In markets where firms submit bids to customers, the price to the customer is "determined by the cost of the second lowest-cost seller" – historically either CB&I or PDM.

Merger Guidelines § 2.21, n. 21. Thus, a merger between close competitors like CB&I and PDM "could cause prices to rise to the constraining level of the next lowest-cost seller." (*Id.*)

Response to Finding No. 12:

Complaint Counsel's finding number 12 is inaccurate for two reasons. First, Complaint Counsel has offered no evidence supporting its assumptions that CB&I and PDM were the two lowest cost competitors before the acquisition. The weight of the evidence suggests that CB&I does not have cost advantages over entrants. (Harris, Tr. 7264, 7273, 7358-59). Second, in order for this statement to be true, CB&I must have good information regarding its competitors' costs; unless CB&I actually knows its competitors costs, it is unable to raise prices just below the "next lowest-cost seller." (Harris, Tr. 7264, 7273, 7358-59). Record evidence indicates that CB&I does not have good information about its competitors costs; therefore Complaint Counsel's finding No. 11 is inaccurate. (*See* Simpson, Tr. 3073, 3771, 3844-47; Harris, Tr. 7264, 7273, 7358-59; Jolly, Tr. 4761-62; Patterson, Tr. 350-60; Scorsone Tr. 5010).

13. Respondents' principal defense is that new entry or expansion by existing firms will replace PDM and deter or counteract any anticompetitive conduct by CB&I. The *Merger Guidelines* require that entry must be timely, likely and sufficient. *Merger Guidelines* § 3.0. In other words, the foreign or domestic entrant must be able to "cause prices to fall to their premerger levels or lower." (*Id.*)

Response to Finding No. 13:

Complaint Counsel's finding number 13 is misleading. First, entry is not a defense; it is evidence that rebuts Complaint Counsel's prima facie case, should the court decide Complaint Counsel established a prima facie case. Second, the entry proven by Respondents meets the requirements of the *Merger Guidelines*. Third, the *Merger Guidelines* do not have the force of law, and are instead intended to guide the Commission in analyzing mergers; therefore it is misleading to suggest that the *Merger Guidelines* "require" anything of Respondents. (*E.g.*,

New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 359 n.9 (S.D.N.Y. 1995) (internal citations omitted). See also, *e.g., FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353-54 (2d Cir. 1979); *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1300 (9th Cir. 1993)).

14. Entry into the relevant markets is not easy. There are numerous and significant barriers to entry. CCFF 292-392.

Response to Finding No. 14:

Complaint Counsel's finding number 14 is patently false and is contrary to the weight of record evidence indicating that entry is in fact easy. For example, in the LPG market, Morse tank was able to succeed in a "hit and run entry" whereby Morse profitably built an LPG tank without having ever bid on an LPG tank or bidding on another LPG tank. (Harris, Tr. 7296-97). In the LNG market, the same barriers to entry identified by Dr. Simpson existed in Trinidad where CB&I lost to TKK/AT&V. (Harris, Tr. 7247-55). There is ample actual and potential entry, which proves ease of entry. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). *See also* RFOF 750-1221. Complaint Counsel's own expert admits that there has been actual entry, which undermines Complaint Counsel's assertions that entry is difficult. (Simpson, Tr. 3952-53, 5605, 3913-19) (FOF 7.227, 7.251, 7.252). Contrary to Complaint Counsel's baseless assertions about barriers to entry, the evidence overwhelmingly indicates that entry is easy.

15. Respondents' business records and the testimony presented in this case confirm that CB&I and PDM won the vast majority of projects in the United States because entry barriers placed other firms (foreign and domestic) at a competitive disadvantage. CCFF 393-420. CB&I acknowledges that this competitive disadvantage persists today, which explains why no firm has eroded CB&I's dominant market position or restrained CB&I's market power since the merger. CCFF 399 and 400-402.

Response to Finding No. 15:

Complaint Counsel's finding number 15 is entirely false. First, since the Acquisition, CB&I has only won less than 20% of the dollars available in the relevant markets. Further, competition has restrained CB&I's pricing through both actual and potential entry. For example, in the LIN//LOX market, AT&V has won the majority of projects. Internal CB&I emails do indicate that CB&I's prices have been constrained. (RX 208, RX 627). There is evidence that CB&I was forced to lower its prices in response to competition. (FOF 4.67-4.70). It is absolutely untrue that CB&I has market power and that its prices have not been constrained.

16. Respondents did not present any evidence of a post-merger competitive situation where another firm (foreign or domestic) constrained CB&I/PDM's pricing strategy. To the contrary, the numerous examples of post-merger price and margin increases by Respondents indicate that other firms, domestic and foreign, have neither deterred nor counteracted Respondents' exercise of market power. CCFF 750-1221.

Response to Finding No. 16:

Complaint Counsel's finding number 16 is entirely false. There is evidence that CB&I has lowered prices in response to competition and that it has had to keep on its toes in response to competition. Internal CB&I documents do indicate that CB&I's prices have been constrained. (RX 208, RX 627). There is evidence that CB&I has had to lower its prices in response to competition. Specific examples where CB&I's pricing was constrained include a projects for MG Industries, (FOF 5.151-5.158), Air Liquide, (FOF 5.123-5.125), CMS and Southern LNG (FOF 3.470-3.480, 3.485-3.486), ABB/Lummus (4.66-4.70) and in Trinidad (FOF 3.140, 3.327-3.331). It is absolutely untrue that CB&I has market power and that its prices have not been constrained.

17. Industry members with first-hand knowledge about the vigorous head-to-head competition between Respondents are concerned that this merger will result in higher prices. CCFF 711-729. None of Respondents' customer witnesses had the requisite first-hand experience with pre-merger competition between CB&I and PDM in the United States to attest to the likely competitive effects of the merger.

Response to Finding No. 17:

Complaint Counsel's finding number 17 is false and directly contrary to the record evidence. It is *Complaint Counsel's* customer witnesses who had no foundation to testify regarding the likely competitive effects of the merger. Complaint Counsel relies on the testimony of "customer" witnesses who, in some cases, are actually competitors, and who in some cases are retired, have not purchased the relevant products in a decade, and/or admittedly know nothing about present competitive conditions. (*See* FOF 3.642-3.696, 4.144-4.158, 5.144, 5.180, 5.181, 5.192, 5.193). Respondents presented the testimony of witnesses who have the requisite first hand knowledge and experience necessary to testify regarding competition and prices. (FOF 3.571-3.596, 4.159, 4.160, 5.79-5.86).

18. Respondents' merger planning documents and the testimony in this case demonstrate that the rationale for the merger was to create a dominant firm with the power to raise prices and margins. CCFF 730-749.

Response to Finding No. 18:

Complaint Counsel's proposed finding number 18 is false; the uncontroverted record evidence is that the rationale for the Acquisition was to expand CB&I's resources generally and to expand its global LNG presence. (Glenn, Tr. 4080-81).

19. Consistent with its dominant market position, and as predicted by industry participants and Respondents' merger planning documents, CB&I/PDM has in fact raised prices and its margins since the merger. CCFF 750-1221.

Response to Finding No. 19:

Complaint Counsel's finding number 19 is entirely false; there is no evidence that CB&I has raised prices since the merger. Complaint Counsel relies on examples of purported price increases that are either based on inappropriate comparisons of budget estimates, inappropriate comparisons of different types of projects, or an analysis Complaint Counsel's own expert cannot vouch for. (FOF 3.597-3.641, 5.182-5.211, 7.164). Further, there has been entry

or will be entry sufficient to maintain competition in the alleged product markets. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (See FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). (*See also* RFOF 750-1221.)

20. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. CCFF 778-831.

<u>Response to Finding No. 20:</u>

This finding is inaccurate, misleading, and unsupported by record evidence. (RFOF 778-831). As an initial matter, there is no evidence that "competition between CB&I and PDM caused" any changes in price on the Cove Point project. Further, this finding relies on comparisons between budget pricing and firm, fixed prices bids. As Respondents have already established, such a comparison is highly inappropriate. (*See* FOF 7.1-7.38). In addition, this finding is misleading to the extent it implied that any increase in CB&I's actual margin on this project is related to the Acquisition; such an implication is inappropriate and unsupported by the evidence. (*See* Reply Brief at Part III.)

21. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]**. CCFF 930-978, 1008-1027.

<u>Response to Finding No. 21:</u>

This finding is inaccurate, mislead, and unsupported by record evidence. (RFOF 930-978, 1998-1027). In particular, this finding is misleading to the extent it relies on budget

pricing as evidence of anticompetitive effect. Respondents have already established that budget pricing is often rough and inaccurate, and that use of such data for the purpose advanced by Complaint Counsel is patently improper. (*See* FOF 7.1-7.38). Comparison of budget pricing to fixed, firm priced bids, which Complaint Counsel has attempted to do in this case, only magnifies the error. (*See* FOF 7.1-7.38).

22. On three LNG projects for **[xxxxxxxxxxxxxxxxxxx]**, CB&I pressured **[xxxx]** to enter into negotiations for a sole-source arrangement in which **[xxxx]** may incur higher costs and CB&I is likely to earn a higher margin. **[xxxx]** rationale for doing so included an analysis that showed that CB&I's foreign competitor's prices for single-containment LNG tanks were at least **[xxxxx]** higher than CB&I's prices. That same analysis shows PDM as the closest price constraint on CB&I. CCFF 832-929.

Response to Finding No. 22:

This finding is inaccurate, misleading, and unsupported by credible evidence. In fact, the evidence from **[xx]** is to the contrary. As discussed more extensively in RFOF 832-929, this proposed finding is based on a document completely devoid of contextual testimony, which was available to Complaint Counsel. None of the conclusions advanced by Complaint Counsel in this finding were testified to by **[xxx]** corporate representative -- **[xxxxxxxxxxxxxxxx].** (*See* RFOF 832-929).

23. In both the Dynegy and Yankee Gas projects, CB&I attempted to leverage its competitive advantages compared to other LNG tank suppliers to convince the customers to accept CB&I as the tank constructor and supplier on terms favorable to CB&I. CCFF 979-1007 (Dynegy); CCFF 1008-1027 (Yankee Gas).

Response to Finding No. 23:

This finding is inaccurate, misleading, and unsupported by credible evidence. In particular, there is no evidence that CB&I has any "competitive advantages compared to other LNG tank suppliers" that would prevent them from competing on an equal footing with CB&I. No significant entry barriers prevent these foreign competitors from entering the market; in fact, they have already done so. (*See generally* Opening Br. at 46-61). Further, this finding is

misleading to the extent it implies that CB&I has any ability to exercise market power over LNG owners. In fact, Dynegy rejected CB&I's suggested turnkey approach to LNG import terminal development, and selected Skanska/Whessoe as its EPC contractor. Similarly, Yankee Gas is currently in the process of developing a bid specification for its peakshaving facility; it is currently considering pre-qualifying foreign competitors such as Skanska/Whessoe and Technigaz. (*See* RFOF 979-1007; RFOF 1008-1027).

24. On LIN/LOX projects in New Mexico, Respondents have quoted prices, with positive margins, that are 8.7% higher than prices for comparable projects awarded to CB&I and PDM immediately before the merger. When Respondents competitively bid against each other before the merger, their aggressive price reductions often resulted in **negative** margins on LIN/LOX projects. CCFF 277-278.

Response to Finding No. 24:

On LIN/LOX projects in New Mexico, Respondents have quoted prices, with positive margins, that are 8.7% higher than prices for comparable projects awarded to CB&I and PDM immediately before the merger. When Respondents competitively bid against each other before the merger, their aggressive price reductions often resulted in negative margins on LIN/LOX projects. CCFF 277-278.

Complaint Counsel's finding is false, misleading and fails to rely on any record evidence. Respondents have also demonstrated that prices have not increased. (*See* RFOF 1053; *see also* FOF 5.79-5.211). Additionally, LIN/LOX customers have testified that they are satisfied with the post-Acquisition prices and believe they are in line with pre-Acquisition prices. (FOF 5.96, 5.125, 5.182).

25. On a TVC project for Spectrum Astro, immediately after the merger, Respondents implemented a price increase that anticipates a 50% increase in margins, from **[xx]** to **[xx]**. CCFF 1109-1165.

Response to Finding No. 25:

Complaint Counsel's finding number 25 is misleading because CB&I re-pricing was not a result of the Acquisition. Rather, the original firm fixed price expired after 90 days in February, 2001. In November 2001, nearly one year after the original price was submitted to Spectrum Astro, CB&I provided a new price which included an increase in margin in order to account for an increase in the risk, increased labor and materials costs, changes in the scope of the project, and an attempt to recover some of the un-reimbursed pre-contract costs. Spectrum Astro admits that this increase was the result of a negotiation, and constituted a common business dispute. The Acquisition had no impact on the Spectrum Astro re-pricing. (FOF 6.169-6.202; *see also* RFOF 1109-1165.) Moreover, the Spectrum Astro project ultimately was cancelled. Thus, Spectrum Astro never paid any price to CB&I.

26. On a TVC project for **[xxxxx]**, immediately after the merger, Respondents implemented a 35% increase from the price quoted by PDM before the merger, from **[xx]** million to **[xx]** million. CCFF 1208-1221.

Response to Finding No. 26:

Complaint Counsel's finding number 26 is misleading because it compares a firm fixed price provided by PDM in 1999 of $16 million with a rough order of magnitude (rougher than budget estimate) price provided by CB&I of $21.6 million in 2002. (FOF 6.154-6.168). Budget prices are different from firm fixed prices. Budget prices do not constitute a selling price. Budget prices are merely provided by suppliers for planning purposes. (FOF 7.1-7.38). In the instance of the **[xxxxx]** 2002 ROM price, the budgetary number of **[xxxxxxxxxx]** was only accurate to a degree of plus or minus 30%. (FOF 6.161; s*ee also* RFOF 1208-1221.)

27. Respondents did not present any evidence challenging the accuracy of these price and margin increases since the merger.

Response to Finding No. 27:

Complaint Counsel's finding number 27 is false. Complaint Counsel neglects to acknowledge the undisputed testimony that the **[xxxxx]** 2002 ROM price was only accurate to a degree of plus or minus 30%. (FOF 6.161). Budget prices and firm fixed prices are completely different and cannot be compared. (FOF 7.1-7.38).

28. Respondents have also engaged in conduct suggestive of collusion. Before the companies finalized the merger (and while the FTC was still investigating the merger), on the TVC project for Spectrum Astro there were impermissible inter-company activities. CCFF 1120-1125. There is also evidence of impermissible communications between Respondents and a competing supplier regarding bidding on a TVC project for TRW. CCFF 1174-1178.

Response to Finding No. 28:

Complaint Counsel's finding number 28 is false. Respondents' conduct has not suggested collusion. The evidence shows that PDM and CB&I both bid the Spectrum Astro job competitively and did not communicate in any way prior to the Acquisition with regard to bidding or pricing on that project. (FOF 6.138-6.153). Furthermore, the evidence shows that Respondents did not impermissibly communicate with regard to the TRW budget pricing. In that situation, a lower level employee sought to inquire about the use of Howard Fabrication as a subcontractor on the proposed project, without the knowledge or consent of CB&I's management. (FOF 6.131; s*ee also* RFOF 1120-25, 1174-78.)

29. By proposing a TVC remedy to the Tribunal during the trial, Respondents have conceded that this merger will likely have anticompetitive effects in the TVC market.

Response to Finding No. 29:

Complaint Counsel's finding number 29 is false and contrary to well-settled principals of law. It is fundamental that an offer of settlement is not an admission of liability. Fed. R. Evid. 408. Further, Respondents state that CB&I is a fringe firm in the TVC market and the remedy offer proposed by Mr. Glenn is a good faith effort to maintain low pricing and

competition in a market that has historically only supported the existence of one supplier, i.e. PDM was the only supplier from 1984 until 1997. (FOF 6.40). Respondents' proposed remedy is not a concession of any kind.

30. Respondents have abandoned any claim that the merger will generate significant cognizable efficiencies or that any such efficiencies "likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market." *Merger Guidelines* § 4.

Response to Finding No. 30:

Complaint Counsel's finding number 30 ignores evidence from CB&I's CEO, Gerald Glenn, that the Acquisition was intended, in part, to achieve efficiencies. (Glenn, Tr. 4080-81).

31. Given that Respondents have not presented an efficiencies defense that the merger reduced costs, these post-merger higher profit margins show that prices have increased after the acquisition. Post-merger increases in profit margins and prices constitute evidence that a merger created market power.

Response to Finding No. 31:

Complaint Counsel's finding number 31 is false - Complaint Counsel has not shown a single instance where CB&I has raised price on a firm fixed bid, or a single instance where a customer paid a higher price. Complaint Counsel's purported examples of price increases depend on wholly inappropriate comparisons of actual prices and budget estimates and conjecture. (FOF 3.597-3.641, 5.182-5.211, 7.164).

32. Respondents assert an "exiting assets" defense that has never been recognized by the *Merger Guidelines* or any court. In any event, the evidence flatly contradicts Respondents' claim. Absent the merger, PDM would have continued as a viable and vigorous competitor against CB&I. Respondents failed to prove that PDM conducted an exhaustive search for alternative buyers; and it could not have exited the market in any event, since PDM planned to sell the assets, including on-going contracts, to other companies. CCFF 1227-1239.

Response to Finding No. 32:

Complaint Counsel's finding number 32 is false. First, the court in *Olin* recognized the exiting assets defense, but found that the Respondent did not meet the criteria in

that case. *Olin Corp. v. Federal Trade Commission*, 986 F.2d 1295, 1306-7 (9th Cir. 1993). Further, the evidence is clear and uncontroverted that PDM would have liquidated its EC division had it not been acquired by CB&I. (FOF 8.115-8.126; s*ee also* RFOF 1227-1239.)

33. Complaint Counsel has demonstrated sufficiently high market shares and increases in market concentration to trigger the presumption that the CB&I/PDM merger will likely have anticompetitive effects. Complaint Counsel has also shown that the elimination of CB&I's closest competitor will likely lessen competition. Respondents have not rebutted this presumption with proof of ease of entry, cognizable efficiencies or an "exiting assets" defense. Although not required to do so, Complaint Counsel has also shown instances of actual anticompetitive effects. In other words, the evidence establishes that this merger violates Section 7 of the Clayton Act and Section 5 of the FTC Act.

Response to Finding No. 33:

Complaint Counsel's finding number 33, which contains no citation and is pure argument, is patently false. The evidence fails to establish any violation of Section 7 of the Clayton Act, and instead weighs against a finding of a Clayton Act violation. First, Complaint Counsel's prima facie case depends wholly on market share statistics, which are not predictive of future competition. Further, Complaint Counsel persistently ignores the reality that there is both actual and potential entry. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (See FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). This entry rebuts Complaint Counsel's prima facie case, as does the sophistication of customers in the alleged product markets and the unreliability of the market share statistics heavily relied on by Complaint Counsel as well as the bulk of other evidence presented at the two month long trial.

34. The explicit terms of the Clayton Act and Supreme Court and FTC precedents unequivocally require an order of divestiture in this case. Respondents must be ordered to recreate PDM as a viable competitor. There is substantial evidence on how the divestiture must be implemented. CCFF 1283-1375.

Response to Finding No. 34:

Complaint Counsel's finding number 34 is unquestionably false. First, there has been no Clayton Act violation, thus it is wholly inappropriate to order divestiture in this case. Complaint Counsel asks the court to blindly order divestiture despite its failure to present a shred of evidence indicating that divestiture would not lessen competition in the relevant markets. Complaint Counsel's own expert admitted that he had not fully considered whether full divestiture is advisable if there is not a violation in every market. (Simpson, Tr. 5586) (FOF 9.32). Instead, Respondents *have* presented evidence that a full divestiture would harm customers and would be inadvisable. (FOF 9.11-9.31). Further, even if there were a Clayton Act violation, the law is clear that divestiture is not a *required* remedy; the United States Supreme Court has made this clear. *United States v. E.I. DuPont de Nemours*, 353 U.S. 586, 607-08 (1961). The Federal Trade Commission has also recognized this fact. *See also In the Matter of Retail Credit Company*, 92 F.T.C. 258-59 (1978); *In the Matter of Ekco Prods. Co.*, 65 F.T.C. 1163, 126 (1964); *In the Matter of The Grand Union Company*, 102 F.T.C. 812, 503 (1983).

II.

THE RESPONDENTS AND THE MERGER

A. The Respondents

35. Since 1990, CB&I and PDM have won virtually all of the field-erected LNG, LIN/LOX, LPG and TVC projects awarded in the United States. CCFF 135, 151, 172, 192.

Response to Finding No. 35:

This finding is misleading and inaccurate as set forth in RFOF 135, 151, 172, and 192. For example, Graver Tank won a significant number of LIN/LOX projects. (Patterson, Tr. 478-79) (FOF 5.146). This finding is also irrelevant, as it ignores the fact that AT&V has won

three out of four competitively bid LIN/LOX projects since the Acquisition. (Scorsone, Tr. 5018) (FOF 5.78). Finally, CB&I has not won a TVC project since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26).

1. *CB&I*

36. Among other products and services, CB&I is engaged in the business of designing, engineering, manufacturing and constructing field-erected LNG, LIN/LOX and LPG storage tanks and TVCs in the United States and abroad. (CX 1033 at 6; CX 212 at CB&I-PL 031711).

Response to Finding No. 36:

This finding is misleading and inaccurate because CB&I has not built or constructed a TVC project since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). As to the rest of CCFF 36, Respondents do not dispute the truth of this finding. (FOF 8.2).

37. In 1999, prior to the merger, CB&I had revenues of $674 million; in 2000, revenues were $612 million; in 2001, after the merger with PDM, revenues were approximately $1.081 billion. (CX 1033 at 22). In 1999, CB&I had adjusted earnings before interest, taxes, depreciation, and amortization (EBITDA) of $49 million; in 2000, earnings were $46 million; in 2001, after the merger with PDM, earnings were approximately $89 million. (CX 1033 at 28).

Response to Finding No. 37:

This finding is misleading and inaccurate. For example, CX 1033 at 22 does not contain relevant information regarding CB&I's revenues in 1999-2001 or relate to the proposition asserted. In addition, this finding fails to recognize the impact of CB&I's acquisition of Howe Baker, Inc. in December 2000, which accounted for a "tremendous" increase in CB&I revenues. (Glenn, Tr. 4403-05) (FOF 8.107).

2. *PDM*

38. Prior to being acquired by CB&I, Pitt Des-Moines, Inc. ("Pitt Des-Moines") was a diversified company with several divisions, two of which were PDM Engineered Construction (PDM EC) and PDM Water. Both divisions were acquired by CB&I. (CX 328 at CB&I 001253-CHI).

Response to Finding No. 38:

This finding is misleading and inaccurate to the extent that Pitt Des-Moines was acquired by CB&I. In fact, CB&I acquired only the PDM EC and PDM Water Divisions. (CX 328 at 001253-CHI) (FOF 8.105). Otherwise, Respondents do not dispute the truth of this finding.

39. Pitt Des-Moines was a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, publicly traded on the American Stock Exchange, with its principal place of business at 1450 Lake Robbins Drive, Suite 400, the Woodlands, Texas, 77380. (CX 328 at CB&I 001253-CHI; CX 21 at PDM-C 1000003; Byers, Tr. 6732). PDM's headquarters were located at 10200 Grogan's Mill Road, Suite 300, the Woodlands, Texas, 77380. (CX 661 at PDM-HOU017554).

Response to Finding No. 39:

Respondents have no specific response.

40. In 1999, Pitt-Des Moines had a total revenue of $629 million and EBIT of $41 million. (CX 520 at TAN 1003289; Scheman, Tr. 2915-2916). In 2000, Pitt-Des Moines had a total revenue of $659 million and EBIT of $76 million. (CX 520 at TAN 1003289; Scheman, Tr. 2915-2916). In 1999, PDM had a total revenue of $281 million and EBIT of $16.1 million. (CX 525 at TAN 1000385). In 2000, PDM had a total revenue of $268 million and EBIT of $0.7 million. (CX 525 at TAN 1000385).

Response to Finding No. 40:

Respondents have no specific response.

41. Among other products and services, PDM was engaged in the business of designing, engineering, manufacturing and constructing field-erected LNG, LIN/LOX and LPG storage tanks and TVCs in the United States and abroad. (CX 522 at TAN 1003371; CX 850 at PDM-HOU 0129192-0129195, 0129199; CX 911 at CB&I 028717-HOU -CB&I 028726-HOU).

Response to Finding No. 41:

Respondents have no specific response. (FOF 8.1-8.3)

B. The Merger

42. In August of 2000, CB&I offered $93.5 million for PDM. (CX 521 at TAN 1000328).

Response to Finding No. 42:

To the extent this finding refers to CB&I's initial offer to purchase PDM, Respondents have no specific response. This finding is misleading to the extent it refers to something other than CB&I's initial offer because multiple downward concessions were made by PDM given PDM EC's substantial losses in fiscal year 2000. (Byers, Tr. 6789-91, 6793-94; Glenn, Tr. 4255-56) (FOF 8.110, 8.112).

43. In late May of 2000, Goldman Sachs, the investment banking firm, valued PDM at $68.6 million. (Byers, Tr. 6745-46). Goldman Sachs also believed that a "[r]equest for a preemptive bid may elicit a full price from a strategic buyer," and listed dozens of potential buyers who were never called. (CX 520 at TAN 1003292; Scheman Tr. 2915-16). CB&I was a preemptive buyer of PDM, and thus, no other prospective buyers were solicited. (Scheman, Tr. 2938-39).

Response to Finding No. 43:

This finding is misleading and inaccurate. For example, Mr. Byers testified that Goldman Sachs placed a "book value" on PDM EC and PDM Water of $68.6 million, but that book values are not an accurate indicator of PDM's value because book value is a historical calculation not used for valuation purposes. (Byers, Tr. 6746; RX 23) (FOF 8.28). Further, this finding is inaccurate because Goldman Sachs never believed that a "[r]equest for a preemptive bid may elicit a full price from a strategic buyer" -- neither CX 520 nor Mr. Scheman refer to a Goldman Sachs document or Complaint Counsel's asserted proposition. CX 520 is a Tanner & Co. document. In addition, Goldman Sachs was never selected as investment banker for PDM. (Scheman, Tr. 2914-15, 7911-12, 6907-08; RX 25 at 2) (FOF 8.30). Finally, simply because CB&I was considered a preemptive buyer does not mean that Tanner continued to evaluate potential viable purchasers and field inquiries from interested parties. (Scheman, Tr. 6911) (FOF 8.53). In fact, PDM management began looking at alternatives on how to sell PDM EC and Water with Tanner's assistance in December 2000. (Byers, 6768-70) (FOF 8.118).

44. Tanner believed, "rational buyers who were the only people who would make sense would be unlikely to put up a premium price in light of the fact that they had tough competition from CB&I." (Scheman, Tr. 2967).

Response to Finding No. 44:

This finding is misleading and irrelevant to the extent that Mr. Scheman's testimony is taken out of context and is incomplete. Mr. Scheman's complete statement is that any potential purchasers would not have paid an irrational price for PDM given the substantial losses incurred by PDM EC as well as the competitive industry landscape from "CB&I and others." (Scheman, Tr. 2966-68).

45. On August 29, 2000, CB&I and PDM entered into a letter of intent for CB&I to acquire PDM. (CX 21 at PDM-C 1000003).

Response to Finding No. 45:

Respondents do not dispute the truth of this finding. (FOF 8.105).

46. CB&I's earlier offer of $93.5 million for PDM was negotiated downward to $84 million in December of 2000 because of financial losses suffered by PDM EC in 2000. (Byers, Tr. 6789-6790). CB&I's purchase price of $84 million was eventually lowered to approximately $76 to $77 million because of losses in PDM's foreign subsidiary, PDM Venezuela, that did not become apparent until after the transaction was consummated. (Byers, Tr. 6793-6794).

Response to Finding No. 46:

Respondents do not dispute the truth of this finding. (FOF 8.110, 8.112-14).

47. Respondents made their filings under the Hart-Scott-Rodino Act ("HSR") on September 12, 2000. (CX 56 at PDM-HOU 002331). The initial waiting period under HSR expired on October 12, 2000. (CX 56 at PDM-HOU 002331).

Response to Finding No. 47:

Respondents have no specific response.

48. On November 12, 2002, this administrative hearing began before the Honorable D. Michael Chappell, Administrative Law Judge. (Tr. 4). The hearing ended on January 16, 2003. (Tr. 8364).

Response to Finding No. 48:

Respondents have no specific response.

49. On January 16, 2003, the record in this matter was closed. (Tr. 8364).

Response to Finding No. 49:

Respondents have no specific response.

III.

THE SIX RELEVANT PRODUCT MARKETS ARE LARGE, FIELD-ERECTED LNG, LIN/LOX AND LPG STORAGE TANKS AND TVC

50. The relevant product markets in which to analyze the acquisition are field-erected LNG storage tanks (individually, or as a component of an LNG import terminal or a LNG peak shaving plant), LIN/LOX storage tanks, LPG storage tanks and TVCs.

Response to Finding No. 50:

Complaint Counsel's finding number 50 is false to the extent that it includes spheres in the LIN/LOX storage tank market in its complaint.

51. Respondents agree that the relevant product markets are field-erected LNG storage tanks, LIN/LOX storage tanks, LPG storage tanks and TVCs. Drs. Simpson and Harris agree on the relevant product markets. (Simpson, Tr. 2989 (LNG); Harris, Tr. 7192 (LNG); Simpson, Tr. 3356-57 (LPG); Harris, Tr. 7280 (LPG); Simpson, Tr. 3416-17 (LIN/LOX); Harris, Tr. 7300 (LIN/LOX); Simpson, Tr. 3483 (TVC); Harris, Tr. 7324 (TVC)).

Response to Finding No. 51:

Complaint Counsel's finding number 51 is false to the extent that Dr. Harris was explicit in his testimony that he accepted the product markets only for the purposes of his analysis and that spheres should not be included in the LIN/LOX market. (Harris, Tr. 7301-02, 7192-95, 7280, 7324).

52. The first step in analyzing mergers and acquisitions is to distinguish between close and distant substitutes. (Simpson, Tr. 2986). "[T]he definition of the product market seeks to distinguish between producers of close substitutes whose actions would have a large effect on the marketplace and producers of distant substitutes whose actions would have little, if any, effect on the marketplace" (Simpson, Tr. 2992).

Response to Finding No. 52:

Respondents have no specific response.

53. The *Merger Guidelines* define a product market by asking whether a hypothetical monopolist of some set of products could profitably increase price by a small but significant amount, such as 5%. (Simpson, Tr. 2992). Field-erected LNG, LIN/LOX and LPG tanks and TVCs comprise relevant product markets if a "small but significant and nontransitory" increase in the price of these products does not induce so much substitution to other storage alternatives that the price increase would be unprofitable. (*Merger Guidelines* § 1.11). For each of these products, there are no economic substitutes to which customers will turn in the face of a "small but significant and nontransitory" price increase.

Response to Finding No. 53:

Complaint Counsel has not shown that there are no substitutes for the products at issue. In fact, there is record evidence that there are substitutes in some markets. For example, Mr. Kamrath testified that shop-built LIN/LOX tanks can serve as a substitute for field-erected LIN/LOX tanks. (Kamrath, Tr. 1984). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Proulx, Tr. 1928, 1942-43). Mr. Scorsone testified that customers have substituted pressure spheres for LPG tanks. (Scorsone, Tr. 5170). The underlying assumption made by Complaint Counsel that there are no substitutes for the relevant products is contradicted by record evidence.

A. LNG Tanks Are a Relevant Product Market

54. LNG storage tanks are a type of cryogenic tank that stores natural gas or methane at a temperature of -260° F. (Kistenmacher, Tr. 879; CX 1074 at CB&I-001243-PLA). Due to these very cold temperatures, LNG storage tanks are made of special materials, such as 9% nickel alloy steel, and are specially designed so that they do not crack. (Kistenmacher, Tr. 881-82; CX 1074 at CB&I-001245-PLA). LNG tanks are double-walled, with special perlite insulation between the two shells, and may have some form of concrete containment for safety reasons. (Kistenmacher, Tr. 881-82; CX 1074 at CB&I-001243-PLA). The outer walls of single containment tanks are carbon steel and the inner walls are nine percent nickel steel. (CX 1074 at CB&I-001243-PLA).

<u>Response to Finding No. 54:</u>

The proposed finding is misleading and mischaracterizes the evidence to the extent that it suggests LNG storage tanks store methane in addition to liquefied natural gas. Complaint Counsel cites to Mr. Kistenmacher, who did not testify that LNG tanks store methane as an alternative to natural gas. To the contrary, while natural gas contains methane and other types of gas, the terms "methane" and "LNG" are not used interchangeably. (Kistenmacher, Tr. 889) (FOF 3.2). In fact, pure methane derived from certain petroleum products "is not natural gas." (Blaumueller, Tr. 282). Further, Complaint Counsel's citations do not support the assertions that LNG tanks are "specially designed." In fact, CB&I uses the same construction steps when it builds LNG tanks as it does when it builds any ambient-temperature flat-bottom tank. (Scorsone, Tr. 4885) (FOF 3.26). Similarly, the engineering of an LNG tank does not differ from the engineering of any cylindrical flat-bottomed tank, as the same processes are used. (Rano, Tr. 5894) (FOF 3.28). None of the citations Complaint Counsel provides support the assertion that the steel and perlite used for LNG tanks are "special." LNG storage tanks are made of 9 percent nickel which has certain crack arresting properties when containing LNG at low temperatures, and is less brittle than carbon steel. (CX 1074 at CB&I-001245-PLA; Glenn, Tr. 4109-10) (FOF 3.4). While perlite is often used as insulation for the construction of LNG tanks, there are a number of other systems that could be used in place of perlite. (Glenn, Tr. 4110) (FOF 3.4).

55. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Price, Tr. 524-525; Kistenmacher, Tr. 879; CX 176 at CB&I-PL010926, *in camera*; CX 162 at CB&I-PL006153; Puckett, Tr. 4566; J. Kelly, Tr. 6260).

<u>Response to Finding No. 55:</u>

Respondents have no specific response.

56. There are three basic types of LNG tanks: (1) single containment; (2) double containment; and (3) full containment. (Puckett, Tr. 4541; Bryngelson, Tr. 6170-71). The type of LNG tank that is traditionally built in the United States is a single containment tank. (Glenn, Tr. 4110-4111). Single containment LNG tanks store LNG in a nine percent nickel steel inner tank that is surrounded by a low earthen dike which would contain LNG in case of a leak. (Puckett, Tr. 4541; Bryngelson, Tr. 6173; CX 1074 at CB&I 001243-PLA). Double containment tanks have the same nine percent nickel steel inner tank as a single containment tank, but offer a concrete outer tank to contain spillage from the inner tank. (Price, Tr. 530-32; CX 1074 at CB&I 001243-PLA). Full containment tanks consist of a self-supporting inner tank and the outer tank used in a double-containment tank, but also include a concrete roof, so that the inner tank is completely encapsulated in a concrete shell. (CX 1074 at CB&I 001243-PLA). Full containment tanks are designed to contain both the spillage of refrigerated liquid and the vapor resulting from leakage. (CX 1074 at CB&I 001243-PLA).

Response to Finding No. 56:

While there are three basic types of LNG tanks, there is a trend in the United States toward the use of double and full-containment LNG tanks for projects currently under development. (Glenn, Tr. 4112-13; Scorsone, Tr. 4921-22; Izzo, Tr. 6491-92) (FOF 3.11-3.13) (*see also* FOF 3.5-3.7).

57. LNG import terminals are "facilities to receive an LNG tanker, offload LNG into LNG storage tanks, take the LNG from those storage tanks over time, vaporize it, pressurize the gas, and send it out into a pipeline." (Bryngelson, Tr. 6170). The terminals include storage tanks, ship loading/unloading facilities, send-out facilities and vapor handling systems. (CX 650 at CB&I/PDM-H4019758). LNG is stored in the tanks, pumped out, vaporized and injected into pipelines for transmission to end users. (CX 853 at PDM-HOU011487).

Response to Finding No. 57:

Respondents have no specific response.

58. LNG peak shaving plants store LNG to provide an emergency reserve of LNG in the event that gas customers experience a severe shortage of natural gas. (CX 650 at CB&I/PDM-H4019758). LNG peak shaving plants consist of a liquefaction unit, where the gas is turned into liquid, and LNG storage tanks. (Kistenmacher, Tr. 884-85). In LNG peak shaving facilities, natural gas from a pipeline is refrigerated in the liquefaction unit and stored in liquid form in an LNG tank during the warmer months when demand and prices are low. (CX 142 at CB&I 000241-HOU). As gas demand increases in colder months, the stored LNG is heated, vaporized and put back into the supply stream to meet heating demand peaks, when prices are high. (CX 142 at CB&I 000241-HOU; Hall, Tr. 1775-1776).

Response to Finding No. 58:

Respondents have no specific response.

59. The evidence demonstrates that a small but significant, nontransitory increase in the price of a field-erected LNG tank would not prompt customers to switch to alternative products. (*see* Price, Tr. 450; Bryngelson, Tr. 6217-6218; Davis, Tr. 1781).

Response to Finding No. 59:

The proposed finding is erroneously cited. Neither Mr. Price, nor any other witness, ever testified at page 450 regarding the proposed finding. Further, neither Mr. Davis, nor any other witness, ever testified at page 1781 regarding the proposed finding. Respondents have no further specific response.

60. There are no economical alternatives to using field-erected LNG tanks for storing LNG. (CX 1074 at CB&I001243-PLA; *see also* Price, Tr. 540; Bryngelson, Tr. 6217; Davis Tr. 3186; Hall, Tr. 1781, 1786; JX 21 at 47-48 (Andrukiewicz, Dep.)).

Response to Finding No. 60:

The proposed finding does not contain accurate citations, and is thus, not supported by the record evidence. First, JX 21 was never admitted into evidence. Second, the citations to Mr. Bryngelson's testimony and Mr. Davis' testimony do not support the proposed finding. (Bryngelson, Tr. 6217; Davis, Tr. 3186). Mr. Hall's testimony also does not support the proposed finding, as he testified about various economic alternatives to building a peakshaving facility, not an LNG tank. (Hall, Tr. 1781).

61. A 5-10% price increase "translates into maybe a 4 or 5 increase – percent increase in overall cost, which would translate into a couple of pennies per mm Btu that we would have to charge the customer, and that's something that can probably be absorbed by the customer and by our profit margin." (Bryngelson, Tr. 6217-18).

Response to Finding No. 61:

Respondents have no specific response.

62. LNG tanks comprise about half of the cost of a peak shaving plant and about one-quarter to one-half of the cost of an import terminal. (Bryngelson, Tr. 6215-16; CX 1185 at

CB&I-PL045968). Thus, a 10% increase in the price of an LNG tank would result in no more than a 5% increase in the price of a peak-shaving plant or an import terminal. (Bryngelson, Tr. 6217-18). A price increase of this size is unlikely to make or break a project. (*Id.*)

Response to Finding No. 62:

The proposed finding is misleading and is not supported by the citations. While Mr. Bryngelson testifies about import terminals, he never testified about the cost of a peak shaving facility. (Bryngelson, Tr. 6215-18). CX 1185 likewise does not discuss the cost of peak shaving facilities. Further, at least one customer would have reconsidered its decision to build an LNG peakshaving facility in 1994 if the bid prices increased. (Hall, Tr. 1785).

63. Luke Scorsone, President of CB&I Industrial and former President of PDM-EC, could not cite a single instance in which a potential customer of an LNG tank tried to get a lower price by threatening to switch to an alternative to an LNG tank. (Scorsone, Tr. 2845).

Response to Finding No. 63:

Respondents have no specific response.

64. Respondents' documents focus exclusively on competition with other field-erected LNG tank builders rather than on competition from suppliers of alternative products. (*See, e.g.*, CX 1185 at CB&I-PL045968; CX 227 at CB&I-PL045127-5133; CX 184 at CB&I-PL012440-2441; CX 259 at CB&I-H003002; CX 94 at PDM-HOU017580; CX 107 at PDM-HOU005016).

Response to Finding No. 64:

Respondents have no specific response.

65. The large tanks required for LNG storage are much too large practically to shop-fabricate and ship to the site. (Andrukiewicz, Tr. 6697-98). Shop-fabricated tanks cannot provide the storage levels required for LNG facilities. A shop-fabricated tank provides less than 1% of the storage that a field-erected LNG tank provides. (RX 6 at CB&I-PL 031593). Shop-built tanks have size limitations and are "not a direct substitute for larger quantities of LNG." (Davis, Tr. 3184). LNG tanks designed to hold above a certain volume of LNG must be field-erected. (Blaumueller, Tr. 287). The largest shop-built tanks "would pale in comparison to field tanks." (Davis Tr. 3184-85). For example, 420 shop erected tanks would be required to replace one large LNG tank. (Price, Tr. 536-37).

Response to Finding No. 65:

Respondents have no specific response.

66. It is not economic to use multiple shop-built LNG tanks as a substitute for one field-erected LNG tank. (Kistenmacher, Tr. 880). El Paso has not considered shop-built LNG tanks for the LNG imports terminals it is planning because the storage volumes are too large. (Bryngelson, Tr. 6220).

Response to Finding No. 66:

Respondents have no specific response.

B. LIN/LOX Tanks Are a Relevant Project Market

67. LIN/LOX/LAR tanks are field-erected cryogenic tanks that store various liquid gas products including hydrogen, oxygen, nitrogen, argon and helium at cryogenic temperatures, typically at -300°F or lower. (CX 650 at CB&I/PDM-H4019758).

Response to Finding No. 67:

Respondents do not dispute the truth of the proposed finding. (FOF 5.1-5.2).

68. LIN/LOX tanks typically hold 400,000 to 1,000,000 gallons and cost $500,000 to $1 million each. (CX 170 at CB&I-PL009650).

Response to Finding No. 68:

Respondents do not dispute the truth of the proposed finding.

69. The tanks typically include an inner and outer shell of steel material. (JX 37 at 13 Newmeister, Dep.)). The inner tank is made of stainless steel to withstand cryogenic temperatures without becoming brittle and cracking. (Kistenmacher, Tr. 835). Between the two shells is perlite insulation. (Kistenmacher Tr. 833-834). LIN/LOX tanks have dome roofs, safety relief valves and nozzles that connect to piping and other equipment. They are built to withstand wind and seismic conditions. (Kistenmacher, Tr. 864).

Response to Finding No. 69:

Respondents do not dispute the truth of the proposed finding. (FOF 5.2-5.5).

70. LIN/LOX tanks are an essential part of integrated air separation facilities. Air separation plants take ambient temperature air and cool it down to a temperature around -300°F, and through a distillation process separate air into its liquefied elements: nitrogen, oxygen, and argon. (Kistenmacher, Tr. 825-26; Patterson, Tr. 338).

Response to Finding No. 70:

Respondents do not dispute the truth of the proposed finding. (FOF 5.6-5.9).

71. The evidence demonstrates that a small but significant nontransitory increase in the price of a field-erected LIN/LOX tank would not prompt customers to switch to alternative products. (Kistenmacher, Tr. 839-940; *see also* Hilgar, Tr. 1385 (unaware of any substitutes to a field-erected LIN/LOX tank)).

Response to Finding No. 71:

Complaint Counsel's proposed finding of fact is vague, inaccurate, and misleading. First, Dr. Kistenmacher's testimony does not support Complaint Counsel's proposed finding. Dr. Kistenmacher actually testified, over pages 839-840, that (1) shop fabricated tanks may at times be utilized in lieu of field erected tanks, and (2) the decision to utilize a particular shop fabricated or a field erected tank turns on the volume of storage needed for the facility and not an increase or decrease in the going rate for field erected LIN/LOX tanks. (Kistenmacher, Tr. 839-840).

Complaint Counsel's citation of Mr. Hilgar's testimony on this point only bolsters Dr. Kistenmacher and other LIN/LOX tank customer's testimony regarding when it is practical to use shop built tanks over field erected tanks. Mr. Hilgar testified that for some tanks a shop built tank may be appropriate and that the reason that larger tanks are field-erected stems from the feasibility of transporting such a large object. (Hilgar, Tr. 1385).

Moreover, additional LIN/LOX customers, not cited by Complaint Counsel for this finding, name shop fabricated tanks as "substitutes" for field-erected LIN/LOX tanks. (Kamrath, Tr. 1984). David Kamrath testified that shop fabricated tanks are typically used as substitutes for field erected tanks in smaller capacities. Mr. Kamrath testified that any limit on the ability to substitute shop fabricated tanks for field erected tanks was due to shipping concerns generated from shipping excessively large tanks. This concern was echoed by other customers in the market. (Patterson, Tr. 343-343; Hilgar, Tr. 1385).

72. Field-erected tanks are used in industrial applications that require large amounts of storage capacity. In these applications, it is not economic to use shop-built LIN/LOX tanks. (JX 37 at 33 (Newmeister, Dep.)).

Response to Finding No. 72:

Complaint Counsel's proposed finding is inaccurate and overbroad. While it is not disputed that field erected tanks are used in "industrial applications that require large amounts of storage capacity," it is inaccurate and overbroad to conclude that it is not "economic" [sic] to use shop built LIN/LOX tanks in all industrial applications. In fact, it may be economical to use shop built tanks in depending on the total storage volume needed for a particular facility. (Kamrath, Tr. 1984; Hilgar, Tr. 1385; Kistenmacher, Tr. 838-839).

73. Shop-fabricated LIN/LOX tanks can store up to 80,000 gallons of liquid. (Hilgar, Tr. 1385). If a company tried to use shop-erected tanks for applications that require large amounts of storage, it would need to use many smaller tanks, instead of one large, field-erected LIN/LOX tank. (Kistenmacher, Tr. 838; JX 37 at 33 (Newmeister, Dep.)). The cost of multiple shop-built tanks would be higher than the cost of one field-erected tank that could store the same amount of product. Including the cost of attaching all of the piping for connecting multiple shop-built tanks, the increased cost would be "astronomical." (Kistenmacher, Tr. 838-39).

Response to Finding No. 73:

Complaint Counsel's proposed finding is inaccurate and overly broad. The proposed finding is overbroad because in some cases (depending upon the volume of storage needed) shop built tanks can be used as a substitute to field erected tanks in order to store LIN/LOX/LAR for industrial applications. This fact is supported by at least three different customers' testimony. (Kamrath, Tr. 1984; Hilgar, Tr. 1385; Kistenmacher, Tr. 838-839) (RFOF 71).

74. Air Products buys only field-erected LIN/LOX tanks for projects requiring storage of large volumes of liquid. (Hilgar, Tr. 1385). Air Products is not aware of any substitute for LIN/LOX tanks. (Hilgar, Tr. 1385-86).

Response to Finding No. 74:

The proposed finding is vague, ambiguous, and misleading. Air Products' representative, Joseph Hilgar, specifically testified that Air Products would purchase shop built LIN/LOX tanks for projects for storage of liquid gas below 80,000 to 100,000 gallons in volume. (Hilgar, Tr. 1385). To the extent that Complaint Counsel asserts that shop built LIN/LOX tanks are never viable substitutes for field erected LIN/LOX tanks the testimony of Hilgar is not helpful. Hilgar's testimony is more general than that. Hilgar states that there is no substitute for *LIN/LOX tanks* that he is aware of, not that shop built tanks are never substitutes for field-erected tanks. (Hilgar, Tr. 1385) (emphasis added).

75. A small but significant, nontransitory increase in the price of field-erected LIN/LOX tanks would have no impact on demand for field-erected LIN/LOX tanks because of the large cost differential with shop-built LIN/LOX tanks. (Kistenmacher, Tr. 839; Hilgar, Tr. 1385).

Response to Finding No. 75:

The proposed finding is overbroad and misleading because it states that changes in the price of field erected LIN/LOX tanks would never effect the demand of field-erected LIN/LOX tanks because they are always far more expensive than shop built tanks. This statement is overbroad. In fact, the testimony of Complaint Counsel witnesses Mr. Hilgar, Mr. Kamrath, and Dr. Kistenmacher all support the fact that at certain volume levels shop built tanks are viable substitutes for field-erected tanks. (Kamrath, Tr. 1984; Hilgar, Tr. 1385; Kistenmacher, Tr. 838-839) (*See also* RFOF 71-74).

C. LPG Tanks Are a Relevant Project Market

76. LPG tanks field-erected, refrigerated tanks that store liquefied gases such as propane, butane, propylene and butadiene at refrigerated temperatures of around -50° F. (Warren, Tr. 2275, 2306; CX 258 at CB&I-H001793; CX 650 at CB&I/PDM-H 4019758; CX 993 at PDM-HOU021479).

Response to Finding No. 76:

Respondents do not dispute the truth of this finding. (FOF 4.1).

77. LPG customers are oil and petrochemical companies, such as Marathon and Enron; owners of LPG terminals, such as Sea-3 and CMS Energy, that import/export LPG and transfer the LPG between ships and storage tanks via pipelines; and EPC contractors, such as Fluor, who subcontract tank suppliers to build LPG tanks for larger facilities. (CX 993 at PDM-HOU-021484).

Response to Finding No. 77:

Respondents have no specific response to the extent this finding also includes additional companies such as Intercontinental Terminals Co. and Texaco. (*See, e.g.*, FOF 4.2-4.6).

78. The evidence demonstrates that a small but significant, nontransitory increase in the price of a field-erected LPG tank would not prompt customers to switch to alternative products.

Response to Finding No. 78:

This finding is wholly unsupported by any record evidence, misleading and irrelevant as stated. Complaint Counsel fails to cite any record evidence for this conclusion. To the extent that any record evidence does exist, this finding lacks foundation, reliability, is conclusory in nature and represents improper argument.

79. Field-erected LPG tanks can hold substantially larger volumes of LPG than shop-built tanks. (RX 778 at 46-47 (Crider, Dep.)).

Response to Finding No. 79:

This finding is misleading because Mr. Crider simply testified that shop-constructed tanks are smaller in volume, and were not used on the Ferndale LPG project. (Crider, Tr. 6719-20). Further, not all field-erected tanks hold "substantially larger volumes" of product than shop-built tanks. (*See generally* N. Kelley, Tr. 7093-94).

80. Because field-erected tanks can hold a larger volume of LPG, it allows LPG customers to import and export LPG at a faster rate, and minimizes the amount of money

customers spend to hold a ship while the LPG is being transferred. (RX 778 at 26-27 (Crider, Dep.)).

Response to Finding No. 80:

This finding is misleading to the extent that Mr. Crider's testimony relates solely to Texaco's purpose in pursing the Ferndale LPG expansion project. (Crider, Tr. 6708-10). Moreover, this finding is misleading because not all field-erected tanks hold a large volume of LPG product. (*See* RFOF 79).

81. Shop-built pressurized tanks (also known as bullets) and field-erected pressure spheres are not economic substitutes for an LPG tank when storing large volumes. (Scorsone, Tr. 5170-71; Crider, Tr. 6719-20-1; JX 27 at 32 (N. Kelley, Dep.)). For some chemicals such as butadeine, storage tanks must be refrigerated to keep the chemical from polymerizing. (JX 27 at 38-39 (N. Kelley Dep.). For such chemicals an unrefrigerated pressure sphere (or bullet) is not a substitute for an LPG tank.

Response to Finding No. 81:

This finding is misleading and inaccurate for a variety of reasons. Specifically, Mr. Scorsone testified that for "LPG, from time to time customers will evaluate whether refrigerated storage, a relevant product in this case, or pressure storage could be an alternative." (Scorsone, Tr. 5170-71). Mr. Scorsone further testified that sometimes, shop-erected tanks are *less expensive* to the customer given the circumstances of the project. (Scorsone, Tr. 5171). Moreover, Complaint Counsel's assertion that for certain chemicals, unrefrigerated pressure storage is not a substitute for an LPG tank is unsupported by any record evidence. In fact, ITC stores butadiene in a semi-refrigerated sphere pressure vessel. (N. Kelley, Tr. 7097-98). The refrigeration of butadiene at certain temperatures, namely minus 20 degrees, would be too cold and create a vacuum. (N. Kelley, Tr. 7098).

82. To adopt a storage solution for 400,000 barrels of LPG based on multiple shop-built LPG pressure spheres would cost approximately three times the amount of a storage solution based on a field-erected LPG tank. (RX 778 at 46-47 (Crider, Dep.)).

Response to Finding No. 82:

This finding is misleading because it is based on one LPG project in 1994 under a specific set of circumstances. Moreover, this finding is irrelevant to today's market and circumstances in the industry. In fact, under certain circumstances, a shop-built LPG pressure sphere would cost less than a field-erected LPG tank. (Scorsone, Tr. 5171).

83. PDM EC's former president, Mr. Scorsone, who has worked in the tank industry for many years, has never seen a customer switch from field erected LPG tanks to shop-built pressurized tanks to obtain a lower price. (Scorsone, Tr. 5170-71).

Response to Finding No. 83:

This finding is inaccurate and misstates Mr. Scorsone's testimony. Mr. Scorsone stated that "LPG, from time to time customers will evaluate whether refrigerated storage, a relevant product in this case, or pressure storage could be an alternative, so I know throughout my career I've had discussions of that, but I can't recall specifically with whom, but that is a trade-off which is commonly done." (Scorsone, Tr. 5170). Mr. Scorsone further testified that "often customers have needs that are on the cusps of field-erected versus shop-built and sometimes shop-built may be less expensive to that customer given the circumstances of the project." (Scorsone, Tr. 5171).

D. TVCs Are a Relevant Product Market

84. A TVC is a large metal enclosure used to simulate the vacuum of space for the purpose of testing satellites. During a test, air is pumped out of the enclosure and, within the enclosure, liquid or gaseous nitrogen circulates through pipes to heat or cool the interior environment. Controls allow users to adjust the temperature and vacuum conditions inside the enclosure so that satellites can be tested in a space-like environment. (Thompson, Tr. 2039-40). Temperatures simulated within the chamber can range "from minus 180 degrees C to plus 150 degrees C" and the vacuum can range from 1 x 10-6 torr to 1x10-8 torr. (Higgins, Tr. 1262; Scully, Tr. 1143). TVCs range in size from 20 feet in diameter to 45 feet in diameter. (Higgins, Tr. 1264).

Response to Finding No. 84:

Complaint Counsel misquotes the testimony of Higgins. (*See* Higgins, Tr. 1264). The range in size of field-erected TVC's is not limited to 20 feet to 45 feet in diameter, nor does Higgins testify that such a range exists. (*See* Higgins, Tr. 1264). With the exception of the last statement above, Respondents do not dispute the facts contained in this statement. (*See* RFOF 6.1-6.10).

85. The customers of TVCs are satellite manufacturers and government agencies, such as NASA. TVCs are used to test satellites purchased by the Department of Defense, NASA and commercial buyers. (Neary, Tr. 1420; Glenn, Tr. 4074-75; *see also* CX 1196 at PDM-HOU011524-1525 (list of PDM customers)).

Response to Finding No. 85:

Respondents do not dispute the facts contained in this statement, except to note that field-erected TVC customers such as Boeing, Raytheon, Spectrum Astro and TRW are sophisticated aerospace companies. (*See* RFOF 6.68-6.90).

86. "Customers are typically testing satellites costing $50MM to $200MM in thermal vacuum chambers costing $5MM - $20MM." (CX 212 at CB&I-PL031718). The satellites sold by TRW range in value from $750 million to $1.5 billion, while those sold by Spectrum Astro, a smaller satellite manufacturer, range in value from $10 million to $55 million. (Neary, Tr. 1420-21; Thompson, Tr. 2038).

Response to Finding No. 86:

Respondents do not dispute the facts contained in this statement.

87. The evidence demonstrates that a small but significant nontransitory increase in the price of a TVC would not prompt customers to switch to alternative products. CCFF 88.

Response to Finding No. 87:

This finding is inaccurate, because alternatives to field-erected TVCs do exist, and customers have used them. (*See* RFOF 6.65-6.67). For example, **[xxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx]**

88. TVCs are the only satellite testing equipment capable of simulating the vacuum and thermal conditions of outer space. (Higgins, Tr. 1262-63). Other testing chambers are not substitutes for TVCs because they only simulate other conditions. (Scully, Tr. 1139; Proulx, Tr. 1729). Satellite customers require that manufacturers test their satellites in TVCs. (Neary, Tr. 1424).

Response to Finding No. 88:

This finding is misleading to the extent that it suggests shop-erected TVCs are not substitutes for field-erected TVCs. Satellite sizes are shrinking, rendering the large, field-erected TVCs obsolete, because smaller satellites can be tested in smaller shop-erected chambers. (*See* RX 204 (state of mind)). The predominant number of satellites built in the future will be small enough to be tested in existing shop- and field-erected TVCs. (Scully, Tr. 1203-04). Existing large, field-erected TVCs and smaller shop-erected TVCs should be adequate to test these satellites in the future. (*See* Scully, Tr. 1203-04) (FOF 6.22-6.25).

89. Luke Scorsone, President of CB&I Industrial and former President of PDM EC, could not recall an instance in which a potential customer of a TVC tried to get a lower price by threatening to switch to an alternative. (CX 646 at 76-77 (Scorsone, IHT)).

Response to Finding No. 89:

Respondents have no specific response.

90. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 265 at CB&I-H007057; *see* CX 1202 at PDM-HOU1005348, *in camera*; CX 212 at CB&I-PL031709-1724; CX 1196 at PDM-HOU011519-1532).

Response to Finding No. 90:

These documents state that thermal vacuum chambers are a product, however, references in business documents do not account for the legal requirements in defining an antitrust relevant market.

91. Shop-built TVCs are not economic substitutes for field-erected TVCs. Thermal vacuum chambers that are too large to transport from a fabrication shop to the customer's site must be field-erected. (Neary, Tr. 1421-22; Gill, Tr. 186-87; Glenn, Tr. 4064; JX 37 at 88 (Newmeister, Dep.)). At **[xxxxxx]**, "90 percent of the time, most assembled satellites do require

testing in field fabricated rather than [shop-fabricated thermal vacuum chambers]." (Proulx, Tr. 1727).

Response to Finding No. 91:

This may have been true in the past. However, this is not true today because of the miniaturization of satellites. (*See* FOF 6.22-6.25).

92. The construction of a shop-fabricated thermal vacuum chamber is "markedly different" from the construction of a field-erected thermal vacuum chamber. (Scully, Tr. 1101-02; Gill, Tr. 235). "In shop-built chambers, all of the equipment and capability, personnel capability, lies within the confines of the shop." (Scully, Tr. 1103). In contrast, field-erected chambers require a crew that "virtually lives in the field for elongated periods of time.... It's a vastly different technology than what a shop-built chamber requires." (Scully, Tr. 1103).

Response to Finding No. 92:

Some shop-built TVCs still require field-erection, including for example, the small field-erected chambers being built by XL/Votaw for Raytheon. (Hart, Tr. 406-07; *See* RFOF 6.10).

93. Satellites above a certain size cannot be tested in shop-fabricated thermal vacuum chambers. (Scully, Tr. 1139; Neary, Tr. 1425). Consequently, shop-fabricated thermal vacuum chambers are not an alternative to large, field-erected thermal vacuum chambers for testing large satellites. (Scully, Tr. 1140).

Response to Finding No. 93:

Respondents do not dispute this finding except to note that large satellites are being phased out because of miniaturization. (FOF 6.11-6.16, 6.22-6.25). Complaint Counsel ignores the evidence of miniaturization within the satellite industry, which is driving the size of satellites down and allowing smaller, shop-erected TVC's to serve as substitutes for larger, field-erected TVCs. (*See* RFOF 6.22-6.25, 6.65-6.67).

94. Other products, such as "thermal cycling chambers" and "altitude chambers" are not functional equivalents because they cannot mimic the conditions a satellite will face in space. (Neary, Tr. 1463-1464; *see* Scully, Tr. 1135-1139).

Response to Finding No. 94:

Respondents do not dispute the that "thermal cycling chambers" and "altitude chambers" are not functional substitutes.

IV.

THE RELEVANT GEOGRAPHIC MARKET IS THE UNITED STATES

95. The parties agree that the relevant geographic market in which to analyze the merger is the United States. Drs. Simpson and Harris agree that the relevant geographic market in which to assess the impact of the acquisition is the United States. (Simpson, Tr. 3035 (LNG); Harris, Tr. 7192 (LNG); Simpson, Tr. 3361-3362 (LPG) (citing CX 116); Harris, Tr. 7280 (LPG); Simpson, Tr. 3421 (LIN/LOX); Harris, Tr. 7300-7301 (LIN/LOX); Simpson, Tr. 3488 (TVC); Harris, Tr. 7324 (TVC)).

Response to Finding No. 95:

Complaint Counsel's finding number 95 is incomplete because it fails to include Dr. Harris' qualification that technically, under the guidelines, every single project is a separate antitrust market. (Harris, Tr. 7192, 7301-02, 7280, 7324).

96. By definition, field-erected LNG, LIN/LOX and LPG storage tanks and TVCs must be built at customers' sites in the United States. "LNG tanks are purchased as part of a larger facility that is designed to supply natural gas to gas users in a particular area. As a consequence, the LNG tanks have to be located in a particular locality." (Simpson, Tr. 3034). "The competitive situation is basically the same across the localities in the U.S., so defining the geographic market as the U.S...make[s] the analysis much more tractable without harming the analysis at all." (Simpson, Tr. 3035). Dr. Simpson testified: "LIN/LOX/LAR tanks are purchased as part of a facility that makes liquefied gas, and those facilities are built close to a customer." (Simpson, Tr. 3420). Dr. Simpson then noted: "[A]s with the other structures, the identity of the market participants is basically the same across the U.S. So to make the analysis more tractable, it makes sense to define the geographic market as the United States." (Simpson, Tr. 3421).

Response to Finding No. 96:

Respondents have no specific response.

97. Respondents' business documents analyze competition separately in the United States compared to other areas of the world. Respondents' business documents identify the United States as a "marketplace in which they will institute a particular policy." (Simpson, Tr. 3035, citing CX 185). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Simpson, Tr. 3036, citing CX 364, *in camera*). PDM strategic documents differentiate

between the domestic and international LNG markets and identify a separate cast of competitors for each market. (CX 99 at PDM HOU 000259; CX 646 at 282 (Scorsone, IHT)). **[xxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 94 at PDM-HOU017580; *see also* CX 217 at CB&I-PL034441 *in camera*).

<u>Response to Finding No. 97:</u>

Complaint Counsel's finding number 97 is irrelevant; whether CB&I's documents differentiate markets is not the issue in this case. Further, because competition has changed in the alleged product markets and increasingly CB&I's worldwide competitors are its domestic competitors. (*See* Harris, Tr. 7123, 7287-94) (FOF 7.93, 7.118).

98. It is economically infeasible to import a field-erected storage tank from anywhere outside the United States. (Kistenmacher, Tr. 840, 881).

<u>Response to Finding No. 98:</u>

Complaint Counsel's proposed finding number 98 is inaccurate; it depends on where the tank is being imported from. Further, this assertion is overbroad; what type of storage tank is Complaint Counsel talking about? LNG? Water? However, there is ample evidence that nine percent nickel steel for LNG tanks are imported in pre-fabricated pieces on a regular basis. (FOF 3.560-3.564).

V.

THE MERGER WILL LIKELY LESSEN COMPETITION BECAUSE <u>IT CREATES A DOMINANT FIRM IN HIGHLY CONCENTRATED MARKETS</u>

99. Prior to the merger, CB&I and PDM each had market shares ranging from **[xx]** to **[xx]** in each relevant market. CCFF 146, 154. After the merger, the combined market share in the relevant markets ranges from 70% to 100%. CCFF 138, 151, 180, 191.

<u>Response to Finding No. 99:</u>

Complaint Counsel's finding number 99 is incorrect. AT&V's post acquisition LIN/LOX market share is 60%; CB&I's market share in LIN/LOX cannot therefore be 70% to 100%. Further, CB&I will not win the Dynegy project, thus CB&I's post-Acquisition share

cannot be 100%. In addition, CB&I has not built a thermal vacuum chamber since 1984 -- how could CB&I's market share be 70%-100% since the merger? In addition, Complaint Counsel's reliance on shares is inappropriate because it fails to reflect competition going forward; the appropriate method of calculating market shares would be a 1/N or bidding model. (Harris, Tr. 7340-41).

100. A 1998 presentation to the PDM Board reported market shares for PDM and CB&I as **[xx]** and **[xx]**, respectively, for a combined share of **[xxx]**. Morse was listed as having a **[xx]** share; since Morse is now owned by CB&I, the combined market share of all three firms is **[xx]**. (CX 648 at PDM-HOU000249).

Response to Finding No. 100:

Complaint Counsel's finding number 100 is absurdly irrelevant because the document cited by Complaint Counsel is clearly indicating market share across ***all products excluding LNG***, which includes all of the non-relevant products made by CB&I and PDM. (CX 648 at PDM-HOU000249). Even without this enormous oversight by Complaint Counsel, as the finding itself notes, the referenced document dates from 1998. Complaint Counsel is attempting to calculate shares based on a five year old document that was not prepared using "market share" in the antitrust context.

101. These market share figures provide several important insights. First, Respondents' high pre-merger market shares reflect the vigorous direct competition that existed between them before the merger. "The market concentration measures provide a measure of this [unilateral anticompetitive price increase] if each product's market share is reflective of not only its relative appeal as a first choice to consumers of the merging firms' products but also its relative appeal as a second choice, and hence as a competitive constraint to the first choice." *Merger Guidelines* § 2.211.

Response to Finding No. 101:

Complaint Counsel's finding number 101 is incorrect. The market share figures referenced by Complaint Counsel are those contained in CX 648, which as noted above, purports to calculate market share across all markets (including water, flat bottom tanks, etc.) *excluding*

LNG. (CX 648 at PDM-HOU000249). There are no important insights provided by this document, other than that Complaint Counsel's case is based on utter distortions of documents taken out of context. Further, this finding entirely ignores the fact that there has been entry and that further entry is imminent. Firms have recently entered or have made plans to enter the alleged product markets. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

102. Second, the greater the level of direct competition before the merger, as reflected in Respondents' high individual market shares, the greater the likely anticompetitive harm after the merger. *Merger Guidelines* § 2.21 ("The price rise will be greater the closer substitutes are the products of the merging firms, *i.e.* the more the buyers of one product consider the other product to be their next choice.").

Response to Finding No. 102:

Complaint Counsel's finding number 102 is unsupported by evidence and is irrelevant because it fails to account for post-acquisition evidence indicating that the Acquisition of PDM by CB&I has not lessened competition in the alleged product markets. (Harris, Tr. 7184-89) (FOF 7.56, 7.57) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

103. Third, Respondents' [**xx]** plus combined market shares exceed the 35% level at which the *Merger Guidelines* "presume that a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Merger Guidelines* § 2.211.

Response to Finding No. 103:

Complaint Counsel's proposed finding 103 is irrelevant and does not support the view that CB&I and PDM were customers' first choices. Further, it ignores entirely the issue of entry.

104. CB&I's and PDM's market shares, and those of other competitors in the relevant markets, are also used to compute the level of concentration in a particular market and the increase in concentration caused by the merger. "Market concentration is a useful indicator of the likely potential competitive effect of a merger." *Merger Guidelines* § 1.51.

Response to Finding No. 104:

Complaint Counsel's finding number 104 is incomplete because it fails to note that under section 1.41 of the *Merger Guidelines* it is necessary that market shares be "the best indicator of firms' future competitive significance." (*Merger Guidelines* § 1.41; *see also id.* § 1.32; Harris, Tr. 7221-29, 7286-87, 7311-13; *see United States v. Baker Hughes*, 908 F.2d 981, 984 (D.C. Cir. 1990); *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974)). Further, this proposed finding entirely ignores entry.

105. The antitrust agencies use the Herfindahl-Hirschman Index ("HHI") of market concentration. *Merger Guidelines* § 1.5. The HHI is calculated by summing the squares of the individual market shares of all participants. (*Id.*) The increase in concentration caused by the merger is calculated by doubling the product of the market shares of the merging firms. (*Id.* § 1.51, n.18).

Response to Finding No. 105:

Respondents have no specific response.

106. In the LNG market, the merger increases the HHI by **[xxxx]** to **[xxxx]**; in the LIN/LOX market, the merger increases the HHI by **[xx]** to **[xx]**; in the LPG market, the merger increases the HHI by **[xxxx]** to **[xxxx]**; and in the TVC market, the merger increases the HHI by **[xxxx]** to 10000. CCFF 146, 151, 180, 198.

Response to Finding No. 106:

Complaint Counsel's finding number 106 is misleading and irrelevant because, as indicated previously, the HHIs are not an accurate reflection of present and future competition in

these markets and do not satisfy the requirements of section 1.41 of the *Merger Guidelines*. (RFOF 7). As stated *supra* RFOF 7, the starting date of 1990 in Complaint Counsel's HHI calculations is arbitrary and manipulates the HHI numbers when the HHIs show a change of zero in three of the markets if one starts calculating in 1995 or 1996 or any time after.

107. The *Merger Guidelines* provide that where "the post-merger HHI exceeds 1800, it will be **presumed** that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." *Merger Guidelines* § 1.51(c) (emphasis supplied).

Response to Finding No. 107:

Complaint Counsel's finding number 107 is misleading and irrelevant because, as indicated previously, the HHIs are not an accurate reflection of present and future competition in these markets and do not satisfy the requirements of section 1.41 of the *Merger Guidelines*. Further, the *Merger Guidelines* are not binding on the courts. (*See also* RFOF 7.)

108. In this case, the increase in concentration in each of the relevant markets is, at a minimum, more than 25 times as great as the threshold that the *Merger Guidelines* identify as the level of increase that is likely to create market power.

Response to Finding No. 108:

Complaint Counsel's finding number 108 is misleading and irrelevant because, as indicated previously, the HHIs are not an accurate reflection of present and future competition in these markets and do not satisfy the requirements of section 1.41 of the *Merger Guidelines*. RFOF 7. As stated *supra* RFOF 7, the starting date of 1990 in Complaint Counsel's HHI calculations is arbitrary and manipulates the HHI numbers when the HHIs show a change of zero in three of the markets if one starts calculating in 1995 or 1996.

109. The HHI levels in this case well exceed the postmerger market concentration levels of recent FTC actions in which the FTC successfully enjoined mergers. FTC v. Libbey, 211 F. Supp. 2d 34 (D.D.C. 2002) (HHI of 5251); FTC v. Heinz, 116 F. Supp. 2d 190, 195 (D.D.C. 2000) (HHI of 5285); FTC v. Swedish Match, 131 F. Supp. 2d 151, 167 (D.D.C. 2000) (HHI of 4733); FTC v. Cardinal Health, 12 F. Supp. 2d 34, 53 (D.D.C. 1998) (HHI of 2224).

Response to Finding No. 109:

Complaint Counsel's finding number 109 is misleading and irrelevant because, as indicated previously, the HHIs are not an accurate reflection of present and future competition in these markets and do not satisfy the requirements of section 1.41 of the *Merger Guidelines*. RFOF 7. Further, in none of these cases did the court find for the Plaintiff based on HHIs alone. As stated *supra* RFOF 7, the starting date of 1990 in Complaint Counsel's HHI calculations is arbitrary and manipulates the HHI numbers when the HHIs show a change of zero in three of the markets if one starts calculating in 1995 or 1996.

A. Market Shares Should Be Measured Based on Historical Sales

110. The appropriate measure of market shares is each firm's sales, as opposed to each firm's production capacity. In markets where the products are supplied on a differentiated basis, and in which firms have different capabilities to supply customers, it is appropriate to determine market shares by each firm's success in securing sales. *Merger Guidelines* § 1.41 ("Dollar sales or shipments generally will be used if firms are distinguished primarily by differentiation of their products. Unit sales generally will be used if firms are distinguished primarily on the basis of their relative advantages in serving different buyers or groups of buyers.").

Response to Finding No. 110:

Complaint Counsel's proposed finding is false; the Merger Guidelines state that the appropriate measure of market shares is whatever is predictive of future competitiveness. *Merger Guidelines* § 1.41. Further, neither dollar sales nor unit sales nor production capacity are appropriate measures of market share in this case because none of these gives the best indication of firm's ability to compete in the future. The appropriate method of calculating market shares would be a 1/N or bidding model. (Harris, Tr. 7340-41).

111. Each of the relevant markets is comprised of highly differentiated products. Field-erected LNG, LIN/LOX and LPG tanks and TVCs vary by size, by specific application, by installation parameters, by site characteristics, and by specific design. Factors that differentiate LNG tanks include the location, the nature of the site, the size of the tank, and the tank's design. (CX 573 at CB&I-PL031580 (describing CB&I LNG tank "design considerations," including factors such as codes and regulations, materials, site conditions, wind loads, seismic events,

secondary containment and internal pressure); *see also* CX 85 (LIN/LOX tanks); CX 1048 (LPG tanks and TVCs)).

Response to Finding No. 111:

Respondents have no specific response.

112. Suppliers set prices by individual project, depending on the nature of the project and on the level of competition among the suppliers. (Gill, Tr. 209-210; Price, Tr. 556). The design of the LNG tank is heavily dependent on an analysis of risk factors. (CX 573 at CB&I-PL031585). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (*See, e.g.*, CX 827 (PDM pricing); CX 1321, *in camera* (CB&I pricing)).

Response to Finding No. 112:

Respondents have no specific response.

113. In this case, the firms that compete for new projects are distinguished by several factors that are relevant to their ability to secure contracts. These include firms' actual experience, their reputation for providing quality products on a timely basis, their engineering and fabrication resources, and their cost structure. (Simpson, Tr. 3037).

Response to Finding No. 113:

Respondents have no specific response.

114. In the past decade, Respondents have won virtually every contract in the relevant markets. CCFF 136, 151, 172, 192. Domestic firms have won only a handful of contracts and foreign firms have not won any contracts in head-to-head competition with Respondents. CCFF 136, 151, 172, 192. The reason Respondents' competitors have not won more contracts is because of the competitive advantage enjoyed by Respondents, including lower cost structures. CCFF 393-420.

Response to Finding No. 114:

Complaint Counsel's finding number 114 is misleading and/or inaccurate. First, it is inaccurate to characterize CB&I's defeats by domestic firms as a "handful" of projects. In the LIN/LOX market, for example, AT&V has won three of the last five projects available. (Harris, Tr. 7308). Foreign firms have only recently entered or have made plans to enter the alleged product markets; thus the failure of foreign firms to beat CB&I or PDM in "head-to-head" competition for a project prior to their entry in the United States is misleading. (*See*

Harris, Tr. 7209-13, 7239-47). Further, Complaint Counsel has done no analysis whatsoever of CB&I's cost structure, PDM's cost structure, or foreign or domestic competitors' cost structures; thus it is an inappropriate assumption that Respondents have a lower cost structure. Dr. Simpson believes that the costs of foreign LNG competitors put them at a competitive disadvantage, however Dr. Simpson has never seen the costs of the foreign competitors. (Simpson, Tr. 3919-22). Dr. Simpson has not seen evidence permitting him to quantify differences between CB&I and foreign firms in terms of field erection costs, labor costs, acquisition, project management personnel rates, engineering personnel rates, fabrication costs, administrative overhead, or costs relating to owning versus renting equipment. (Simpson, Tr. 3921-37) (FOF 7.150).

115. Dr. Simpson provided a probability analysis for LNG tanks, which compared the actual results of bids with the likely results if other firms had been equally situated with CB&I and PDM. Based on his assessment, the probability is extremely low that CB&I and PDM would have prevailed as often as they did if other firms were equally capable of competing with CB&I and PDM. CCFF 141.

Response to Finding No. 115:

Complaint Counsel's finding number 115 is misleading and irrelevant because Dr. Simpson's probability analysis was so fundamentally flawed both logically and economically that it had no value whatsoever. Dr. Simpson used probability theory to predict that firms who were not competing had no probability of winning jobs. (Simpson, Tr. 3393-94, 3400, 3663-65, 5753, CX-1645) (FOF 7.213). This is conceptually flawed because, obviously, firms that were not competing and not bidding on projects had no chance of winning projects. It is illogical to suggest that this means firms that bid now have no chance of winning projects based on the fact that they did not win jobs when they did not bid. (*See* Harris, Tr. 7339).

116. Actual sales data since 1990 provides the best data to measure market shares and concentration levels. "Market concentration and market share data of necessity are based on historical evidence." *Merger Guidelines*, § 1.521.

Response to Finding No. 116:

Complaint Counsel's finding number 116 is inaccurate; 1990 was chosen arbitrarily by Complaint Counsel. First, it is difficult to imagine that 1990 is the best starting date in all four markets. Second, the arbitrary nature of the HHIs is underscored by the fact that choosing a different date achieves a completely different result; picking a different starting point of 1995 or 1996, vastly different concentration statistics emerge. CB&I did not build an LNG or LPG tank between 1995 and the date of the Acquisition, resulting in a change of zero in the HHIs in those markets, and the HHI in the LIN/LOX market is lowered. (*See*, *e.g.*, Simpson, Tr. 3744) (FOF 7.236). In the thermal vacuum chamber market, CB&I has not built a thermal vacuum chamber since 1984. (Scorsone, Tr. 5055) (FOF 7.235). Thus, choosing to calculate HHIs beginning in 1996 results in an HHI change of zero in three of the four markets. Under *Baker Hughes* and Section 1.5 of the Merger Guidelines, an Acquisition resulting in zero change in the HHI fails to establish a prima facie case. In the LIN/LOX market, even Dr. Simpson admitted that CB&I's sale by Praxair in 1997 was a significant competitive change, a fact which would justify beginning the HHI calculation in 1997 after the date of the sale. (*See* Simpson, Tr. 3753) (FOF 7.236) (RFOF 10).

117. Because the products in all of the relevant markets are sold on an infrequent basis, sales data from any particular year may be unrepresentative of the competitive significance of any particular firm. Sales of LNG tanks are made infrequently. **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1210, *in camera*; CX 1212, *in camera*). That is fewer than one tank per year.

Response to Finding No. 117:

Respondents have no specific response.

118. It is appropriate in this case to measure market shares by examining sales data over an extended period of time. *Merger Guidelines* § 1.41 ("where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time.").

Response to Finding No. 118:

Complaint Counsel's finding number 118 is misleading because while under the Guidelines it may appropriate to measure over a "longer" period of time, there is no support whatsoever for using market shares spanning 13 years. Further, the proposed finding is incomplete because it fails to note the requirement under the *Merger Guidelines* that market shares be measured using "the best indicator of firms' future competitive significance." *Merger Guidelines* § 1.41. The changes in the alleged product markets militate against a different date, depending on the particular circumstances of each market, which have been highlighted *supra* RFOF 7.

119. In order to evaluate how CB&I's acquisition of PDM affected competition for LNG tanks, it is appropriate to examine sales from 1990 to the time of the acquisition (Simpson, Tr. 3037-38, 3043-46). Economists examine multi-year periods when analyzing competition (Simpson, Tr. 3044). The respondents use sales data going back eleven years or more to make inferences about the competitive strength of companies. (CX 160; CX 169 at CB&I-PL 007573; CX 173 at CB&I-PL010403; CX 205; CX 207 at CB&I-PL 031456-57; CX 244). There is no evidence that market conditions changed significantly during this period. (Simpson, Tr. 3046).

Response to Finding No. 119:

Complaint Counsel's finding number 119 is incorrect and directly contradicts admissions made by Dr. Simpson himself. First, there is economic testimony indicating that the LNG market has been historically depressed, but is seeing a significant rise in demand. (Harris, Tr. 7195-96). Further, Dr. Simpson acknowledged that LNG tanks are increasingly double or full containment rather than single containment. (Simpson, Tr. 3854, 3993, 3729-30, 3732, 3736) (FOF 7.220-7.226). This is supported by other economic testimony. (Harris, Tr. 7220). Dr. Simpson admitted that whether LNG tanks will be double or full containment rather than single containment should be considered in a market share analysis. (Simpson, Tr. 3743) (FOF 7.226). Additionally, there has been a change in competitors. (Harris, Tr. 7220-21). Dr. Simpson agreed that for LNG if you calculated HHIs from 1996 to 2001, the change would be

zero. (Simpson, Tr. 3744) (FOF 7.236). In addition, Dr. Simpson admitted that the spin-off of CB&I by Praxair was an important change. (Simpson, Tr. 3753) (FOF 7.235). There have clearly changes in market conditions. Complaint Counsel has used an inappropriate date to measure market shares, and its use of such old and outdated data contradicts the Merger Guidelines' requirement that market shares be predictive of future competition. There is no authority for the period of time used by Complaint Counsel to measure market share. Certainly Respondents' sales data does not support Complaint Counsel's use of 1990 for a starting date for HHIs -- not a single document cited by Complaint Counsel supports Complaint Counsel's finding. (CX 160, CX 169, CX 173, CX 205, CX 207, CX 244). While economists may use historical evidence, there is no support for going 13 years back.

120. Dr. Harris acknowledged that 1995 or 1996 would be an arbitrary starting date to examine market sales and that it would be wrong to conclude that the merger does not hurt competition simply because over some period of years CB&I or PDM accounted for all of the sales in the market and the other firm accounted for none. (Harris, Tr. 7228).

Response to Finding No. 120:

Complaint Counsel's finding number 120 is incomplete because it fails to note that Dr. Harris thought that the choice of 1990 was arbitrary, and his use of the years 1995 or 1996 were intended to underscore the uselessness of Complaint Counsel's HHI calculation and the arbitrary nature of the selection of 1990. (Harris, Tr. 7227-28, 7364).

121. Respondents' witness, Nigel Carling of Enron testified that, in assessing suppliers, "You're really looking at expertise over the last ten years." (Carling, Tr. 4512).

Response to Finding No. 121:

Complaint Counsel's finding number 121 is irrelevant because if "expertise over the last ten years" were the proper gauge for measuring market share, it would be necessary to include all worldwide projects. Nigel Carling stated that one looks at expertise worldwide. (Carling, Tr. 4552). Further, the statement made by Nigel Carling was clearly not an economic

analysis and was clearly not meant to suggest that market shares in antitrust cases should be calculated one way or another.

122. In their own documents and in presentations to customers, Respondents draw upon their historical sales achievements to make new sales. In a bid proposal to Louisville Gas & Electric, CB&I touted that it has been "integrally involved with LNG peak shaving facilities **since the 1960's**. The enclosed installation list summarizes the 43 LNG peak shaving facilities and 90 individual LNG tanks designed and constructed by CB&I [on] a lump sum basis." (CX 173 at CB&I-PL010403 (emphasis supplied); *see also* CX 207 at CB&I-PL 013456-457; CX 150 at CB&I-PL 002655, 002661; CX 142 at CB&I-00212-HOU). With respect to LIN/LOX tanks, CB&I and PDM tout their experiences in constructing tanks from as far back as 1957. (*See* CX 160 ("CB&I has built the majority of LIN/LOX/LAR tanks in the world, and in total we have designed and erected over 600 cryogenic tanks throughout the world."); *see also* CX 85; CX 145 at PDM-S-001409; CX 154 at CB&I-PL002939-70; CX 443; CX 914; CX 1048; CX 1201).

Response to Finding No. 122:

Complaint Counsel's finding number 122 is irrelevant because CB&I sales documents are just that: sales documents. As such they do not indicate that market shares measured from 1990 are an indicator of future competition. They do, however, indicate that CB&I competes in the U.S. LNG market, as do the sales documents of the various entrants. One can point to historical events for one purpose without having to do so for all purposes. Complaint Counsel's argument is extremely specious.

123. In a May 2001 LNG tank sales presentation to Yankee Gas (CX 417 at CB&I 026845-HOU), CB&I detailed its relevant LNG tank experience, including the 2000 ENRON, Puerto Rico LNG import terminal (*id.* at CB&I 026848-HOU - 849-HOU), the 1999 Pine Needle, North Carolina, peakshaving facility (*id.* at CB&I 026850-HOU), the 1997 Memphis Light, Gas and Water LNG peakshaving facility and the 1993 Salley, South Carolina, LNG satellite storage facility (*id.* at CB&I 026849-HOU), and other LNG import terminal and peakshaving projects extending from 1969 through 2002. (*Id.* at CB&I 026851-HOU - 852-HOU; CX 417 at CB&I 026845-026852).

Response to Finding No. 123:

Complaint Counsel's finding number 123 is irrelevant because CB&I sales documents are just that: sales documents. As such they do not indicate that market shares measured from 1990 are an indicator of future competition. Sales documents only indicate that

CB&I is competing in the market, as do the sales documents of CB&I's competitors. One can point to historical events for one purpose without having to do so for all purposes. Complaint Counsel's argument is extremely specious.

124. Steven Knott, CB&I's vice-president of sales for North American, declared under penalty of perjury, "[I]nformation regarding LNG tank and TVC prices – which are far less common – is far more valuable, because the number of completed jobs is far fewer. Because fewer solid data points exist, the remaining data points become even more valuable, even ones from the mid-1990s. Further, the greater value of LNG and TVC projects increases the value of pricing information for these projects to CB&I." (CX 393 at 6).

Response to Finding No. 124:

Complaint Counsel's finding number 124 contradicts Complaint Counsel's suggestion that 1990 is an appropriate date from which to measure market share; Mr. Knott uses the words "even ones from the mid-1990s" which suggests that the mid 1990s are a more appropriate starting point for measuring market share. Further, Mr. Knott is talking about the value of *knowing a competitor's price* when bidding on future projects, which is much different than suggesting that information regarding who won a project is important in predicting who will win a project ten years later.

125. Respondents assert that the historical market shares are not relevant to the competitive analysis in this case. Giving no weight to historical sales results, Dr. Harris suggested that each firm could be allocated an identical market share. This assumes that, in spite of the historical bidding patterns, each firm Respondents have identified as a potential bidder in each relevant market is equally qualified to secure a contract. (Harris, Tr. 7177-78; *see Merger Guidelines* § 1.41, n.15 ("Where all firms have, on a forward-looking basis, an equal likelihood of securing sales, the [Commission] will assign firms equal shares.")). Dr. Harris concludes from this methodology that the acquisition has resulted in only minor increases in concentration. (Harris, Tr. 7195, 7300, 7302, 7326).

Response to Finding No. 125:

Respondents have no specific response.

126. There is no evidence to conclude that all of the companies who may bid in the future have an equal likelihood of winning in head-to-head competition with Respondents. To the contrary, there is evidence that firms who bid in the past and may bid in the future are not equally qualified. Several of the firms identified by Dr. Harris are the same firms that before the

merger lost to Respondents because of their competitive disadvantage vis-a-vis Respondents in the United States. (Harris, Tr. 7211). CCFF 393-571.

Response to Finding No. 126:

Complaint Counsel's finding number 126 is wrong and unsupported. Further, Respondents have never suggested that companies who may bid in the future have an equal likelihood of winning in head-to-head competition with Respondents. There is evidence that foreign competitors with concrete technology are *more* likely to win LNG projects than CB&I in the future. (Jolly, Tr. 4439-40; RFOF 119). Further, since the Acquisition, AT&V has won *more than half* of all LIN/LOX tank projects. (Harris, Tr. 7308) (*See also* FOF 3.493-3.508).

127. By failing to consider actual historical sales, Dr. Harris' analysis fails to take into account the substantial direct competition between CB&I and PDM that was eliminated by the merger. (Harris, Tr. 7185-86, 7223, 7233).

Response to Finding No. 127:

Complaint Counsel's finding number 127 is purely argumentative. Further, Complaint Counsel's finding number 127 mischaracterizes Dr. Harris' approach; indeed Dr. Harris examined the totality of the evidence to analyze the future competitive impact of the Acquisition of PDM's EC division by CB&I. (Harris, Tr. 7181, 7183-84, 7222).

128. For all these reasons, the historical sale data provided by Complaint Counsel is the most appropriate method for measuring market shares and market concentration.

Response to Finding No. 128:

For all the above stated reasons, the historical sale data provided by Complaint Counsel is an inappropriate method for measuring market shares and market concentration. RFOF.

B. Market Shares and Concentration in the LNG Market

129. Four LNG import terminals were constructed in the United States since the 1970s, during the energy crisis when gas prices were high and gas supplies questionable. (CX 853 at PDM-HOU011488). PDM constructed two (Lake Charles, Louisiana and Cove Point, Maryland)

and CB&I constructed two (Boston, Massachusetts and Savannah, Georgia). (CX 853 at PDM-HOU011488; CX 154 at CB&I-PL002958, 002961).

<u>Response to Finding No. 129:</u>

The proposed finding is misleading and mischaracterizes the evidence. For example, CX 853 states that PDM constructed the storage tanks for the Cove Point, Maryland and Lake Charles, Louisiana terminals. (CX 853 at PDM-HOU011488). CX 853 does not state that PDM constructed the entire terminals as the proposed finding suggests. Additionally, CX 154 states that CB&I constructed an LNG tank in Everett, Massachusetts not an entire import terminal in Boston, Massachusetts as the proposed findings avers. (CX 154 at CB&I-PL002958). Likewise, CX 154 states that CB&I built three LNG tanks in Savanna, Georgia not the entire import terminal. (CX 154 at CB&I-PL002961).

130. There are about 90 LNG peak shaving plants in the United States. (CX 228 at CB&I-PL046034). CB&I and PDM have constructed every LNG tank built in the United States since 1975. (CX 125 at PDM-HOU 2017162-7169).

<u>Response to Finding No. 130:</u>

The proposed finding is misleading and mischaracterizes the evidence. First, CX 228 states that 90 LNG peak shaving facilities have been built in "North America." (CX 228 at CB&I-PL046034). The proposed finding erroneously substitutes the geographic location of the United States for North America. Second, CX 125 does not support the proposition that "CB&I and PDM have constructed every LNG tank built in the United States since 1975." No testimony, during trial, was presented regarding CX 125. Thus, it is unclear whether this document exhaustively lists all LNG tanks constructed in the United States since 1975. Further, CX 125 clearly states that it only applies to *LNG peak shaving facilities* built in the United States or Canada. (CX 125 PDM-HOU 2017162-7169).

131. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Kistenmacher, Tr. 891;

[xxxx], Tr. 714-15, *in camera* (["[F]rom 1965 through '97 or so, the only two companies pretty much across the board that built LNG plants in the United States were PDM and CB&I"]); Cutts, Tr. 2390 (CB&I and PDM "dominated the marketplace significantly and the interpretation by most people would have been that any large cryogenic projects in the United States would have been built by CB&I or PDM.")).

<u>Response to Finding No. 131:</u>

Testimony elicited during trial and Complaint Counsel's own documents demonstrate the falsity of the proposed finding. CB&I and PDM were not the only firms to build field-erected LNG tanks prior to the merger. Dr. Kistenmacher, a witness who is only "somewhat" familiar with LNG tanks and who has been involved with "very, very few LNG tanks", testified that he could only *recall* CB&I and PDM having built LNG tanks prior to the merger. (Kistenmacher, Tr. 879, 888, 891; *see also* FOF 3.669-670). In fact, Ms. Outtrim testified that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Outtrim, Tr. 715) (in camera). Mr. Cutts also recognized that he possessed limited knowledge regarding which companies had previously built LNG tanks in the United States. (Cutts, Tr. 2390). Mr. Cutts admitted that he was not in a position "to speak for all the customers." (Cutts, Tr. 2390). Further, a document cited by Complaint Counsel in the previous proposed finding, CX 125, clearly demonstrates that Graver and Preload have constructed LNG tanks in the United States. (CX 125 at PDM-HOU 2017162-7167). This proposed finding is contradicted by proposed finding number 132.

132. 1975 was the last time a firm other than CB&I or PDM built an LNG tank in the United States. (CX 125). Graver, which is now out of business, built the tank in 1975. (CX 125 at PDM-HOU2017165; CX 1546 (ITEQ, Graver's successor, ceased operations in March 2001)).

<u>Response to Finding No. 132:</u>

Respondents have no specific response.

133. Preload built an LNG tank in the United States in 1971. (CX 125 at PDM-HOU2017164). Preload possesses a "completely concrete" technology that "would be a very costly design and not be a competitive design to the tanks that the other people could build."

(Price, Tr. 550; Hall, Tr. 1817). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 689-691, 693, 724, *in camera*).

<u>Response to Finding No. 133:</u>

The proposed finding is misleading because United States' owners may choose to utilize an all-concrete LNG tank design (Andrukiewicz, Tr. 6464-65; **[xxxxxxxxxxxxxxxxx];** s*ee also* FOF 3.344, 3.420). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]** (Sawchuck, Tr. 6088; *see also* FOF 3.420). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6087; *see also* FOF 3.420). The proposed finding is further misleading because Skanska/Whessoe submitted preliminary engineering designs to CHI, for the Yankee Gas peak shaving facility, for an exclusively concrete tank utilizing inner and outer walls of concrete. (Andrukiewicz, Tr. 6447; *see also* FOF 3.344). In fact, CHI engineering specifically cited Skanska/Whessoe's concrete design to Yankee Gas in its preliminary engineering report. (Andrukiewicz, Tr. 6447; *see also* FOF 3.344).

134. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 4683, *in camera*; CX 125; CX 853 at PDM-HOU011458).

<u>Response to Finding No. 134:</u>

The proposed finding is irrelevant given the fact that **[xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4683; *see also* FOF 3.162). Since the Acquisition, foreign companies have entered the United States market and competed for American LNG projects. (*See generally* FOF 3.68-73, 3.109-22, 3.173-78, 3.200-03, 3.212-27). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4760; *see also* FOF 3.307). When completed, the Hackberry

facility will be the largest LNG regasification facility in the United States. (Puckett, Tr. 4540; *see also* FOF 3.259).

135. Other companies attempted to compete during this period but failed to beat CB&I and PDM. TKK and Whessoe both submitted proposals for the Memphis project in 1995 but were substantially higher-priced than CB&I and PDM. CCFF ___. **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (RX 157 at **[xxx]** 02 004, *in camera*). No other firm has won a U.S. LNG project in head-to-head competition against CB&I or PDM.

<u>Response to Finding No. 135:</u>

The first two sentences and the last sentence of the proposed finding lack factual support in the record as Complaint Counsel failed to cite any evidence supporting its assertions. In fact, the record contradicts Complaint Counsel's proposed finding. **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (Jolly, Tr. 4683, 4729; *see also* FOF 3.162). The proposed finding is also misleading in that it suggests that Whessoe's portion of the Memphis bid was significant. This is clearly untrue given that Whessoe's engineering package accounted for only $1 million of Lotepro's $40 million total bid. (Kistenmacher, Tr. 900, 938-939; *see also* FOF 3.498). Titan Constructor's LNG tank construction/erection costs, conversely, accounted for $14 million of Lotepro's total bid. (Kistenmacher, Tr. 900, 938; *see also* FOF 3.498). Similarly, TKK's portion of the Memphis bid accounted for less than $3 million of the total Black & Veatch bid. (RX 888; *see also* FOF 3.502). Characterizing Whessoe's and TKK's "bids" as substantially higher priced than CB&I's or PDM's bids is also misleading given the discrepancies in the record regarding CB&I's LNG tank price and the fact that PDM's bid was disqualified for failing to meet the owner's specifications. (Hall, Tr. 1823-24; Davis, Tr. 3196; RX 888, RX 1571; *see also* FOF 3.505, 3.506). Finally, the Memphis 1995 bidding is irrelevant to assessing competition today for the reasons set forth in FOF 3.493-3.508.

The proposed finding that Whessoe's price to **[xx]** was not competitive is misleading and irrelevant. First, the document relied upon is from 1998, well before the Acquisition. Additionally, the document was created before Skanska acquired Whessoe in 2000. (RX 770 at 33/49; *see also* FOF 3.57). Further, testimony at trial contradicts the proposed finding. British Petroleum testified that it would include Whessoe on a potential bidder list for LNG projects in the United States. (Sawchuck, Tr. 6062; *see also* FOF 3.78).

136. As shown in the following table, nine LNG tank projects were awarded in the United States from 1990 through the time of the acquisition in early 2001.

[xxxxxxxxxxxxxxxx]

[xxxxxxxxxx]	**[xxxxxxxxxxxx]**	**[xxxxxx] [xxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxxx]**	**[xxxxxxxxx]**

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

[As some of the projects are *in camera*, a table in its entirety should be treated *in camera*]

(CX 1210, *in camera*; CX 824; CX 1212, *in camera*; CX 1645 at 2 (demonstrative); CX 26 at CB&I-PL069530, *in camera*; RX 757; Simpson, Tr. 3046, 3052-3055).

<u>Response to Finding No. 136:</u>

Complaint Counsel’s proposed finding is irrelevant since projects awarded from 1990 through 2001 do not provide useful information about future competition and do not reflect post-Acquisition entry.

137. Dr. Harris acknowledges that prior to the merger, United States LNG tanks were built entirely by CB&I and PDM. (Harris Tr. 7196, 7521-22). According to Dr. Harris, "until

roughly 2001 I guess, the competitors in the market, were almost entirely limited to CB&I and PDM." (Harris, Tr. 7220). Based on information at the time of the acquisition CB&I had roughly one chance in two of winning an LNG tank award. (Harris, Tr. 7877).

Response to Finding No. 137:

Complaint Counsel's proposed finding is irrelevant since projects awarded from 1990 through 2001 do not provide useful information about future competition and do not reflect post-Acquisition entry.

138. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1210, *in camera*; CX 1645 at 2, (demonstrative); Simpson, Tr. 3046, 3052-3054). CB&I won five of these projects and PDM won four. (Simpson, Tr. 3046, 3052-3054).

Response to Finding No. 138:

Complaint Counsel's proposed finding is irrelevant since projects awarded from 1990 through 2001 do not provide useful information about future competition and do not reflect post-Acquisition entry.

139. Dr. Simpson testified that the fact that a company does not bid for a project is informative. (Simpson, Tr. 5757). Dr. Simpson testified that he concluded that the reason foreign firms were not bidding for LNG projects prior to CB&I's acquisition of PDM is that the foreign firms believed that they were not competitive with PDM and CB&I. (Simpson, Tr. 5757).

Response to Finding No. 139:

Complaint Counsel's proposed finding is irrelevant because Dr. Simpson's analysis is illogical. First, the joint ventures entering the LNG market were not yet formed in the 1990s. Dr. Simpson's belief that prior to the acquisition foreign firms were not competitive is irrelevant to whether they are in the future. That a company does not bid for a project is not informative if that company does not compete in that market. It is only informative if they are in the market.

140. Dr. Simpson also testified that the fact that foreign firms did not participate in sole-source negotiations for U.S. LNG tank projects prior to CB&I's acquisition of PDM is also informative. (Simpson, Tr. 5757). Dr. Simpson testified that buyers who sought to buy LNG

tanks through sole-source contracts would have approached the foreign firms if they thought that these foreign firms were competitive with CB&I or PDM. (Simpson, Tr. 5757-5758).

Response to Finding No. 140:

Complaint Counsel's proposed finding is irrelevant since "these foreign firms" were not competing in the U.S. markets in the relevant product markets during the 1990s -- there would be no reason to approach firms who are not competing or soliciting business. That would make no sense.

141. An analysis of U.S. LNG tank projects awarded between 1990 and the time of the acquisition indicates that CB&I and PDM were the two strongest competitors. (Simpson, Tr. 3050). Dr. Simpson testified that respondents had claimed that seven other companies competed with CB&I and PDM to supply LNG tanks in the U.S. (Simpson, Tr. 3047, 5753). If seven companies competed on an equal footing with CB&I and PDM, then the probability that CB&I and PDM would have won all nine of the U.S. LNG projects awarded between 1990 and the time of the acquisition is 0.0000013 (2/9 X 2/9 X 2/9 X 2/9 X 2/9 X 2/9 X 2/9 X 2/9 X 2/9). (Simpson, Tr. 3047-3048 (referencing CX 1645 at 3, (demonstrative)). If one other firm competed on an equal footing with CB&I and PDM, the probability that CB&I and PDM would have won all nine of the U.S. LNG tank projects awarded between 1990 and the time of the acquisition is 2.6 percent (2/3 X 2/3 X 2/3 X 2/3 X 2/3 X 2/3 X 2/3 X 2/3 X 2/3). (Simpson, Tr. 3048 (referencing CX 1645 at 3, (demonstrative)). Given these results, an environment in which other firms competed on an equal footing with CB&I and PDM is extremely unlikely to produce the observation that CB&I and PDM won all nine awards. (Simpson, Tr. 3048). Thus, the history of LNG tank awards in the United States reflects the fact that CB&I and PDM were each other's strongest competitors and that foreign companies did not compete on an equal footing with CB&I and PDM. (Simpson, Tr. 3050).

Response to Finding No. 141:

Complaint Counsel's proposed finding 141 is so completely devoid of logic that it is irrelevant. Obviously, if current competitors were not competing between 1990 and the time of the Acquisition, they had a zero percent chance of winning projects they did not bid on. This, however, says nothing about whether a competitor has a chance of winning a job it does bid on once it competes in the market. For example, company A may enter the widget market in 2000 and become the most successful widget maker in the widget market. That company A never bid

on or won a widget contract before 2000 does not predict that company A cannot win widget contracts after 2000. Complaint Counsel's rationale leads to absurd results.

142. Dr. Simpson noted that the *Merger Guidelines* indicate that a firm's market share should reflect that firm's future competitive significance. (Simpson, Tr. 3050). Dr. Harris acknowledged that the strength of competitors going forward should be considered in examining the acquisition. (Harris, Tr. 7229). Dr. Simpson concluded that CB&I and PDM were far and away the two strongest competitors in the market for LNG tanks in the U.S. (Simpson, Tr. 3050). Dr. Simpson testified that Whessoe, Technigaz, and TKK were not a competitive factor in the U.S. market for LNG tanks at the time of the acquisition. (Simpson, Tr. 3051). Dr. Simpson further testified that Whessoe, Technigaz, and TKK would need to make a significant investment for more than a year in order to acquire the tangible and intangible assets necessary to become competitive with CB&I and PDM. (Simpson, Tr. 3051-3052).

Response to Finding No. 142:

Complaint Counsel's proposed finding 142 is misleading as stated because what the *Merger Guidelines* state is that market share is only relevant if it is predictive of future competition; not that market shares *are* necessarily predictive of future competition. *Merger Guidelines* § 1.41.

143. Dr. Simpson testified that one did not need detailed cost information to determine whether foreign firms would have higher costs than CB&I in building LNG tanks in the U.S. (Simpson, Tr. 5765). Dr. Simpson noted that one could use other sources of information, such as company documents, statements to investors, and a history of past awards, to determine whether foreign firms had higher costs than CB&I in building LNG tanks in the U.S. (Simpson, Tr. 5765).

Response to Finding No. 143:

Complaint Counsel's proposed finding is irrelevant because he did not examine company documents of any foreign competitors. Dr. Simpson could not know foreign firms' costs from *CB&I* documents, since CB&I does not know foreign firms' costs. In any case, Dr. Simpson admitted on cross-examination that he had done no analysis of competitors' costs, so whether he *could have* is irrelevant. (FOF 7.150-7.156).

144. Dr. Simpson then testified that CB&I and PDM would each have a 50-percent market share if they were treated as equally strong competitors. (Simpson, Tr. 3050). Dr. Simpson testified that CB&I and PDM would have similar market shares if they were assigned

market shares based on the value of their actual sales of LNG projects between 1990 and the time of the acquisition. (Simpson, Tr. 3050-51).

Response to Finding No. 144:

Complaint Counsel's proposed finding 144 is irrelevant because entry and changes in market conditions render such an observation wholly irrelevant.

145. If CB&I and PDM are each assigned a 50-percent market share, then CB&I's acquisition of PDM increased the HHI by 5000 from a pre-merger HHI of 5000 to a post-merger HHI of 10000. (Simpson, Tr. 3055 (referencing CX 1646)).

Response to Finding No. 145:

Complaint Counsel's proposed finding 144 is irrelevant because entry and changes in market conditions render such an observation wholly irrelevant.

146. As shown in the table below, if CB&I and PDM are assigned market shares based on the LNG tank awards between 1990 and the time of the acquisition, the effect of the acquisition on market concentration is similar irrespective of whether concentration is measured based on the number of awards or the dollar value of the awards and irrespective whether cancelled projects are included in or excluded from the calculation. (*See* Simpson, Tr. 3055-3058 (referencing CX 1645, (demonstrative)).

[xxxxxxxxxxx]								
	[xxxxxx] [xxxxxx]	**[xxxxxx] [xxxxxx] [xxxxxx] [xxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**
[xxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxx] [xxxxxxxx] [xxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxx] [xxxxxxxx] [xxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxx] [xxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**

[xxxxxxxxx] **[xxxxxxxxx]** **[xxxxxxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**

[As some of the projects are in camera, above table in its entirety should be treated *in camera*]

Response to Finding No. 146:

Complaint Counsel's proposed finding 144 is irrelevant because entry and changes in market conditions render such an observation wholly irrelevant.

147. Of the LNG tank projects awarded before the acquisition, CB&I accounted for **[xxx]** of LNG tank projects awarded, and **[xxx]** of projects excluding projects cancelled following award. PDM accounted for **[xxxx]** of LNG tank projects awarded, and **[xxxx]** excluding cancelled projects. Based on dollar value of projects, CB&I accounted for **[xxx]** of project awards and **[xxxx]** excluding cancelled projects, and PDM accounted for **[xxxx]** of awards and **[xxxx]** excluding cancelled projects.

Response to Finding No. 147:

Complaint Counsel's proposed finding 147 is irrelevant because entry and changes in market conditions, such as the shift from single to full and double-containment tanks, render such an observation wholly irrelevant. (Harris, Tr. 7227-28).

148. By any measure, the combined share of the two companies is 100 percent and the post acquisition HHI is 10000. (Simpson, Tr. 3055 (referencing CX 1646)).

Response to Finding No. 148:

Complaint Counsel's proposed finding 148 is false. If HHIs are measured from 1996 to the Acquisition the change in HHIs would be zero. (Harris, Tr. 7228). Clearly, the HHIs in this case depend on the "measure" used.

149. Dr. Harris erroneously argues that market shares should be measured based on the post-acquisition period. In using the HHI to predict the effects of the acquisition it is appropriate to assign CB&I and PDM shares based on their future competitiveness. When CB&I and PDM merged their combined share was 100 percent. (Simpson, Tr. 3711). Exercise of market power by the merged firm, following the acquisition, will lead to an erosion of market share. Dr. Harris confuses this effect with analysis of market concentration. Dr. Simpson explains that "if you have a monopolist and they have market power, they will increase price. When they increase price, other firms that previously were not able to make sales begin to make sales. So if you were to look after the acquisition and if the monopolist has increased price and has lost sales to

other customers as a result of that price increase, you would *see* that the HHI would fall from the 10,000 level that we computed before the acquisition to some level under 10,000." (Simpson, Tr. 3711).

Response to Finding No. 149:

This proposed finding is unsupported by the evidence Dr. Harris, as evidenced by the lack of citation to testimony, did not argue that market shares should be calculated after the date of the Acquisition. Dr. Harris argued that Complaint Counsel's reliance on market shares generally was inappropriate since a reliance on shares failed to account for both actual and potential entry and changes in the market. (Harris, Tr. 7227). Further, Dr. Harris believes that Complaint Counsel's selection of 1990 as the starting date was arbitrary. (Harris, Tr. 7227).

150. Under the *Merger Guidelines*, the CB&I/PDM merger has resulted in a substantial increase in concentration in an already highly concentrated LNG market. The HHI level raises the presumption that the merger will likely create or enhance market power or facilitate its exercise by CB&I. (*Merger Guidelines* § 1.51(c)).

Response to Finding No. 150:

Complaint Counsel's proposed finding 150 is false; the Acquisition has not created a presumption that the merger will likely create or enhance market power because Complaint Counsel has improperly calculated the HHIs. The HHIs, as calculated by Complaint Counsel, are not predictive of future competition and therefore do not trigger the presumption of illegality. (Harris, Tr. 7227; *Merger Guidelines* § 1.41) (FOF 7.116). New competitors have entered the U.S. market since the Acquisition. (*See* Harris, Tr. 7219-21, 7307-08, 7311-12). (FOF 7.108, 7.127, 7.130). *Supra*, RFOF 7 (detailing why HHIs are not predictive of future competition in this case).

C. Market Shares and Concentration in the LIN/LOX Market

151. The table below shows LIN/LOX tank awards in the United States during the period 1990 to the time of the acquisition:

[xxxxxxxxxxxxxx]

	[xxxxxx] [xxxxxx]	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxx] [xxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxxxxx] [xxxxxxxxx] [xxxxxxxxx]**	**[xxxxxxxxx] [xxxxxxxxx] [xxxxxxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx] [xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxx] [xxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**

[As some of the projects are in camera, above table in its entirety should be treated *in camera*]

(CX 26; CX 85; CX 155; CX 183; CX 260; CX 282; CX 397, *in camera*; CX 755; CX 1025; CX 1170; CX 1210 at 5-6, *in camera*; CX 1212 at 6, *in camera*; CX 1321, *in camera*; CX 1458; CX 1663 (demonstrative); CX 1664 (demonstrative); CX 1665 (demonstrative) *in camera*; Simpson, Tr. 3422, 3429, 3430; Cutts, Tr. 2451 (AT&V built two tanks for BOC); Newmeister, Tr. 1587 (Matrix has won **[xxx]** LIN/LOX projects); JX 37 at Exh. 3 (Newmeister, Dep.)).

Response to Finding No. 151:

The proposed finding is irrelevant because the market statistics cited by Complaint Counsel do not accurately reflect the state of competition in today's LIN/LOX market. (FOF 5.22-5.78) (showing that three competitors have successfully entered the LIN/LOX market in recent years). Specifically, the chart created by Complaint Counsel simply ignores post-Acquisition evidence regarding the success of AT&V. In fact, AT&V has a 60 percent market share after the Acquisition and has never lost a LIN/LOX bid to CB&I. (FOF 5.76-5.78). Moreover, Complaint Counsel fails to account for CB&T in its market share analysis. CB&T

has been pre-qualified to bid on LIN/LOX projects and has entered the LIN/LOX market. (FOF 5.56-5.71). Finally, the record evidence shows that Matrix is currently competing for LIN/LOX jobs and intends to be a "competitive force" in this market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

152. As shown in the above table, during the period from 1990 to the time of the acquisition, 83 LIN/LOX projects were awarded comprising 109 tanks with a total value of **[xxxx]** million.

<u>Response to Finding No. 152:</u>

The proposed finding is irrelevant and inaccurate for several reasons. First, Complaint Counsel's LIN/LOX market statistics are irrelevant. Complaint Counsel's statistics are irrelevant because they do not accurately reflect the current state of competition in the LIN/LOX market. First, there is substantial empirical evidence regarding the post-Acquisition competitive strength of AT&V. The statistics relied on by Complaint Counsel are pre-Acquisition only, despite the fact that AT&V did not fully enter the LIN/LOX market until 2000. (*See* FOF 5.26-5.30). After the Acquisition, CB&I has not fared well when in direct competition with AT&V for LIN/LOX tank awards. CB&I has never won a LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018) (*See also* FOF 5.26-5.42; 7.127). AT&V has captured a majority of the post-Acquisition LIN/LOX market in the U.S., and has done so at prices lower than PDM's pre-Acquisition prices. (Scorsone, Tr. 5017-5018; RX 208). Complaint Counsel's chart ignores this evidence and represents that AT&V has less than a 2 percent market share.

Further, Complaint Counsel also fails to account for new entry from firms such as CB&T and Matrix who have both been pre-qualified by LIN/LOX customers and permitted to bid on recent LIN/LOX projects. CB&T has entered the LIN/LOX market. CB&T has submitted pricing on jobs for BOC and MG Industries. Further, Martix has entered the market

and has bid on work for Air Liquide, Linde, Praxair, and Air Products. (FOF 5.56-5.71, 5.43-5.55). Finally, Complaint Counsel's analysis also fails to account for Praxair's spinoff of CB&I in the mid-1990s and the exit of Graver from that market in 1999. (*See* Harris, Tr. 7307-08, 7311-12) (FOF 7.127, 7.130). In the LIN/LOX market, Dr. Simpson admitted that CB&I's sale by Praxair in 1997 was a significant competitive change, a fact which would justify beginning the calculations in 1997, after the date of the sale. (*See* Simpson, Tr. 3753) (FOF 7.236).

153. As further shown in the above table, PDM won **[xxx]** projects (**[xxxx]** of the total), including **[xxx]** tanks (**[xxxx]** of the total) with total revenues of $41.8 million (**[xxxx]** of the total).

<u>Response to Finding No. 153:</u>

The proposed finding is misleading for reasons cited above in Respondent's Response to Finding No. 152. (RFOF 152).

154. CB&I won **[xxx]** projects (**[xxxx]** of the total) encompassing **[xxx]** tanks (**[xxxxx]** of the total) with a total value of $36.3 million (**[xxxxxx]** of the total).

<u>Response to Finding No. 154:</u>

The proposed finding is irrelevant. First, Complaint Counsel's analysis is an inaccurate measurement of the current state of competition in the U.S. LIN/LOX market. Complaint Counsel's statistics do not take into account the fact that AT&V has won all three of the jobs it has competed on against CB&I and reduce the market share AT&V rightfully possesses. Moreover, Complaint Counsel fails to account for new entry by Matrix and CB&T. (RFOF 152). In this way Complaint Counsel overstates CB&I's LIN/LOX market share. In fact, Dr. Harris testified that, since the Acquisition, CB&I has won only 17-18 percent of the dollar amounts awarded in the four markets combined. (Harris, Tr. 7223) (FOF 7.78).

155. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 155; CX 183; CX 282; CX 755; CX 1321, *in camera*). Graver went out of business, in 2001, and is no longer a

competitor in the LIN/LOX market. (CX 1546; Hilgar, Tr. 1543). Graver's assets were sold at auction. (Harris, Tr. 7312, 7313).

Response to Finding No. 155:

The proposed finding is irrelevant in that key portions of Graver's assets were purchased by current day LIN/LOX market entrants. In fact, these assets have allowed potential new entrants to bid on LIN/LOX tank contracts after the Acquisition. Specifically, CB&T purchased "quite a bit of equipment" from ITEQ/Graver when it went out of business in 1999. (Stetzler, Tr. 6317-18). CB&T has also hired two former Graver employees and opened an office in Houston, in order to expand into the oil market as well as the LIN/LOX market. The office is also positioned to promote CB&T in the Houston area. (Stetzler, Tr. 6318-19; RX 273). CB&T has used and plans to utilize these assets to compete for LIN/LOX jobs in the future. (Stetzler, Tr. 6347, 6350-51, 6368) (FOF 3.59-3.65).

156. Matrix won four projects (**[xxx]** of the total) including four tanks (**[xxx]** of the total) with a total value of **[xxx]** million (**[xxx]** of the total). (RX 290 at CB&I-046596-NEW; Newmeister, Tr. 1587; JX 37 at Exh. 3 (Newmeister, Dep.)). In August 2000, Matrix sold Brown Steel and its fabrication facility. (Newmeister, Tr. 1589-90). Matrix's sale of Brown Steel competitively disadvantages Matrix in the LIN/LOX tank market. (Newmeister, Tr. 1590-91). Matrix has not won a LIN/LOX award since it sold Brown Steel.

Response to Finding No. 156:

The proposed finding is irrelevant and understates Matrix's abilities to compete in today's LIN/LOX market. The record evidence has shown that Matrix is a viable competitor in the LIN/LOX market that has successfully completed four LIN/LOX projects, received recommendations from LIN/LOX customers, and continues to offer competitive pricing. (*See* FOF 5.43-5.55). Matrix has successfully constructed four LIN/LOX tanks in the U.S. for Praxair and Air Products, and won those jobs when PDM was still in the market. (Newmeister, Tr. 2213-14, 2173-74; FOF 5.47-5.50). Both Praxair and Air Products were satisfied with Matrix's performance. (Newmeister, Tr. 2173-74, 2176-77; FOF 4.48-4.50). Air Products has informed

CB&I that they consider Matrix to be "a player in the [LIN/LOX] market" and certainly consider them to be a "viable competitor." (RX 273; FOF 5.54). Air Liquide also believes that Matrix is a viable LIN/LOX supplier and has solicited bids from Matrix on at least two projects, Freeport and Longview, Texas. (Kamrath, Tr. 2005-06; FOF 5.53). **[xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

The proposed finding is also inaccurate to the extent it implies that Matrix does not have the ability to fabricate LIN/LOX tanks in-house. In fact, Mr. Newmeister testified that Matrix currently has the required fabrication capabilities in-house in Matrix's existing fabrication facility. (*See* Newmeister, Tr. 2197). As a result, the sale of Brown Steel will have very little effect on Matrix. (Harris, Tr. 7309; *see also* FOF 5.12, 5.17).

The fact that Matrix has not won a LIN/LOX award since it sold Brown Steel is not indicative of its ability to win awards. First, Matrix's bid on Air Liquide's Freeport, Texas LIN/LOX tank was competitive. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]** Further, since 2000 the LIN/LOX market has been in a state of decline and is currently described as having "overcapacity" and demand is not high. (Hilgar, Tr. 1541-43; Stetzler, Tr. 6382-83) (*See also* FOF 7.128) (Harris economic analysis of Matrix and its sale of Brown Steel).

157. AT&V won one project (**[xxx]** of the total) consisting of **[xxx]** tanks (**[xxx]** of the total) with a value of **[xxx]** million (**[xxx]** of the total). (Cutts, Tr. 2451; RX 290 at CB&I-046596-NEW).

<u>Response to Finding No. 157:</u>

The proposed finding is misleading because empirical evidence shows the post-Acquisition competitive strength of AT&V. After the Acquisition, CB&I has not fared well when in direct competition with AT&V for LIN/LOX tank awards. CB&I has never won a

LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018) (*See also* FOF 5.26-5.42; 7.127). In the end, AT&V has captured a majority of the post-Acquisition LIN/LOX market in the U.S., and has done so at prices lower than PDM's pre-Acquisition prices. (Scorsone, Tr. 5017-5018; RX 208) (RFOF 152).

158. After attempting without success to compete for a LIN/LOX project, BSL has exited the U.S. LIN/LOX market. (Hilgar, Tr. 1378-1380). No foreign company has ever built a LIN/LOX tank in the United States. (Hilgar, Tr. 1385).

Response to Finding No. 158:

Respondents do not dispute the truth of the proposed finding.

159. As further shown in the above table, CB&I and PDM have a combined share of **[xxxxx]** of the value of LIN/LOX awards, since 1990, a combined share of **[xxxx]** of the number of projects awarded and **[xxx]** of the number of LIN/LOX tanks. Graver has a **[xxx]** market share, Matrix has a **[xx]** market share, and AT&V has a **[xxx]** market share (Simpson, Tr. 3430).

Response to Finding No. 159:

The proposed finding is irrelevant because the market statistics cited by Complaint Counsel do not accurately reflect the state of competition in today's LIN/LOX market. (FOF 5.22-5.78) (showing that three competitors have successfully entered the LIN/LOX market in recent years). Specifically, the chart created by Complaint Counsel simply ignores post-Acquisition evidence regarding the success of AT&V. In fact, AT&V has a 60 percent market share after the Acquisition and has never lost a LIN/LOX bid to CB&I. (FOF 5.76-5.78). Moreover, Complaint Counsel fails to account for CB&T in its market share analysis. CB&T has been pre-qualified to bid on LIN/LOX projects and has entered the LIN/LOX market. (FOF 5.56-5.71). Finally, the record evidence shows that Matrix is currently competing for LIN/LOX jobs and intends to be a "competitive force" in this market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

160. As further shown in the above table, CB&I's acquisition of PDM increased concentration substantially in the LIN/LOX market. The acquisition increased the HHI by 2635

points to a level of 5845 based on the value of projects awarded, and increased the HHI by 2264 to a level of 5602 based on the number of projects awarded. (Simpson, Tr. 3443, 3343-3344 (referencing CX 1665 (demonstrative)).

Response to Finding No. 160:

For the same reasons as above, the proposed finding is irrelevant because the market statistics cited by Complaint Counsel do not accurately reflect the state of competition in today's LIN/LOX market. (FOF 5.22-5.78) (showing that three competitors have successfully entered the LIN/LOX market in recent years) (RFOF 159). Specifically, the chart created by Complaint Counsel simply ignores post-Acquisition evidence regarding the success of AT&V. In fact, AT&V has a 60 percent market share after the Acquisition and has never lost a LIN/LOX bid to CB&I. (FOF 5.76-5.78). Moreover, Complaint Counsel fails to account for CB&T in its market share analysis. CB&T has been pre-qualified to bid on LIN/LOX projects and has entered the LIN/LOX market. (FOF 5.56-5.71). Finally, the record evidence shows that Matrix is currently competing for LIN/LOX jobs and intends to be a "competitive force" in this market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]**

161. Under the *Merger Guidelines*, the CB&I/PDM merger has resulted in a substantial increase in concentration in an already highly concentrated LIN/LOX market. The HHI level raises the presumption that the merger will likely create or enhance market power or facilitate its exercise by CB&I. *Merger Guidelines* § 1.51(c).

Response to Finding No. 161:

Complaint Counsel's proposed finding is argumentative, conclusory, and not supported by citation or record evidence. First, the Merger Guidelines never comment particularly on the "CB&I/PDM merger" and citation to those guidelines as support for the broad assertion that the Acquisition has resulted in increased concentration, which will likely create or enhance CB&I's market power, is misplaced. Second, Complaint Counsel's proposed market

concentration statistics are both misleading, inaccurate, and irrelevant in light of record evidence detailing present competition and strong indications of potential future LIN/LOX suppliers. (FOF 7.235-7.237) (RFOF 160). Therefore, the proposed finding of fact should not be endorsed by this court.

162. Dr. Simpson testified: [T]he acquisition combined the two strongest builders of LIN/LOX/LAR tanks in the U.S., and I think it enables them to increase price." (Simpson, Tr. 3444; *see* Simpson, Tr. 3450 (Dr. Simpson established that "CB&I and PDM EC were the strongest competitors in this marketplace prior to the acquisition)). Dr. Simpson noted that a merger of the two strongest suppliers would enable the merged firm to increase price up until the point where other less-strong suppliers begin to constrain it. (Simpson, Tr. 3451). Dr. Simpson also testified that a merger that reduces the number of sellers of LIN/LOX tanks from four to three or from three to two would be likely to result in an increase in price. (Simpson, Tr. 3451). Dr. Simpson further testified that CB&I's acquisition of PDM will enable CB&I to increase price by 5 percent in the market for LIN/LOX tanks over the next five years. (Simpson, Tr. 3828, 3869).

Response to Finding No. 162:

The proposed finding is inaccurate and unsupported by empirical evidence. As an initial matter, Dr. Simpson admitted on cross-examination that he may have underestimated the post-Acquisition competitive strength of certain LIN/LOX competitors. (Simpson, Tr. 3703-3707). Simpson also admitted that the knowledge that AT&V beat CB&I twice would have an effect on CB&I's pricing in the LIN/LOX market. (FOF 7.229; Simpson, Tr. 3829).

Evidence shows that CB&I has not been able to increase its prices on LIN/LOX tanks after the Acquisition. (Harris, Tr. 7315-7317) (FOF 7.133; 7.135; 5.72-5.78; *see also* FOF 5.87-5.121 (finding BOC has used AT&V for several LIN/LOX projects and has been pleased with AT&V's performance and price. BOC plans to use AT&V in the future); 5.122-5.130 (establishing that Air Liquide awarded AT&V a LIN/LOX tank at Freeport, Texas because AT&V was the low bidder and despite the fact CB&I lowered its price to a zero percent margin)). CB&I has in fact lost several LIN/LOX tank jobs to other, lower cost providers. (FOF 5.31-5.34). Finally, the record shows that LIN/LOX customers actively involved in the market

today are satisfied with the prices they have received and their available competitive options. (FOF 5.79-5.184).

163. Because Graver has exited the market, the market shares understate the competitive effects of the acquisition. *Merger Guidelines* § 1.52.

Response to Finding No. 163:

The proposed finding is inaccurate and misleading because, as an initial matter, there is no citation to record evidence. The Merger Guidelines state nothing specifically about Graver Tank's exit from the LIN/LOX market. Second, whether Graver is included or not in market share analysis or market concentration statistics is irrelevant because Complaint Counsel's efforts to calculate market share in the LIN/LOX market is inaccurate. (FOF 7.235-7.237) (RFOF 152, 160).

164. The following table shows market shares and market concentration excluding sales by Graver:

[xxxxxxxxxxxxxx]
[xxxxxxxxxxxxxx]

	[xxxxxx] [xxxxxx]	**[xxxxxx] [xxxxxx] [xxxxxx] [xxxxxx]**	**[xxxxxx] [xxxxxx]**	**[xxxxxx] [xxxxxx] [xxxxxx] [xxxxxx]**	**[xxxxxxx] [xxxxxxx] [xxxxxxx]**	**[xxxxxx] [xxxxxx] [xxxxxx] [xxxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx] [xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**
[xxxxxxxxxx]	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxx]**	**[xxxxx]**	**[xxxxx]**

[As some of the projects are *in camera*, above table in its entirety should be treated *in camera*]

Response to Finding No. 164:

The proposed finding is misleading and inaccurate because Complaint Counsel's chart simply assigns the market share previously owned by Graver to CB&I and PDM without accounting for present day competitors in the LIN/LOX market. Present day competition is strong and there is no evidence indicating that CB&I would simply absorb Graver's outstanding market share. First, the record evidence has demonstrated that AT&V can compete as effectively as PDM or CB&I did in the LIN/LOX market, as it beat CB&I three times in a row in post-Acquisition bidding and has done so at prices lower than PDM's pre-Acquisition prices. (Scorsone, Tr. 5017-5018; RX 208) (FOF 5.76-5.78). Second, the market concentrations calculated by Complaint Counsel above also fail to account for the entry of CB&T or Matrix -- entry which is supported by record evidence. (FOF 5.43-5.71).

165. As shown in the above table, excluding Graver, PDM won **[xxxx]** of the number of project awards, **[xxx]** of the tanks, and **[xxx]** of the value of LIN/LOX projects awarded, CB&I won **[xxxxx]** of the number of project awards, **[xxxxx]** of the tanks, and **[xxxxx]** of the value of LIN/LOX projects awarded.

Response to Finding No. 165:

The proposed finding is irrelevant because the market statistics cited by Complaint Counsel do not accurately reflect the state of competition in today's LIN/LOX market. (FOF 5.22-5.78) (showing that three competitors have successfully entered the LIN/LOX market in recent years) (RFOF 159). Specifically, the chart created by Complaint Counsel simply ignores post-Acquisition evidence regarding the success of AT&V. In fact, AT&V has a 60 percent market share after the Acquisition and has never lost a LIN/LOX bid to CB&I. (FOF 5.76-5.78). Moreover, Complaint Counsel fails to account for CB&T in its market share analysis. CB&T has been pre-qualified to bid on LIN/LOX projects and has entered the LIN/LOX market. (FOF 5.56-5.71). Finally, the record evidence shows that Matrix is currently

competing for LIN/LOX jobs and intends to be a "competitive force" in this market. **[xxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

166. As further shown in the above table, excluding Graver, CB&I and PDM have a combined share of **[xxx]** of the value of LIN/LOX awards, **[xxx]** of the number of projects awarded and **[xxx]** of the number of LIN/LOX tanks.

Response to Finding No. 166:

The proposed finding is misleading because combined, CB&I and PDM have not fared as successfully as Complaint Counsel avers in awards for LIN/LOX tanks when faced with current day competition. (*See* RFOF 152, 154, 157, 159, 164, 165).

167. When Graver's exit from the market is taken into account, CB&I's acquisition of PDM increased the HHI by **[xxx]** points to a level of **[xxx]** based on the value of projects awarded, increased the HHI by **[xx]** to a level of **[xxx]** based on the number of projects awarded, and increased the HHI by **[xxx]** to a level of **[xxx]** based on the number of tanks.

Response to Finding No. 167:

The proposed finding is misleading and inaccurate because it does not take into account current market conditions and the strength of present day competition for LIN/LOX tanks awards. (FOF 7.132; 7.133) (*See* RFOF 152; 154; 157; 159; 160). Further, based on empirical evidence of entry and competition in the LIN/LOX market it is illogical to simply assume that CB&I would acquire all of Graver's market share. In fact, CB&I has lost a majority of LIN/LOX projects to AT&V and therefore there is at least as much of a rationale to assume that AT&V would take-up Graver's market share. (FOF 5.76-5.78) (RFOF 164).

168. The LIN/LOX market has remained highly concentrated following the acquisition, with CB&I and AT&V accounting for all five LIN/LOX tank awards during this period. (CX 1758 (demonstrative); Harris, Tr. 7306-7308). Dr. Harris's compilation of the dollar value of LIN/LOX tank awards, during the period 2001 through 2002, shows that concentration as measured by the HHI is **[xxx]**. (CX 1758 (demonstrative); Harris, Tr. 7825-7826).

Response to Finding No. 168:

The proposed finding is inaccurate and misstates testimony given by Dr. Harris. As an initial matter, Complaint Counsel cites the HHIs from exhibit CX 1758, which is a demonstrative and was never admitted into evidence for the truth of its contents. Further, Dr. Harris never agreed that the HHIs for LIN/LOX for this time period were 5372. In fact, Dr. Harris stated narrowly that the arithmetic used by Complaint Counsel to mechanically reach the number 5372 was correct. Specifically, Harris stated with regard to the number 5372: "I don't think it means anything, but as a mechanical matter, I believe that you have done the arithmetic correctly." (Harris, Tr. 7825-7826).

169. Dr. Harris acknowledged that if PDM had not been acquired by CB&I it might have won some of these LIN/LOX tank awards. (Harris, Tr. 7826). Dr. Harris acknowledged that one reason Air Liquide and BOC turned to AT&V was because they thought they needed some alternative to CB&I. (Harris, Tr. 7827-28). Dr. Harris credited to AT&V the award of Air Liquide's Freeport, Texas, LIN/LOX project, even though after the award, Air Liquide requested CB&I to replace AT&V on the project. (Harris, Tr. 7830; Scorsone, Tr. 5036).

Response to Finding No. 169:

The proposed finding mischaracterizes Dr. Harris' testimony to the extent it implies Dr. Harris concluded that the Acquisition has harmed competition in the LIN/LOX market. In fact, Dr. Harris has concluded the opposite, that an economic analysis of market behavior in the LIN/LOX market indicates that competition has not been harmed by the Acquisition. (Harris, Tr. 7302, 7314-15) (FOF 7.124, 7.131).

Further, Dr. Harris has credited AT&V the award of the Freeport project for good reason -- because AT&V was awarded the job and is currently performing the work. (FOF 5.122, 5.141). Moreover, the dispute between Air Liquide and AT&V is a business dispute and not a dispute regarding AT&V's technical capabilities. (FOF 5.131-5.139). Finally, Dr. Harris noted that AT&V is a strong entrant in the LIN/LOX market and has won three of the five post-

Acquisition LIN/LOX projects. AT&V's success rate supports the view that competition has not been harmed in the LIN/LOX market. (Harris, Tr. 7308-10) (FOF 7.127).

170. AT&V has not replaced the competition that existed between CB&I and PDM. (Simpson, Tr. 3452).

Response to Finding No. 170:

The proposed finding is inaccurate and unsupported by empirical evidence found in the record. As an initial matter, Dr. Simpson admitted on cross-examination that he may have underestimated the post-Acquisition competitive strength of AT&V because it was awarded LIN/LOX contracts of which he was unaware. (Simpson, Tr. 3703-3707). Dr. Simpson also admitted that the knowledge that AT&V beat CB&I twice would have an effect on CB&I's pricing in the LIN/LOX market. (FOF 7.229; Simpson, Tr. 3829).

Empirical evidence shows CB&I has lost every LIN/LOX tank job it has bid against AT&V. (Scorsone, Tr. 5018) (FOF 5.31-5.34). As a result of post-Acquisition competition CB&I has not been able to increase its prices on LIN/LOX tanks. (Harris, Tr. 7315-7317) (FOF 7.133; 7.135; 5.72-5.78; *see also* FOF 5.87-5.121 (finding BOC has used AT&V for several LIN/LOX projects and has been pleased with AT&V's performance and price. BOC plans to use AT&V in the future); FOF 5.122-5.130 (establishing that Air Liquide awarded AT&V a LIN/LOX tank at Freeport, Texas because AT&V was the low bidder and despite the fact CB&I lowered it's price to a zero percent margin)). Finally, the record shows that LIN/LOX customers actively involved in the market today are satisfied with the prices they have received and their available competitive options. (FOF 5.79-5.184).

D. Market Shares and Concentration in the LPG Market

171. Analysis of LPG tanks sold between 1990 and early 2001 indicates that CB&I and PDM were the two strongest suppliers of LPG tanks in the United States. (Simpson, Tr. 3363, 3400, 3402-3).

Response to Finding No. 171:

This finding is misleading in that it ignores the current state of competition in the LPG market, and therefore is irrelevant in determining the competitive effects of the Acquisition on the LPG market. For example, such historical information fails to account for AT&V's success in the LPG market from 2000 to the present as well as viable competitors such as Matrix and Chattanooga Boiler & Tank. (N. Kelley, Tr. 7088-89, 7085, 7090; Cutts, Tr. 2334; Stetzler, Tr. 6355, 6365; CX 396, CX 397) (FOF 4.17-4.19, 4.43-4.46, 4.47-4.49). Further, such historical data does not account for the lack of demand and virtually non-existent market for LPG tanks. (Harris, Tr. 7281-82) (FOF 4.10-4.15). Therefore, analyzing the LPG market based on a ten-year time frame is arbitrary and not reflective of the current competitive conditions in the LPG market. (Harris, Tr. 7364-65).

172. CB&I and PDM have built the great majority of LPG tanks constructed in the United States. As shown in the table below, of the fourteen LPG tanks built in the United States between 1990 and 2001, CB&I built **[xxx]** and PDM built **[xxx]**:

[xxxxxxxxxxxxxxxx]

[xxxxxxxxxxx]	**[xxxxxxxxxx]**	**[xxxxxxx] [xxxxxxx]**	**[xxxxxx]**	**[xxxxxxx]**	**[xxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxx]**	**[xxxxx]**	**[xxx]**	**[xxxxxxxxx]**

[As some of the projects are *in camera*, above table in its entirety should be treated *in camera*]

(CX 486; CX 824; CX 1210, *in camera*; CX 1212 at 7, *in camera* ; CX 397, *in camera*; CX 1657 (demonstrative), *in camera*; RX 757; Simpson, Tr. 3368, 3372-3375).

<u>Response to Finding No. 172:</u>

This finding is misleading and irrelevant for a number of reasons. First, this finding is not indicative of the current competitive conditions in the LPG market as set forth in RFOF 171. Second, this finding is misleading because from 1993 to the date of the Acquisition, CB&I did not build a single LPG tank. (Harris, Tr. 7286) (FOF 4.12). From 1994 to 2001, there were only 4 LPG projects and PDM won 3 while AT&V won 1. (Harris, Tr. 7285**)** (FOF 4.13)**.** **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 396 at 2) (FOF 4.18).

173. As shown in the above table, twelve field-erected LPG projects were awarded between 1990 and early 2001 in the United States. (Simpson, Tr. 3399 (referencing CX 1661, demonstrative)). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1660 (demonstrative); CX 486; RX 678; CX 397 at 1, *in camera*). No foreign firms built an LPG tank in the United States during this period.

<u>Response to Finding No. 173:</u>

This finding is misleading, incomplete, and irrelevant for the reasons set forth in RFOF 171-172. Further, this finding's reference to foreign firms is misleading because foreign tank manufacturers are currently soliciting LPG business in the United States. (N. Kelley, Tr. 7126) (FOF 4.52-4.54). Moreover, this finding is unreliable as Complaint Counsel now states that twelve field-erected LPG projects were awarded between 1990 and early 2001, while in CCFF 172 the number it asserted was fourteen.

174. Dr. Harris acknowledged that CB&I and its two acquisitions, PDM and Morse, account for all but one of the sales of LPG tanks in the United States from 1990 to the time of the acquisition. (Harris, Tr. 7522).

Response to Finding No. 174:

This finding is misleading to the extent that Dr. Harris qualified his answer to include that CB&I's acquisition of Morse did not impact competition for LPG tanks in any way. (Harris, Tr. 7522-23). Moreover, from 1993 to the Acquisition, CB&I did not build a single LPG tank. (Harris, Tr. 7286) (FOF 4.12). Further, this finding's reliance on the 1990 to 2001 time frame is misleading, incomplete, and irrelevant as set forth in RFOF 171-173.

175. Dr. Simpson calculated that the probability of observing CB&I and PDM win **[xx]** of twelve projects if some other firm competed on an equal footing with CB&I and PDM is 18 percent. (Simpson, Tr. 3399 (referencing CX 1661, demonstrative)).

Response to Finding No. 175:

This finding is misleading, incomplete, irrelevant, and unreliable for a number of reasons. First, the figures underlying Dr. Simpson's calculations are flawed, misleading, and incomplete as set forth in RFOF 171-174. As a result, this finding is unreliable and improper. Moreover, this calculated probability is irrelevant for the same reasons as set forth in RFOF 171-174. (*See, e.g.*, Harris, Tr. 7339).

176. The value of the LPG tank sold by **[xxx]** was a small fraction of the value of the other LPG tanks sold during this period. (Simpson, Tr. 3395 (referencing CX 1658, demonstrative)). Dr. Simpson testified that if this project is dropped from the sample, then CB&I won **[xxx]** LPG projects, PDM won **[xxx]** LPG projects, and Morse Tank won **[xxx]** LPG project. (Simpson, Tr. 3399). Dr. Simpson testified that the probability of observing CB&I and PDM win **[xxx]** of eleven projects, if some other firm competed on an equal footing with CB&I and PDM, is 7.5 percent. (Simpson, Tr. 3400).

Response to Finding No. 176:

This finding is misleading, incomplete, irrelevant, and unreliable for a number of reasons. First, this finding is misleading because the value of the LPG tank sold by AT&V is irrelevant to AT&V's ability to successfully complete and compete in the LPG market. (*See* N. Kelley, Tr. 7085-86, 7107-08) (FOF 4.36). On the ITC project, AT&V constructed a *field-erected* LPG tank, a project that was completed on time, without any defects, to the satisfaction

of the customer, at a fair price, and through a competitive bidding process that did not include PDM. (N. Kelley, Tr. 7088-89, 7130-31; Cutts, Tr. 2455-56, 2495) (FOF 4.16-4.42). Second, this finding is unreliable and improper to the extent that it asserts Dr. Simpson's probability analysis in the LPG market as expressed in RFOF 175. Moreover, this finding is misleading, incomplete, and irrelevant as set forth in RFOF 171-175.

177. Dr. Simpson testified that an analysis of LPG tanks and ammonia tanks sold between 1990 and early 2001 provides further evidence that CB&I and PDM were the two strongest suppliers of LPG tanks in the United States. (Simpson, Tr. 3400). Dr. Simpson testified that the skill set required to build field-erected ammonia tanks is very similar to the skill set required to build field-erected LPG tanks (Simpson, Tr. 3398 (citing CX 1615 and interviews with industry participants)). Nineteen projects for field-erected LPG tanks and field-erected ammonia tanks were awarded between 1990 and early 2001 in the United States. (Simpson, Tr. 3400 (referencing CX 1660 (demonstrative))). CB&I won **[xxx]** of these projects, PDM won **[xxx]** of these projects, Morse won **[xx]** of these projects, and AT&V won **[xx]** of these projects. (Simpson, Tr. 3400 (referencing CX 1661 (demonstrative))). Dr. Simpson testified that the probability of observing CB&I and PDM win **[xxx]** of nineteen projects if some other firm competed on an equal footing with CB&I and PDM is only 2.4 percent. (Simpson, Tr. 3400 (referencing CX 1661, demonstrative)).

Response to Finding No. 177:

This finding is misleading, irrelevant, incomplete, unreliable, and is wholly unsupported by any record evidence. First, this finding is irrelevant because ammonia tanks are not a relevant product market at issue. Second, this finding is wholly unsupported by any record evidence. Nowhere in this record is any cite regarding the skill set required to build an ammonia tank. However, Complaint Counsel attempts to assert, as a finding of fact, the testimony of Dr. Simpson as to such facts. Moreover, "interviews with industry participants" is not a part of the record evidence in this case and citing to them is wholly improper. Third, this finding is misleading, incomplete, irrelevant, and unreliable as set forth in RFOF 171-176.

178. Dr. Simpson concluded, based on documents, opinions of customers, and on his probability analysis, that CB&I and PDM were the two strongest competitors in the U.S. market for LPG tanks. (Simpson, Tr. 3402-3).

Response to Finding No. 178:

This finding relies on materials wholly unsupported by any record evidence. It attempts to assert as a finding of fact statements and opinions that are not a part of the record evidence. In addition, this finding is misleading, incomplete, irrelevant, and unreliable for the reasons set forth in RFOF 171-177. In particular, this finding ignores AT&V's success in the LPG market as well as viable competitors such as Matrix and Chattanooga Boiler & Tank. (N. Kelley, Tr. 7088-89, 7085, 7090; Cutts, Tr. 2334; Stetzler, Tr. 6355, 6365; CX 396, CX 397) (FOF 4.17-4.19, 4.43-4.46, 4.47-4.49).

179. Dr. Simpson testified that Morse Tank had a large advantage in competing for a project to build an LPG tank for Texaco in Ferndale, Washington in 1994. Dr. Simpson noted that this LPG tank project was very close to Morse Tank's headquarters and fabrication plant and very far from CB&I 's headquarters and fabrication plant. (Simpson, Tr. 3386-8 (citing CX 1482 and referring to CX 1195 for proposition that location provides a competitive advantage)). Dr. Simpson noted that a later PDM document describing competitors in the U.S. LPG tank market did not list Morse as a competitor. (Simpson, Tr. 3389 (citing CX 94)).

Response to Finding No. 179:

This finding is misleading, incomplete, and irrelevant for a variety of reasons. First, Ray Maw testified that Morse actually had a competitive cost disadvantage on the Ferndale LPG project in 1994 because of its obligations under a union collective bargaining agreement. (Maw, Tr. 6563-64, 6566, 6680) (FOF 4.99). These union obligations resulted in a higher wage payment, greater benefits, and subsistence cost obligations incurred by Morse that a nonunion employer, such as CB&I or PDM, would not be required to pay. (Maw, Tr. 6553-56) (FOF 4.99-4.109). In fact, Dr. Simpson even admitted that he did not know Morse was a union employer, that Morse in fact paid subsistence costs on the Ferndale project, and that the Ferndale project was a nonunion project. (Simpson, Tr. 5554-57). He explicitly stated that Morse would have been "at a disadvantage on a merit [nonunion] job." (Simpson, Tr. 5555). This disadvantage was estimated by Mr. Maw to be $180,000, more than outweighing any locational advantage

Morse may have had. (Maw, Tr. 6565-66) (FOF 4.108-4.111). Even Dr. Simpson noted that he did not know if Morse's disadvantage outweighed any locational cost advantage. (Simpson, Tr. 5557). Second, in his analysis, Dr. Simpson failed to account for CB&I's fabrication facility located in Fontana, California in 1994, or the alternative of transporting by railroad to the railspur at the Ferndale site. (Maw, Tr. 6606, 6682, 6685) (FOF 4.110-4.119). Third, CX 1482 is irrelevant; it is a marketing and sales tool that naturally does not express cost disadvantages that Morse would realize on the project. (Maw, Tr. 6680-81) (Respondents also note that CX 1195 is irrelevant as it is a PDM memorandum discussing Graver Tank). Finally, any assertion relating to Morse as a competitor in the LPG market is irrelevant because from the first day in this case, Respondents have asserted that "The Morse Tank Story" demonstrates the ease of entry and lack of entry barriers in the relevant product markets, not that Morse is a current competitor to CB&I. (*See* Opening Br. at 90-93) (FOF 4.90-4.98).

180. As shown in the following table, in the U.S. market for LPG tanks, between 1990 and early 2001, PDM had sales of **[xxxxxxxxx]**, CB&I had sales of **[xxxxxxxxx]**, Morse Tank had sales of **[xxxxxx]**, and AT&V had sales of **[xxxxxx]**. (Simpson, Tr. 3403-04 (referencing CX 1662, demonstrative)). Based on these sales, PDM had a **[xxx]** percent market share, CB&I had a **[xx]** percent market share, Morse Tank had an **[xx]** percent market share, and AT&V had a **[xxx]** percent market share. (Simpson, Tr. 3404).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

	[xxx]	[xxx]	[xxx]	[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]	[xxx]	[xxx]	[xxx]	[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]	[xxx]	[xxx]	[xxx]	[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]	[xxx]	[xxx]	[xxx]	[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]	[xxx]	[xxx]	[xxx]	[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]	[xxx]	[xxx]	[xxx]	[xxx]
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[xxxxxxxxxxxxxxxxxxxxxxxxxx]				[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]				[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]				[xxx]
[xxxxxxxxxxxxxxxxxxxxxxxxxx]				[xxx]

[As some of the projects are *in camera*, above table in its entirety should be treated *in camera*]

Response to Finding No. 180:

This finding is misleading, incomplete, irrelevant, and unreliable for a number of reasons. The figures underlying Dr. Simpson's calculations are flawed, misleading, and incomplete as set forth in RFOF 171-178. This finding does not accurately reflect the current competitive conditions in the LPG market. (RFOF 171). New competitors are currently active in pursuing LPG projects, such as AT&V, Matrix and CB&T. (FOF 4.46-4.54). Further, Complaint Counsel's time period dating back to 1990 is arbitrary. (Simpson, Tr. 3704-05) (*See* Opening Br. at 16-19). In fact, from 1993 to the Acquisition, CB&I did not built a single LPG tank, corresponding to a zero change in HHI for the LPG market. (Simpson, Tr. 3744; Harris, Tr. 7286) (FOF 4.12, 7.236).

181. CB&I's acquisition of PDM increased LPG market concentration, as measured by the HHI, by **[xxx]** points to a level of **[xxx]**. The combined market share of the merged company is **[xxx]** percent. (Simpson, Tr. 3404-3405).

Response to Finding No. 181:

This finding is misleading and unreliable because HHI calculations are not accurate in determining the concentration in the LPG market due to the extraordinarily thin and almost nonexistent demand, and because of recent entry into the market by Matrix and AT&V. (Cutts, Tr. 2495; N. Kelley, Tr. 7088-90, 7130-31; Harris, Tr. 7281-82) (FOF 4.10, 4.17-4.22, 4.42, 4.43-4.46). Further, CB&I did not built an LPG tank from 1993 to the date of the Acquisition, corresponding to a zero change in HHI for the LPG market. (Simpson, Tr. 3744; Harris, Tr. 7286) (FOF 4.12, 7.236) (*See also* Opening Br. at 16-19).

182. Under the *Merger Guidelines*, the CB&I/PDM merger has resulted in a substantial increase in an already highly concentrated LPG market. The HHI level raises the presumption that the merger will likely create or enhance market power or facilitate its exercise by CB&I. *Merger Guidelines* § 1.51(c).

Response to Finding No. 182:

This finding is misleading because HHI calculations are not accurate in determining the concentration in the LPG market due to the extraordinarily thin and almost nonexistent demand. (Harris, Tr. 7281-82) (FOF 4.10). Moreover, this finding is further misleading and unreliable because any presumption is directly contradicted by actual events in the LPG market. For instance, CB&I did not built an LPG tank from 1993 to the date of the Acquisition, corresponding to a zero change in HHI for the LPG market. (Simpson, Tr. 3744; Harris, Tr. 7286) (FOF 4.12, 7.236). (*See also* Opening Br. at 16-19). According to *Baker Hughes*, an HHI change of zero combined with two entrants, AT&V and Matrix, recently competing in the LPG market, with low demand, low barriers to entry, and customer perceptions

of competitive pricing on LPG projects is sufficient to rebut any alleged presumption. (Opening Br. at 88-97) (FOF 4.1-6.160).

183. Shortly after the complaint issued in this matter, CB&I acquired Morse, eliminating the firm that had accounted for the next most substantial share of LPG sales prior to the acquisition. (Maw, Tr. 6545). Because CB&I has acquired Morse Tank, the market shares understate the competitive effects of the acquisition. *Merger Guidelines* § 1.52.

Response to Finding No. 183:

This finding is misleading and incomplete because when Morse was acquired on November 30, 2001 by CB&I, AT&V had already successfully completed LPG tanks. (Maw, Tr. 6545; N. Kelley, Tr. 7088-89, 7130-31; CX 396, CX 397) (FOF 4.16-4.42, 4.75). In addition, Morse has not built or bid on an LPG tank project since 1994. (Maw, Tr. 6546-48) (FOF 4.73). Consistent with Respondents' position in this case, Morse is not a current LPG competitor. (*See* Opening Br. at 90-93). The impact of CB&I's acquisition of Morse has no impact in anyway on the competitive effects of Acquisition. (Harris, Tr. 7522-23).

184. The Morse acquisition further increased CB&I's share of LPG sales to **[xxx]**, leaving AT&V as the only competition to CB&I in the market. CB&I's acquisition of Morse further increased concentration in LPG, as measured by the HHI, by an additional **[xxx]** points to a level of **[xxx]**. (Simpson, Tr. 3404).

Response to Finding No. 184:

This finding is misleading and irrelevant for the reasons set forth in RFOF 180-183. (*See also* Opening Br. at 16-19). In particular, this finding does not account for the lack of demand and virtually "non-existent" market for LPG tanks. (Harris, Tr. 7281-82) (FOF 4.10-4.15). Further, CB&I, combined with Morse, did not built an LPG tank from 1994 to the date of the Acquisition, corresponding to a zero change in HHI for the LPG market. (Simpson, Tr. 3744) (FOF 7.236). More importantly, this finding is incomplete when it states that AT&V is the only competitor left in the LPG market. Direct record evidence exists to the contrary. Matrix has also bid on current LPG projects. (N. Kelley, Tr. 7088-89, 7085, 7090; Cutts, Tr.

2334; CX 396, CX 397) (FOF 4.17-4.19, 4.47-4.49). In fact, LPG customers have testified that Matrix is "a large contractor, and quite capable" of building an LPG tank. (N. Kelley, Tr. 7085, 7090) (FOF 4.43-4.46). Matrix has bid on LPG projects and intends to pursue them in the future. (N. Kelley, Tr. 7083-84; Newmeister, Tr. 2180-82) (FOF 4.34, 4.43).

185. Calculations by Respondents' expert show a similar result. Dr. Harris presented a demonstrative exhibit depicting LPG sales in the United States from 1992 through 2002. (Harris, Tr. 7282-7284 (referencing RX 947)). Dr. Harris acknowledged that his demonstrative exhibit regarding sales in the LPG market is essentially the same exhibit used by Dr. Simpson (Harris, Tr. 7284-7285).

Response to Finding No. 185:

This finding is misleading and unsupported by the record evidence. While Dr. Harris presented a chart similar to Dr. Simpson's demonstrative, Dr. Harris successfully attacked Dr. Simpson's conclusions and expressly disagreed with Complaint Counsel's findings. Complaint Counsel's assertion that Dr. Harris reached a similar result is unsupported by the evidence. For example, Dr. Harris expressly stated that Dr. Simpson's structural analysis does not accurately reflect the current level of competition in the LPG market. (Harris, Tr. 7286-87). Further, Dr. Simpson fails to recognize that CB&I did not win an LPG project from 1993 to the Acquisition and fails to consider entry in the LPG market. (Harris, Tr. 7287). (*See also* RFOF 171-184).

186. The figures presented by Dr. Harris confirm that the United States LPG tank market is highly concentrated and that the acquisition of PDM substantially increased market concentration. Of the eight LPG jobs during this period, **[xxx]** were performed by CB&I, **[xxx]** by PDM, **[xx]** by Morse, and **[xx]** by AT&V. (Harris, Tr. 7285). The one LPG tank constructed by AT&V was only **[xxx]**, much smaller than historical LPG tanks constructed in the United States. (Harris, Tr. 7281).

Response to Finding No. 186:

This finding is misleading, incomplete, irrelevant, and unreliable for a number of reasons. First, Complaint Counsel miscites the record evidence. For example, Dr. Harris

testified that historical LPG tank prices are much smaller than LNG tanks, not as Complaint Counsel asserts in CCFF 186 that AT&V's 2000 LPG tank was much smaller than historical LPG tanks. (Harris, Tr. 7281). Second, this finding is irrelevant because Dr. Harris testified that the Acquisition has not harmed or reduced competition in the LPG market. (Harris, Tr. 7280-81). Third, this finding is misleading because the value of the LPG tank sold by AT&V is irrelevant to AT&V's ability to successfully compete in the LPG market. (*See generally* N. Kelley, Tr. 7085-86, 7107-08) (FOF 4.36). On the ITC project, AT&V constructed a *field-erected* LPG tank, a project that was completed on time, without any defects, to the satisfaction of the customer, at a fair price, and through a competitive bidding process that did not include PDM. (N. Kelley, Tr. 7088-89, 7130-31; Cutts, Tr. 2455-56, 2495) (FOF 4.16-4.42).

187. Using his figures for the dollar value of LPG projects sold in the United States from 1992 through 2002, Dr. Harris determined that CB&I accounted for **[xxxx]**, PDM accounted for **[xxx]**, Morse accounted for **[xxx]**, and AT&V accounted for **[xxx]**. (CX 1757 (demonstrative); Harris, Tr. 7732-7734). According to Dr. Harris's figures, CB&I and PDM together account for 88.3%, and together with Morse account for roughly **[xxx]** of the dollar value of LPG tank projects sold in the United States during the period 1992 through 2002. (CX 1757 (demonstrative); Harris, Tr. 7732-7734, 7773-7774; *see* Harris, Tr. 7770 ("looking at LPG projects sold in the United States 1992 through 2002, I think PDM plus CB&I plus Morse accounted for roughly 99 percent of the dollar value during that period.")).

Response to Finding No. 187:

This finding is another example of Complaint Counsel's attempt to mislead and distort the record evidence. Dr. Harris specifically testified that he did not calculate percentages of the LPG market based on dollar values -- Complaint Counsel calculated these statistics on its own and made its own determinations. (Harris, Tr. 7732-74). Dr. Harris only confirmed that the mechanical process of adding numbers together was as Complaint Counsel said it was performed. In fact, Dr. Harris stated on the record that he was not comfortable with Complaint Counsel's attempt to alter RX 947 in the form of CX 1757. (Harris, Tr. 7754). Moreover, Dr. Harris' direct quote set forth by Complaint Counsel is taken entirely out of context and is

misleading. (*See* Harris, Tr. 7770). Dr. Harris did not state that his own belief was that CB&I accounted for 99 percent of the LPG dollar value. Rather, Dr. Harris agreed with Complaint Counsel that the sum of all Complaint Counsel's percentages added together was 99 percent. (Harris, Tr. 7767-70). Finally, any attempt to use dollar figures from 1992 as compared to dollar figures of projects in 2001 to determine market share is misleading and fails to reflect the current competitive conditions in the LPG market. (Harris, Tr. 7753-54).

188. Using Dr. Harris's dollar sales figures, CB&I's acquisition of PDM increased the HHI by **[xxx]** points to a level of **[xxx]**. (CX 1757 (demonstrative); Harris Tr. 7775-7776, 7759-7762, 7765). CB&I's subsequent acquisition of Morse further increased the HHI by **[xxx]** points to a level of **[xxx]**. (CX 1757 (demonstrative); *see* Harris, Tr. 7772-7773).

Response to Finding No. 188:

This finding is misleading, attempts to distort Dr. Harris' testimony, and is wholly unsupported by the record evidence. Dr. Harris did not perform these HHI calculations. In fact, he testified against them. (Harris, Tr. 7753-54, 7767-68). Instead, Complaint Counsel is asserting as a finding its own calculation of HHIs. Dr. Harris specifically testified that HHIs are not accurate indicators in this case. (Harris, Tr. 7221, 7227-29) (FOF 7.114, 7.115-7.116) (*See* Opening Br. at 16-19).

E. Market Shares and Concentration in the TVC Market

189. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Simpson, Tr. 3489 (citing CX 272; CX 857, *in camera*; CX 264; CX 1040 at PDM-HOU 010889; CX 94 at PDM-HOU 017583)). Since 1960, the only companies that have built TVCs are PDM and CB&I. (Scully, Tr. 1110, 1115 (referencing RX 178); Higgins, Tr. 1267; Newmeister, Tr. 1564). PDM and CB&I are the only TVC suppliers known to customers. (Scully, Tr. 1110; Neary, Tr. 1430 (referencing RX 178); Higgins, Tr. 1267 (referencing RX 178); Gill, Tr. 204-205).

Response to Finding No. 189:

Respondents do not dispute the truth of this statement, except to note that CB&I was a fringe competitor in the field-erected TVC market prior to the Acquisition because of its

lack of experience and lack of commitment to the market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). CB&I has never built a mailbox-shaped field-erected TVC. (Scully, Tr. 1193; Neary, Tr. 1467; Scorsone, Tr. 5056; FOF 6.27). Furthermore**,** CB&I had already exited the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1188; **[xxxxxxxxxxxxxxxxxxxxxx]** (FOF 6.40).

190. Since 1990, PDM built five TVCs, several of which were awarded prior to 1990, and CB&I has been awarded **[xxx]**. (CX 849 at 117-118 (Steimer, IHT) (referencing CX 861 at PDM-HOU00036163); CX 827 at 5; Thompson, Tr. 2061-2062; Scully, Tr. 1169; CX 926 at CB&I 007212-HOU).

Response to Finding No. 190:

This finding is misleading and inaccurate. Specifically, even Complaint Counsel's own expert witness disputes the number of field-erected TVCs built since 1990. (CCFF 192). In fact, PDM has built only one field-erected TVC since 1990, and CB&I, though it has been awarded a field-erected TVC that was ultimately canceled, has not built one since 1984. (CX-1048 at 14; Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26, 6.199).

191. By any measure the TVC market is highly concentrated and the acquisition greatly increased the level of market concentration. Dr. Simpson testified that he would assign a 50-percent market share to CB&I and a 50-percent market share to PDM based on the opinions of market participants, documents, and the history of awarded projects. (Simpson, Tr. 3492-3, 3495-6). Based on these market shares, the acquisition increased market concentration, as measured by the HHI, by 5000 points to a level of 10,000. (Simpson, Tr. 3494).

Response to Finding No. 191:

This finding is inaccurate. CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the

late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxxxxxxx]** (FOF 6.40).

192. As shown in the following table, if CB&I and PDM are assigned market shares based on the dollar value of awarded sales since 1990, CB&I has a **[xxx]** percent market share, and PDM has a **[xxx]** percent market share. (Simpson, Tr. 3493-4).

[xxxxxxxxxxxxxxx]

[xxxxxx]	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**
[xxxxxx]	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**
[xxxxxx]	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**
[xxxxxx]	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**	**[xxxxxx]**

[xxxxxx]	**[xxxxxx]**	
[xxxxxx]	**[xxxxxx]**	
[xxxxxx]	**[xxxxxx]**	
[xxxxxx]	**[xxxxxx]**	

(CX 1210 at 7, *in camera*; CX 567 at CB&I 007139-HOU)

Response to Finding No. 192:

This finding is misleading and inaccurate for four reasons. First, the market concentration statistics are virtually meaningless, as they were generated using a total of two data points over an eleven-year period. (Opening Br. 119). Second, CB&I was a fringe competitor in the field-erected TVC market prior to the Acquisition because of its lack of experience and lack of commitment to the market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Third**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxxx]** (FOF 6.40). Fourth, while CB&I was awarded a bid in 2000, a contract was never signed and the project is

canceled. (FOF 6.169-6.201). Without the proposed Spectrum Astro project included (and it cannot be since the product was never sold), PDM would have an HHI of 10,000 since 1984. (*See* Reply Br. Part I.A.).

193. As shown in the above table, based on the dollar value of TVC awards since 1990, CB&I and PDM have a combined share of 100%, and the acquisition increases market concentration, as measured by the HHI, by **[xxx]** points to a level of 10,000. (Simpson, Tr. 3494).

Response to Finding No. 193:

Respondents dispute this finding for the reasons set forth in RFOF 192.

194. Under the *Merger Guidelines*, the CB&I/PDM merger has resulted in a substantial increase in concentration in an already highly concentrated TVC market. The HHI level raises the presumption that the merger will likely create or enhance market power or facilitate its exercise by CB&I. *Merger Guidelines* § 1.51(c).

Response to Finding No. 194:

The *Merger Guidelines* are not controlling. The Merger Guidelines do not establish a criteria for evaluating entry that is binding on this Court; instead the Merger Guidelines, if anything, are binding on Complaint Counsel and it is Complaint Counsel's burden to show that it brought this proceeding in accordance with its own Guidelines. The proper legal analysis under which entry should be analyzed is set forth in *United States v. Baker Hughes*, 908 F.2d 981, 987-88 (D.C. Cir. 1990). (*See* Opening Br. Part I.D.) Moreover, non-existent demand explains the high concentration in the field-erected TVC market. (*See* RFOF 6.11-6.16). The market for field-erected TVC's is not large enough to support the existence of two suppliers in the U.S. (Scully, Tr. 1226-27; RFOF 6.97). A breakup would result in two smaller companies that would each be substantially weaker than the current CB&I-PDM. (Scully, Tr. 1239-40; RFOF 6.96).

195. Based on the experiences of TVC customers, Dr. Simpson concluded that CB&I's acquisition of PDM would lead to higher prices in the market for TVCs. (Simpson, Tr. 3501).

Response to Finding No. 195:

This finding is misleading and inaccurate, because CB&I was a fringe player and because CB&I has offered a remedy package to this Court that field-erected TVC customers agree would benefit competition and maintain favorable prices for field-erected TVC customers in the future. (FOF 6.99-6.121). Complaint Counsel relies on its expert to prematurely and inaccurately conclude that prices will increase and can cite no evidence of a field-erected TVC price increase in the record.

VI.

THE MERGER WILL LIKELY LESSEN COMPETITION BECAUSE IT ELIMINATES PDM AS CB&I'S CLOSEST COMPETITOR AND OTHER FIRMS CANNOT EFFECTIVELY REPLACE PDM

196. Respondents' high market shares in each of the relevant markets demonstrates that the two firms were the first and second best competitive choices for customers.

Response to Finding No. 196:

Complaint Counsel's finding number 196 is misleading because, as has been stated repeatedly, market shares as calculated by Complaint Counsel are not predictive of future competition in the alleged product markets. (*See supra* RFOF 7.) Furthermore, it entirely ignores the issue of entry.

197. In addition to market share evidence, the record contains business documents, testimony and actual competitive bidding situations in which CB&I and PDM were the closest competitors, CCFF 204-251, and this vigorous head-to-head competition resulted in lower prices and margins CCFF 249-291.

Response to Finding No. 197:

Complaint Counsel's finding number 197 is irrelevant since entry indicates that competition will remain vigorous. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have

entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)); RFOF 204-291).

198. Sellers of LNG, LPG and LIN/LOX tanks and TVCs compete on price, quality, reputation, safety record and timeliness of completion. (CX 1033 at 7; Simpson, Tr. 3037). Prior to the merger, Respondents were far and away the two strongest competitors in terms of offering buyers the best combination of price, quality, reputation, safety record and timeliness of completion. (Simpson, Tr. 3050, 3094).

Response to Finding No. 198:

Complaint Counsel's finding number 198 is misleading and irrelevant since prior to the Acquisition, new entrants were not seriously pursuing projects in the United States. (Harris, Tr. 7209-13, 7239-47). Additionally, since CB&I has not built a TVC since 1984, this statement by Complaint Counsel is flatly false with respect to TVCs. Further, in the LIN/LOX market Graver had the second-highest market share. (Harris, Tr. 7312). Finally, this finding ignores entry.

199. CB&I's acquisition of PDM reduced competition by eliminating the competition between these firms and making it more likely that CB&I could exercise market power. Since PDM was CB&I's closest competitor, it was also the firm to which CB&I would most likely lose sales to when it raised price. Thus, by eliminating competition between CB&I and PDM in the relevant markets, the merger makes it less likely that CB&I would lose sales after increasing prices. *Merger Guidelines* § 2.21 ("The price rise will be greater the closer substitutes are the products of the merging firms, *i.e.*, the more the buyers of one product consider the other product to be their next choice"); *id.* § 2.21, n.21 ("A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller").

Response to Finding No. 199:

Complaint Counsel's finding number 199 is pure argument and unsupported by citation to evidence. Contrary to the assertion made in finding number 199, the Acquisition has not reduced competition in the alleged product markets. (Harris, Tr. 7192). This finding entirely ignores entry.

200. Entry by new firms into the relevant markets or expansion by existing firms may deter or counteract the likely anticompetitive effects of a merger if such entry or expansion will be timely (*i.e.*, within two years of the merger), likely and sufficient. *Merger Guidelines* § 3.0.

This entry or expansion must duplicate the pre-merger competition provided by PDM against CB&I.

Response to Finding No. 200:

Complaint Counsel's finding number 200 is misleading. First, Complaint Counsel is unable to even cite to its own *Merger Guidelines* for its bold, unsupported assertion that "this entry or expansion must duplicate the pre-merger competition provided by PDM against CB&I." Logic dictates that multiple firms, for example, could prevent a substantial lessening of competition without duplicating PDM. Second, while the *Merger Guidelines* may provide guidance, they are not law and are not binding on the Commission itself or on the courts. *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 n.9 (S.D.N.Y. 1995); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353-54 (2d Cir. 1979); *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1300 (9th Cir. 1993). Third, under the law, entry rebuts Complaint Counsel's prima facie case where there is evidence regarding actual or potential entry or the existence of low entry barriers rebuts a prima facie case. *Baker Hughes*, 908 F.2d at 988. A showing of actual entry is not even necessary. Even the mere threat of entry can rebut a prima facie case. *Id*. The "mere threat" of entry could rebut a prima facie case if "these firms would exert pressure on the United States . . . market even if they never actually entered the market." *Id.* Evidence of the absence of entry barriers to the relevant markets rebuts a prima facie case. *Id.* at 989.

201. In the two years since the merger, no firm has replaced PDM as an effective price restraint on CB&I. CCFF 292-571. To the contrary, CB&I has used its competitive advantages, particularly the significant price gap between CB&I and its competitors, to continue building its market leadership. CCFF 568-592.

Response to Finding No. 201:

Complaint Counsel's finding number 201 is riddled with falsehoods. First, there is evidence indicating that CB&I has been constrained; the evidence is overwhelming that there

has been both actual entry and that there is potential entry constraining CB&I's prices. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Internal CB&I documents indicate that CB&I's prices have been constrained. (RX 208, RX 627). There is additional evidence that CB&I has had to lower its prices in response to competition. (FOF 4.67-4.70). Additionally, there is no evidence that CB&I has in fact raised its prices and margins; Complaint Counsel's purported examples of price increases are based on inappropriate comparisons, conjecture, and fabrication. (*See* FOF 7.1-7.41, 3.597-3.641, 5.182-5.211, 7.164).

202. Respondents cite numerous domestic and foreign firms that they claim will replace PDM as a price restraint on CB&I. These are not "new" entrants, but rather the same firms that historically attempted to compete against Respondents in the relevant markets and failed. CCFF 437-571. Moreover, Respondents' ordinary course of business documents, including those prepared after the merger, fail to identify any other firm as a competitive threat to the same extent, consistency and frequency as CB&I and PDM.

Response to Finding No. 202:

Complaint Counsel's finding number 202 is irrelevant and flatly false. First, whether an entrant is "new" is irrelevant; expansion by existing firms is a form of entry sufficient to rebut Complaint Counsel's prima facie case. *In re Grand Union Co.*, 102 F.T.C. 812, No. 9121, 1983 FTC LEXIS 61, *529 (1983) ("Evidence of low entry barriers includes recent entry into the target market, *or recent capacity expansion by existing competitors* in the market.") (emphasis added). *International Distrib. Ctrs., Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 792-93 (2d Cir. 1987) ("Although the issue of barriers to entry is disputed, there was undisputed evidence that a new carrier had in fact entered the market during 1983 and that several existing

carriers had expanded their operations into the market during 1983 and 1984. . . . [W]hen existing carriers expand into a new market, they have lower entry costs than new carriers 'primarily due to their expertise in the trucking business, their ability to shift some existing assets to new locations at minimal cost, and their ability to use existing terminals or break-bulk stations as the core of an expanded service territory.'").

This proposed finding is also false because internal CB&I documents indicate that CB&I's prices *have* been constrained. (RX 208, RX 627). Further, there are specific instances where CB&I has lowered prices in response to competition; for example the ABB Lummus and MG New Johnsonville projects. (FOF 4.66, 4.674.67-4.70, 5.151, 5.153). In addition, CB&I witnesses have testified that the loss of the Dynegy and Trinidad projects has impacted its view that it cannot raise prices. (FOF 3.451-3.459).

Further, the entrants *are* new: S&B/Daewoo, Technigaz/Zachry, Skanska/Whessoe, and TKK/AT&V are all completely new competitors in their current configuration. Even those who bid on Memphis in 1994 did not exist in their present manifestation.

203. These "new" entrants were, and remain, distant competitors, unable to close the competitive gap between them and CB&I. There are numerous marketplace conditions that explain why foreign and domestic firms cannot replace PDM. CCFF 292-420. Respondents and industry participants know this, (CCFF 393-592), which is why Respondents' merger planning documents (CCFF 730-749) and the testimony of industry participants (CCFF 711-727) consistently predict that the merger will likely lead to higher prices.

Response to Finding No. 203:

Complaint Counsel's finding number 203 is false. First, the statement that entrants are distant competitors is false; Respondents have won less than 20% of the available dollars in the relevant product markets. (Harris, Tr. 7223). In LIN/LOX, CB&I has been beaten by AT&V on every project where AT&V was a bidder. (FOF 5.76-5.78). Further, as discussed

below, there are no barriers to entry. Further, as has been addressed, the industry participants who have foundation believe that the Acquisition has not and will *not* lead to higher prices. *See supra* RFOF 17. Finally, this proposed finding is vague since Complaint Counsel does not specify product market. RFOF 393-592, 730-749, 711-727.

A. <u>Respondents Viewed Each Other as Their Closest Competitor</u>

204. PDM was CB&I's "main competitor" in the relevant product markets, and CB&I's ordinary course of business documents reflect this fact. (CX 163 at CB&I-PL006679; *see also*, *e.g.*, CX 186 at CB&I-PL012446 ("two horse race" between CB&I and PDM/Air Products); CX 227 at CB&I-PL045102 ("Principal US Competitor"); Glenn, Tr. 4332 ("principal U.S. competitor for services")).

<u>Response to Finding No. 204:</u>

Complaint Counsel’s finding number 204 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an “old” state of competition do not indicate the state of competition years later.

205. Other descriptions of PDM include the "biggest competitor" (CX 627 at CB&I-H006780), and a "formidable competitor" (CX 216 at CB&I-PL033886; *see also* Glenn, Tr. 4263).

<u>Response to Finding No. 205:</u>

Complaint Counsel’s finding number 205 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an “old” state of competition do not indicate the state of competition years later.

206. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 76 at PDM-C 1006121; *see also* CX 660 at PDM-HOU005014 (since 1996, CB&I is PDM's "most aggressive competitor in increasing market share; Scorsone, Tr. 5174; CX 857 at PDM-HOU019513 (**[xxxxxx xxxxxxxx]**); see CX 218 at CB&I PL034531 (PDM is "CB&I's largest and most mentioned tank competitor")).

Response to Finding No. 206:

Complaint Counsel's finding number 206 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

207. At other times, CB&I was described as PDM's "only competitor" in the relevant markets. (CX 660 at PDM-HOU005016; *see also* Scorsone. Tr. 5156-57, 5177, 5183; CX 94 at PDM-HOU017580, 017582, 017583)

Response to Finding No. 207:

Complaint Counsel's finding number 207 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

208. In September 1998, a PDM EC "President's report" to the Board of Directors portrayed CB&I as "PDM EC's major competitor in almost all of the significant markets PDM EC serves... CB&I and PDM EC are often the only competitors for [] cryogenic storage contracts." (CX 68 at PDM-C 1002632; *see also* Scorsone, Tr. 5153-4).

Response to Finding No. 208:

Complaint Counsel's finding number 208 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

209. A later "President's report" to PDM's Board in November 1998 states that "CB&I remains the major competitor to PDM EC." (CX 67 at PDM-C 1002625; *see also* CX 106 at PDM-HOU004990; CX 116 at PDM-HOU019181 ("CB&I is PDM's major competitor for both [LNG] storage tanks and turnkey facilities in the US"); CX 116 at PDM-HOU019176 ("CB&I is PDM's competition for LNG tanks alone. Others have bid tanks in recent years, such as Preload and Graver, but are not now competitive."); CX 119 at PDM-HOU019508).

Response to Finding No. 209:

Complaint Counsel's finding number 209 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

210. In 1999, PDM's Board was advised that CB&I is PDM EC's "[w]orldwide competitor on all projects," and that PDM EC's objective is to "Be the largest and most profitable storage tank and related systems contractor in the U.S. and Latin America - beat CB&I!" (CX 74 at PDM-C 1005928, PDM-C 1005940). PDM EC's president, Mr. Scorsone used the idea of "beating CB&I" as a "rallying" cry for PDM to "focus on." (Scorsone, Tr. 5166, 5167-68). The same document attributes CB&I with the highest and PDM with the second highest market shares for the markets PDM served. (CX 74 at PDM-C 1005933).

Response to Finding No. 210:

Complaint Counsel's finding number 210 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

211. Tanner & Company, who was retained to locate buyers for PDM in 2000, described CB&I and PDM as the "two main players" in the relevant markets, who "bid against each other a lot." (CX 75 at PDM-C 1006089; *see* RX 26 at PDM-C 1004310 (August 2000 Tanner & Company sales presentation characterizing competition between CB&I and PDM as "stiff")).

Response to Finding No. 211:

Complaint Counsel's finding number 211 is irrelevant since the relevant question is competition going forward. (Harris, Tr. 7196). Old documents reflecting an "old" state of competition do not indicate the state of competition years later.

1. *Respondents Were the Closest Competitors in the LNG Market*

212. In July 1998, PDM's Carroll Davis wrote to his colleague, Steve Crain, and others that, for the Atlanta Gas Light/Southern Natural Gas LNG project in Etowah, GA, "the real competition [was] between CB&I and PDM." (CX 161 at CB&I-PL006113).

Response to Finding No. 212:

Respondents have no specific response.

213. An LNG/Aerospace marketing presentation, dated November 2000, states that CB&I was "PDM's competition for LNG tanks alone." (CX 116 at PDM-HOU019176).

Response to Finding No. 213:

The proposed finding is factually incorrect. There is no evidence suggesting that CX 116 was dated November, 2000. In fact, the document suggests that it was prepared prior to 2000: "A firm price inquiry is expected sometime during the first half of 2000." (CX 116 at PDM-HOU019176).

214. PDM's 2000 Business Plan states that "CB&I is PDM EC's domestic competition for LNG tanks." (CX 94 at PDM-HOU017580).

Response to Finding No. 214:

Respondents have no specific response.

215. PDM characterized CB&I as "PDM EC's only competitor on domestic cryogenic, LNG, LPG, Ammonia and thermal vacuum projects." (CX 107 at PDM-HOU005016).

Response to Finding No. 215:

Respondents have no specific response.

216. In a 1997 PDM Customer Briefing, PDM determined that with "only two capable LNG tank builders in the U.S. (PDM and CB&I) our teaming with Air Products has essentially put Lotepro and other liquefaction design companies out of the LNG business in the domestic U.S." (CX 113 at PDM-HOU014838 (emphasis added)).

Response to Finding No. 216:

Respondents have no specific response.

217. Mr. Scorsone confirmed that PDM and CB&I competed fiercely against one another for LNG tanks. (Scorsone, Tr. 5173).

Response to Finding No. 217:

This finding is misleading and irrelevant as it related to PDM's view as to competition in November, 2000. (Scorsone, Tr. 5173, citing CX 857). This finding is not relevant to the current state of competition in the LNG market because of the emergence of new entrants and foreign tank suppliers. (*See generally,* FOF 3.451-3.459). Moreover, Complaint Counsel's cite makes no reference to the "fierce" state of competition at that time. Instead, Mr.

Scorsone read from an exhibit as follows: "CB&I is PDM's competition for LNG tanks alone." (Scorsone, Tr. 5173).

2. *Respondents Were the Closest Competitors in the LPG Market*

218. Respondents' business documents refer to each other as a "formidable" competitor (CX 216 at CB&I-PL-033886) or "major" competitor in the LPG market (CX 116 at PDM-HOU019181).

Response to Finding No. 218:

This finding is irrelevant to the current state of competition in the LPG market, especially in light of recent entry by AT&V and Matrix. (N. Kelley, Tr. 7088-89, 7130-31, 7085, 7090) (FOF 4.16-4.46).

219. PDM believed CB&I was its "only competition on tanks over 100,000 bbl [barrel]." (CX 303 at CB&I/PDM-H 4001285).

Response to Finding No. 219:

This finding is irrelevant as it fails to reflect the current state of competition in the LPG market, especially in light of recent entry by Matrix and AT&V. (*See* RFOF 218). In addition, this finding is misleading given that AT&V has successfully completed LPG projects. (N. Kelley, Tr. 7088-89, 7130-31) (FOF 4.16-4.42).

220. Mr. Scorsone testified that CB&I was "PDM EC's major competitor" for LPG tanks. (Scorsone, Tr. 5157, 5174; CX 94 at PDM-HOU017580).

Response to Finding No. 220:

This finding is irrelevant to the current state of competition in the LPG market as set forth in RFOF 217-219.

3. *Respondents Were the Closest Competitors in the TVC Market*

221. CB&I's business and strategic documents refer to PDM as CB&I's "only competitor" for TVC projects in the United States. (CX 212 at CB&I-PL031721; *see also* CX 264 at CB&I-H006780 ("only real competitor"); CX 265 at CB&I-H007057 ("single USA competitor").

<u>Response to Finding No. 221:</u>

Respondents have no specific response.

222. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 216 at CB&I-PL033886, *in camera*; *see also* CX 212 at CB&I-PL031721 (PDM's strategic alliance was "the only competition for the thermal vacuum systems market")), **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1040 at PDM-HOU 010889).

<u>Response to Finding No. 222:</u>

Respondents have no specific response.

223. A 1998 CB&I e-mail discussing a TVC project for Orbital Sciences discussed a bidding strategy that focused upon beating PDM, and no one else. (CX 272 at CB&I-H010889-90).

<u>Response to Finding No. 223:</u>

This finding is misleading and irrelevant. First, the email refers to a project to modify an existing 12' thermal vacuum chamber. (CX 272 at CB&I-H010889-90). Repair jobs are not relevant to this litigation, and are outside of the product market definitions. (*See* RFOF 6.1-6.10). Furthermore, this existing chamber is a shop-built TVC, and not a relevant product, by Complaint Counsel's definition, thus exposing a direct contradiction in its findings. (*See* CCFF 84, 223).

224. A 1997 memo to a senior CB&I executive notes reaching the objective of maneuvering CB&I "into a position which could provide CB&I significant advantages over Pitt Des Moines." (CX 261 at CB&I-H004029).

<u>Response to Finding No. 224:</u>

Respondents have no specific response, except to note that this document shows Respondents' interest in entering the field-erected TVC market in 1997. (FOF 6.40).

225. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 242 at CB&I-PL 4003341, *in camera*).

Response to Finding No. 225:

Complaint Counsel's arguments rely heavily on Mr. Lacey, even though he was an entry-level marketing person at CB&I who worked primarily in the aerospace business during the time that XL was owned by CB&I. (Scully, Tr. 1125; Scorsone, Tr. 5045). Mr. Lacey was indeed CB&I's contact person with Spectrum Astro. (Thompson, Tr. 2043). However, Mr. Lacey generated a large volume of ideas for management to consider with regard to the field-erected TVC business. (Scully, Tr. 1218; CX-242). Mr. Lacey's ideas were ignored. (Scorsone, Tr. 5045-46; Scully, Tr. 1221). (FOF 6.150-6.153).

226. In its 2000 Business Plan, PDM stated that "The [EC] Division's competition is CB&I." (CX 94 at PDM-HOU 017583; *see also* CX 859 at PDM-HOU017583; CX 857 at PDM-HOU019511).

Response to Finding No. 226:

Complaint Counsel ignores record substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

4. ***Respondents Were Major Competitors in the LIN/LOX Market***

227. PDM and CB&I were major competitors in the LIN/LOX market. (CX 183 at CB&I-PL012437; *see* CX 660 at PDM-HOU 005016; CX 658 at PDM-HOU 1002551).

Response to Finding No. 227:

The proposed finding is made irrelevant by the fact that new entry has created competition in the LIN/LOX market. (FOF 5.22-5.78) (RFOF 152).

228. In a March 1996 memo to Mr. Scorsone, PDM staff anticipated that CB&I, by separating from its former parent, Praxair, would "become a major competitor in [the LIN/LOX] market." (CX 1040 at PDM-HOU010888). Between 1990 and 1997, PDM identified at least four tanks that were lost due to competition from CB&I. (CX 1049 at PDM-HOU11767-70).

Response to Finding No. 228:

The proposed finding is made irrelevant by the fact that new entry has created competition in the LIN/LOX market. (FOF 5.22-5.78) (RFOF 152). Therefore, any implication that absent PDM CB&I would be the only major competitor left is inaccurate.

229. In a July 1997 competitor report to Luke Scorsone, PDM's Bill Weber noted that "[s]ince last fall, CB&I has been the most aggressive competitor in increasing market share." (CX 108 at PDM-HOU005018).

Response to Finding No. 229:

The proposed finding is irrelevant. First, the fact that PDM felt CB&I was the most aggressive competitor in the LIN/LOX market in 1997 has no bearing on present day competition. In reality, since the Acquisition CB&I has lost the majority of LIN/LOX project awards, each time because the competition bid a lower price. (Scorsone, Tr. 5017-18) (FOF 5.76-5.78).

230. PDM was the lower price alternative to CB&I in the LIN/LOX market. According to an October 2000 e-mail from Bob Lewis, then CB&I's Vice President of Corporate Business Development, PDM had "[a] tendency to bid much lower than the market leaving a lot of money on the table." (CX 632 at CB&I-PL 4000160). In April 1997, Rich Kooy compared CB&I and PDM's LIN/LOX prices and recognized that "[i]n North America we [CB&I] could still be very handily undercut (by as much as 10%) by PDM if they wanted to work at a lower price level." (CX 178 at CB&I-PL011835).

Response to Finding No. 230:

The proposed finding is irrelevant and because it does not reflect today's LIN/LOX market. Today, the other firms have been able to compete with CB&I on price. (FOF 5.76-5.78, 5.87, 5.96, 5.124, 5.128, 5.151-5.158). As a result of this competition, CB&I believes that this market is competitive and plans to act accordingly. In fact, over the past two years, CB&I has been forced to cut its price to LIN/LOX customers in order to win work from other competitors. (FOF 5.151-5.156, 5.128-5.130). In fact, AT&V's prices have been so low that recent CB&I documents reflect pessimism as to CB&I's ability to even compete in this market. (RX 208).

Further, the proposed finding is inaccurate because not all LIN/LOX customers believed PDM was the low-cost provider prior to the Acquisition. **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

B. Industry Members View Respondents as the Closest Competitors

1. *LNG Industry Members*

231. Eckhard Blaumueller, former Director of Pipelines and Peaking Services for People's Energy, testified that "there were only two [suppliers] who had U.S. experience, and those were the parties that we were talking to, Chicago Bridge & Iron and PDM." (Blaumueller, Tr. 302; *see also* Tr. 307-09).

Response to Finding No. 231:

The proposed finding is irrelevant, misleading and incomplete. Mr. Blaumueller was personally involved with the construction of only one LNG facility, which was built in 1973. (Blaumueller, Tr. 325) (FOF 3.642). The testimony Complaint Counsel cites refers to Mr. Blaumueller's role in a proposed methane storage facility, not an LNG storage facility. (Blaumueller, Tr. 282, 327). Since his retirement in 2001, Mr. Blaumueller had not done any

research regarding the LNG tank market in the United States (Blaumueller, Tr. 329), and has no knowledge of foreign LNG tank suppliers. (Blaumueller, Tr. 309, 315, 321, 330) (FOF 3.643-3.644).

232. Robert Davis, Director of HYCO Services for Air Products, testified that "virtually all, with just few exceptions, of the LNG tanks in this country had been built by CB&I and PDM." (Davis, Tr. 3192-3).

Response to Finding No. 232:

Respondents have no specific response.

233. James Clay Hall, Chief LNG Project Engineer for Memphis Light, Gas & Water, viewed CB&I as the "industry leader" and PDM was "certainly a close second." (Hall, Tr. 1801). Together, CB&I and PDM provided "very competitive" supply options. (Hall, Tr. 1804).

Response to Finding No. 233:

The proposed finding is irrelevant, misleading, and incomplete. Although Mr. Hall testified as set forth above, he is not a current participant in the market for field-erected LNG tanks. (Hall, Tr. 1832-33) (FOF 3.650). Since 1994, Mr. Hall has not conducted any searches for builders of field-erected LNG tanks or facilities. (Hall, Tr. 1843-45) (FOF 3.653). Mr. Hall does not monitor the LNG markets, and is not familiar with the current state of competition in these markets today. (Hall, Tr. 1857) (FOF 3.653).

234. John Newmeister, Vice President of Marketing and Business Development at Matrix Services, Inc., explained that historically the suppliers of LNG tanks in the U.S. were "CB&I, PDM and possibly Graver," but with Graver's exit and CB&I's acquisition of PDM, "the list of qualified tank suppliers decreased to one." (Newmeister, Tr. 2166).

Response to Finding No. 234:

Respondents have no specific response.

235. Brian Price, Vice President of LNG Technology for Black & Veatch, who competed against CB&I and PDM for the Memphis LNG project, saw first-hand that "the two competitors with the lowest prices were CB&I and PDM." (Price, Tr. 558).

Response to Finding No. 235:

The proposed finding is misleading because it attempts to refer to eight year-old events as current. The bidding process for the Memphis LNG project occurred in 1994, almost nine years ago, when foreign companies such as Noell Whessoe were reluctant to enter the U.S. LNG market. (Hall, Tr. 1771, 1778-80; Scorsone, Tr. 5014; Kistenmacher, Tr. 895, 939-40) (FOF 3.493-3.508).

2. ***LPG Industry Members***

236. Mr. Newmeister of Matrix had no knowledge of any firm competing for an LPG project in the United States other than CB&I and PDM. (Newmeister, Tr. 1614, 2166).

Response to Finding No. 236:

This finding is misleading and irrelevant as AT&V has successfully entered the LPG market and completed such projects. (N. Kelley, Tr. 7088-89, 7130-31) (FOF 4.16-4.42). This finding lacks foundation, particularly in light of the fact that Matrix, a competitor of CB&I in the LPG market, competed for the ITC LPG project in 2000, despite losing to AT&V. (N. Kelley, Tr. 7083-84) (FOF 4.34).

237. Amy Warren, Contracts Administrator for Fluor, Inc., testified that for Fluor's 2000 LPG project (Sea-3), the only competitors available were PDM and CB&I. (Warren, Tr. 2307-8).

Response to Finding No. 237:

This finding is misleading, irrelevant, and lacks foundation. First, Ms. Warren's testimony lacks foundation because she was last involved in the procurement of an LPG tank in 1998. (Warren, Tr. 2284, 2318) (FOF 4.148). Contrary to Complaint Counsel's assertion, Fluor's last LPG project was completed in 2000 but was actually procured in 1998. (Warren, Tr. 2318) (FOF 4.148). Therefore, Ms. Warren admits that her knowledge regarding LPG competitors is based on pre-1998 LPG competition. (Warren, Tr. 2318) (FOF 4.148).

Accordingly, this finding is irrelevant to the current state of competition in the LPG market, especially given that AT&V has successfully completed LPG projects. (N. Kelley, Tr. 7088-89, 7130-31) (FOF 4.16-4.42). In fact, Ms. Warren testified that she did not even know which companies are *currently qualified* by Fluor to build field-erected LPG tanks, or which companies currently have the ability to construct LPG tanks. (Warren, Tr. 2318) (FOF 4.156-4.157).

3. *LIN/LOX Industry Members*

238. William Cutts, president of American Tank & Vessel ("AT&V") agreed that, prior to the merger of CB&I and PDM, customers preferred PDM or CB&I for their LIN/LOX tank projects, "almost exclusively [desiring] one or the other or pit[ting] the two against the other." (Cutts, Tr. 2390).

Response to Finding No. 238:

The following finding is irrelevant and misleading because it is not representative of current LIN/LOX market conditions. Cutts' own company, AT&V, is currently a strong competitor often preferred by present day LIN/LOX customers. (FOF 5.26-5.42). Aside from CB&I, several LIN/LOX market entrants are utilized by current customers. (FOF 5.22-5.78). Customers have awarded AT&V three out of the five post-Acquisition LIN/LOX tanks awarded (Scorsone, Tr. 5018) (FOF 5.76-5.78) and AT&V currently has six different bids outstanding for budget pricing on LIN/LOX tanks. (Cutts, Tr. 2452-2453). Each time since the Acquisition Cutts' own company, AT&V, has bid against CB&I they have been awarded the LIN/LOX project. (Scorsone, Tr. 5018) (FOF 5.31-5.34). Finally, Cutts testified that as a result of the Acquisition of PDM, customers have looked at AT&V and awarded them several LIN/LOX tank projects. (Cutts, Tr. 2572).

239. Chung Fan, Proposal Manager for Linde BOC Process Plants, testified that before the merger, Linde typically purchased LIN/LOX tanks from PDM, but today CB&I is "the only game in town." (Fan, Tr. 1023, 1026-1027).

Response to Finding No. 239:

The proposed finding is inaccurate for several reasons. As an initial matter, Chung Fan is not involved in the procurement of LIN/LOX tanks and, therefore, has no basis for asserting CB&I is the "only game in town." (Fan, Tr. 951; Cutts, Tr. 2420). Further, empirical evidence establishes CB&I is not the only game in town. Specifically, post-Acquisition CB&I has lost a *majority* of LIN/LOX tanks awarded. (Scorsone, Tr. 5018) (FOF 5.76-5.78) (RFOF 238).

240. Cleve Fontenot, former Vice President of Procurement for Air Liquide Process and Construction, testified that CB&I and PDM were the two most qualified LIN/LOX/LAR tank suppliers. Air Liquide's bid slate included, "CB&I, PDM and a little bit lower would be Matrix." (Fontenot, Tr. 2021-2). However, Air Liquide "didn't feel as comfortable" with Matrix because the "number of references they had weren't nearly what the other two suppliers [CB&I and PDM] had." (Fontenot, Tr. 2022).

Response to Finding No. 240:

The proposed finding is irrelevant because Cleve Fontenot has no current experience nor basis for his assertions. Fontenot admitted at trial that he left Air Liquide in July 2001 and has not kept up to date with current or potential suppliers for LIN/LOX tanks in the United States. (Fontenot, Tr. 2032) (FOF 5.144). Fontenot further admitted he is unaware of current market conditions and has no knowledge of which companies Air Liquide has currently pre-qualified or permits to bid for the supply of field-erected LIN/LOX tanks. (Fontenot, Tr. 2033). In fact, Air Liquide has awarded AT&V, a supplier not referenced by Fontenot, a contract for the field erection of a LIN/LOX tank in Freeport, Texas. (FOF 5.122-5.130).

241. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxx].** (**[xxxxxxx]**, Tr. 1988, *in camera*; CX 136 at CB&I 014195-HOU; CX 289 at CB&I/PDM-H4000815).

Response to Finding No. 241:

The proposed finding is contradicted by empirical evidence in the record. Air Liquide has awarded AT&V, a supplier not referenced by Kamrath, a contract for the field erection of a LIN/LOX tank in Freeport, Texas. (FOF 5.122-5.130). **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

242. Dr. Hans Kistenmacher, Vice President of Marketing and Sales for Linde BOC Process Plants, LLC, testified that the merger has "reduced the number of vendors, experienced vendors from prior to Graver going out of business, we had three experienced, with PDM we had two, and now we have one." (Kistenmacher, Tr. 876).

Response to Finding No. 242:

The proposed finding lacks foundation and is inaccurate. The proposed finding lacks foundation because at trial it was demonstrated that Dr. Kistenmacher does not even know of the current LIN/LOX suppliers for his own company, Linde BOC. As an initial matter, Linde has not actually purchased a LIN/LOX tank for several years. In fact, the last LIN/LOX tank purchased by Linde, prior to its acquisition of BOC, was in 1999. (Kistenmacher, Tr. 868-869). Moreover, Kistenmacher is unaware that BOC awarded AT&V two LIN/LOX tanks after the Acquisiton. (Kistemacher, Tr. 922). Therefore, the fact that Kistenmacher testified that "we now have one" experienced LIN/LOX vendor is of little weight.

Further, record evidence establishes that Matrix and AT&V both have experience field erecting LIN/LOX tanks. (FOF 5.26-5.34, 5.47-5.55). Thus, Dr. Kistenmacher's claim that

only one experienced vendor exists in the United States is inaccurate and contradicted by record evidence.

4. ***TVC Industry Members***

243. John Gill, owner of Howard Fabrication, testified that prior to the acquisition, "before Pitt-Des Moines was taken off the street as a competitor [for TVCs]," "PDM was either number one or number two," and CB&I was, "either number one or number two." (Gill, Tr. 204-205).

Response to Finding No. 243:

This finding is inaccurate and misleading for two reasons. First, Complaint Counsel flagrantly misappropriates the first quotation as testimony from Mr. Gill. In fact, Mr. Robertson stated "before Pitt-Des Moines was taken off the street as a competitor …" as part of his predicate to a question stricken from the record by a sustained objection. (Gill, Tr. 204-205). Second, Respondents reiterate that CB&I is a fringe competitor in the field-erected TVC market, even if it was "number two." (*See* RFOF 6.26-6.64).

244. Kent Higgins, President of Process Systems International, testified that "PDM and CB&I" were the only firms that had the capability to construct TVCs. (Higgins, Tr. 1267).

Response to Finding No. 244:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

245. Patrick Neary, Manger of the Environmental Test Organization, testified that Respondents were "the two large field-erected manufacturers" of TVCs. (Neary, Tr. 1430).

Response to Finding No. 245:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

246. Mr. Newmeister of Matrix testified that Respondents were the only two firms who have competed in the TVC market. (Newmeister, Tr. 1564).

Response to Finding No. 246:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

247. **[xxxxxxxxx]**, Product Manufacturing Factory Planning Manager for **[xxxxxxxxxxxxx]**, testified that Respondents were "the lowest risk and best candidates for success." (**[xxxxxx]**, Tr. 1899, 1900). Other firms lack the expertise to be as cost-effective and of equal quality as Respondents. (**[xxxxxx]**, Tr. 1900-01, *in camera*).

Response to Finding No. 247:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

248. Ronald Scully, President of XL Systems, testified that turnkey suppliers for TVCs were limited to Respondents. (Scully, Tr. 1115, 1237).

Response to Finding No. 248:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

249. David Thompson, CEO of Spectrum Astro, who has "seen most of the thermal vacuum chambers in the industrial base in the [United States]," testified that Spectrum Astro "tried to do a survey of everybody in the country that we thought would be a qualified bidder, and the two bidders that we found at the time were Chicago Bridge and Iron and PDM." (Thompson, Tr. 2039-41).

Response to Finding No. 249:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40).

250. Based on "[c]ompany documents and the opinions of market participants and the results of previous projects that had been awarded," Dr. Simpson concluded that Respondents are "the only competitors for large field-erected thermal vacuum chambers." (Simpson, Tr. at 3489, 3492). CCFF 189.

Response to Finding No. 250:

Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxx xxxxxx]** (FOF 6.40). Finally, Dr. Simpson relies on market concentration statistics that are virtually meaningless, as they were generated using a total of two data points over an eleven-year period. (Opening Br. 119).

C. Competition from PDM Caused CB&I to Lower Prices and Margins

251. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 260 at CB&I-H003010-22; CX 227 at CB&I-PL045101; CX 282; CX 183; CX 1321 at CB&I-PL069518-29, *in camera*).

<u>Response to Finding No. 251:</u>

This finding is vague, as it does not identify a specific product market. It is also misleading to the extent it implies that customers do not benefit today from the aggressive pricing strategy of current competitors in the relevant markets. As discussed in Respondents' Opening Brief and Findings of Fact, customers in the relevant products continue to receive competitive prices from suppliers. (*See*, *e.g.*, FOF 3.256-3.459; FOF 4.55-4.70; FOF 5.79-5.185).

252. PDM was the "single largest" reason CB&I lost business in the United States; competition from PDM accounted for 33% of CB&I's lost business. (Glenn, Tr. 4331; CX 227 at CB&I-PL045101; *see also* CX 23 at PDM-C1002566 (PDM has made "significant market share increases against CB&I in both domestic and international markets")). In March 2000, CB&I reported that "in the last three months our business lost report is showing PDM taking some 13 jobs from [CB&I] at a value of $25 million." (CX 243 at CB&I-PL 4004707; *see* CX 660 at PDM-HOU005014 ("Since the fall of 1996, CB&I has been the most aggressive competitor in increasing market share")).

<u>Response to Finding No. 252:</u>

This finding is vague, as it does not identify a specific product market. It is also misleading to the extent it implies that CB&I does not lose business today in the relevant products. In fact, CB&I faces stiff competition in the relevant products. It has lost the only competitively-bid LNG job to be awarded since the Acquisition, three of last four competitively bid LIN/LOX jobs, and half of the last LPG jobs in the last four years. (*See* generally FOF 3.256-3.459; FOF 4.55-4.70; FOF 5.79-5.185).

253. In March 2000, Steve Knott, CB&I's sales manager for the United States, e-mailed CB&I's sales team to lament that PDM is "'eating our lunch' and we know much of it is because of a CB&I cost problem." (CX 243 at CB&I-PL 4004707).

Response to Finding No. 253:

This finding is vague, as it does not discuss a specific product market. It is also irrelevant, because there is no evidence in the record that Mr. Knott's concern was valid, or whether CB&I has any such "cost problem" today. Further, there is no evidence to suggest that there are not other low-cost providers of the relevant products in the relevant markets today that act as a check on CB&I's pricing. For example, AT&V has recently established itself as a low-cost provider in the LIN/LOX and LPG market; it is able to "beat the socks off of CB&I." (*E.g.*, FOF 4.55-4.70; FOF 5.79-5.185).

254. Mr. Knott asked, "What is PDM doing that gives them the ability to be this low, this often? I am not 'coming down' on our group for losing to PDM. We all recognize that we can only sell to the market what the market will pay. Given our current system, we are bumping against pricing levels that are dangerously close to our direct cost." (CX 243 at CB&I-PL 4004707).

Response to Finding No. 254:

This finding is vague and irrelevant for the reasons set forth in response to Finding No. 252 and Finding No. 253.

255. Mr. Knott concluded that "We need to come up with a strategy to combat the effort PDM is making to erode our market share." (CX 243 at CB&I-PL 4004707).

Response to Finding No. 255:

This finding is vague and irrelevant for the reasons set forth in response to Finding No. 252 and Finding No. 253.

256. In late 2000, CB&I's Bob Lewis wrote to Steve Crain, President of CB&I's Western Hemisphere Operations that PDM was bidding "much lower than the market, leaving a lot of money on the table." (CX 278 at CB&I-H 4004204).

Response to Finding No. 256:

This finding is irrelevant. There is no evidence regarding which product market Mr. Lewis was referring to, who Mr. Lewis is, or whether Mr. Lewis was correct in his

assessment. Further, the record evidence contradicts the assertion that PDM bid "much lower than the market." For example, in the LIN/LOX market, Graver was known as the low-cost provider of LIN/LOX tanks, beating out CB&I and PDM in many instances. (*E.g.*, FOF 5.146).

257. Mr. Glenn testified that the competition between CB&I and PDM caused substantial downward pressure on pricing and operating margins. (Glenn, Tr. 4335-6).

Response to Finding No. 257:

This finding is misleading to the extent it implies that Mr. Glenn's statement referred to competition after 1997. Mr. Glenn explicitly limited his testimony on this point to 1997. (Glenn, Tr. 4335-36). Further, it is misleading to the extent it suggests that "substantial downward pressure on pricing and operating margin" does not exist in the relevant markets today. As Respondents have set forth in great detail, such pressure does exist. (*See generally* Opening Br. at 19-118).

258. In April 1997, CB&I stated that, in North America, CB&I could be "very handily undercut (by as much as 10%) by PDM if they wanted to work at a lower price level; the implication being that MG has seen lower LIN/LOX tank pricing from PDM." (CX 178 at CB&I-PL011835).

Response to Finding No. 258:

This finding is irrelevant and misleading. It is misleading because it cites a document and attributes it to "CB&I." This document does not state any corporate positions on behalf of CB&I. It is a document authored by Rich Kooy, a person that Complaint Counsel did not call as a witness. There is no evidence providing insight regarding the meaning of this phrase or why Mr. Kooy wrote this document. Further, this e-mail does not even relate to a U.S. project; it relates to a project in Malaysia. In short, this document is not probative of any relevant issue in this case.

259. In competing for LIN/LOX jobs, CB&I and PDM would in some instances, set prices that would generate "negative margins." (CX 183). In fact, CB&I lost some projects to PDM because of PDM's "very low" pricing levels. (Crain, Tr. 2592; CX 624).

Response to Finding No. 259:

This finding is misleading to the extent it suggests that PDM was the sole driving factor for bidding at negative margins. As discussed above, Graver provided heavy competition in the LIN/LOX market, for example. Graver's influence affected how PDM and CB&I set their prices. (*See* RFOF 256).

260. No firm exerted a greater consistent competitive threat than PDM across the relevant markets.

Response to Finding No. 260:

This finding is vague because it does not set forth a specific time frame or in a specific product market. It is also irrelevant because it says nothing about current competitive conditions in the relevant markets. As discussed in Respondents' Opening Brief, customers in the relevant product markets have competitive threats available to them to keep prices in check. (*See* Opening Br. at 19-118).

D. Competition from CB&I Caused PDM to Lower Prices and Margins

261. In the late 1990s, PDM began increasing its market share against CB&I. A PDM Board presentation states: "CB&I is currently a weakened and vulnerable organization and PDM EC is in an excellent position to exploit this weakness and build profitable market share in domestic and select international markets." (CX 68 at PDM-C 1002634).

Response to Finding No. 261:

This finding is irrelevant, as it merely sets forth the view of PDM regarding CB&I. There is no evidence that the assessment identified in Finding No. 261 was accurate.

262. Recognizing CB&I's weakness, PDM began pricing more aggressively to gain business. Handwritten notes from the files of PDM's President reviews the evolution of PDM: (1) 1996-1997 "focused on more profitable assignments;" (2) 1997-1998 accept **"lower gross profit in pursuit of higher revenues;"** and (3) 1998-1999 PDM **"forced to bid at lower margins"** due to **"competition w/CB&I"** and **"seeking more revenues."** (CX 76 at PDM-C1006141-3 (emphasis supplied); *see also* CX 390 at PDM-C 1006145 ("97-98 -> aggressive growth market share - sacrifice margins")).

Response to Finding No. 262:

This finding is vague, as it does not reference a specific product market. Further, it is misleading to the extent it implies that competition in the relevant product markets is anything less than strong. As explained in Respondents' Opening Brief and Findings of Fact, CB&I faces an array of competition from recent entrants in the relevant markets. (*See generally* Opening Br. at 19-118).

263. In May 2000, PDM warned its Board of Directors that "CB&I has been extremely aggressive on pricing work in North and South America. They have taken certain projects at levels which would be slightly over PDM EC's flat cost." (CX 64 at PDM-C 1002562).

Response to Finding No. 263:

This finding is vague, as it does not reference a specific product market. Further, it is misleading to the extent it implies that competition in the relevant product markets is anything less than strong. As explained in Respondents' Opening Brief and Findings of Fact, CB&I faces an array of competition from recent entrants in the relevant markets. (*See generally* Opening Br. at 19-118).

264. Mr. Scorsone confirmed that he told Tanner & Company about the competition between PDM and CB&I and how the companies were "forced to bid at lower margins" because of this competition. (Scorsone, Tr. 5152).

Response to Finding No. 264:

This finding is vague as to time frame and as to which products it refers to. It is also misleading to the extent it implies that CB&I does not currently face competition in the relevant markets. As explained in Respondents' Opening Brief and Findings of Fact, CB&I faces an array of competition from recent entrants in the relevant markets. (*See generally* Opening Br. at 19-118).

265. There are no PDM documents that discuss any firm as a greater competitive threat than CB&I in the relevant markets.

<u>Response to Finding No. 265:</u>

This finding is vague as to time frame. It is also misleading to the extent it implies that CB&I does not currently face competition in the relevant market. As explained in Respondents' Opening Brief and Findings of Fact, CB&I faces an array of competition from recent entrants in the relevant markets. (*See generally* Opening Br. at 19-118).

E. Competition Between Respondents <u>Resulted in Lower Prices for LNG Customers</u>

266. In 1998, **[xxxxxxxxxxxxxxxxxxxxxxxxxxx]** sent requests for bids to CB&I, PDM/Air Products, and a third competitor, Marlborough Enterprises, for a proposed LNG peak shaving facility. According to CB&I, "**[xxxxx]** considered the Marlborough bid more of a courtesy proposal with the real competition between CB&I and PDM/AP." (CX 161 at CB&I-PL006113). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 161 at CB&I-PL006114; CX 1321 at CB&I-PL 069518).

<u>Response to Finding No. 266:</u>

The proposed finding is irrelevant because: (i) the Atlanta Gas project was never built; (ii) the cited documents do not support that competition between CB&I and PDM led to lower prices; and (iii) it ignores the fact that many new competitors have entered the United States LNG market since the Acquisition. (*See generally* FOF 3.68-73, 3.109-22, 3.173-87, 3.200-03, 3.212-27).

267. In 1998, Peoples Gas of Illinois ("Peoples") sought an LNG tank supplier. (Blaumueller, Tr. 306). Peoples received budget pricing from CB&I and PDM, the only two "real" competitors on the project. (CX 237 at CB&I-PL067744; *see also* Blaumueller, Tr. 289, 296; CX 601 at CB&I-PL067744 (CB&I's assessment of "competition" – only PDM)).

<u>Response to Finding No. 267:</u>

The proposed finding is factually incorrect and misleading. First, People's Gas' never sought an LNG supplier, it sought a supplier of methane tanks, for its proposed methane facility, in Joliet, Illinois. (*See* FOF 3.646, 3.647). In fact, the testimony cited in the proposed finding itself confirms that the Joliet facility would not have been the same as an LNG facility.

(*See* Blaumueller, Tr. 306). Second, it has been well established that budget pricing does not have any bearing on the ultimate competitiveness of firm fixed bids. (*See* FOF 7.1-7.38). Lastly, the proposed finding is irrelevant because People's Gas considered the methane project in 1998 well before the Acquisition and emergence of new LNG competitors.

268. Peoples originally solicited budget pricing from CB&I only, who wanted to "keep the inquiry 'off the street,'" but PDM found out and asked to be considered for the project. (CX 259 at CB&I-H003002; Blaumueller, Tr. 296).

Response to Finding No. 268:

The proposed finding is misleading, irrelevant and factually incorrect for the reasons articulated in CB&I's Response to Finding No. 269. (*See* FOF 3.646, 3.647).

269. PDM saw an opportunity to win because CB&I's "price is probably substantially high due to their perceived sole source situation." (CX 112 at PDM-HOU 011513-4). PDM planned to undercut CB&I by submitting a "very competitive budget price." (*Id.*)

Response to Finding No. 269:

The proposed finding is irrelevant and misleading for the reasons articulated in CB&I's Response to Finding Nos. 267 and 268. (*See* FOF 3.646, 3.647). The proposed finding is also factually incorrect because the PDM document cited in the proposed finding does not state that PDM "planned to undercut CB&I." (CX 112 at PDM-HOU 011513-14). The document merely states that PDM planned to submit a competitive budget price. (CX 112 at PDM-HOU 011513-14).

270. CB&I feared that if PDM bid, the process would become "a classic head-to-head price war." (CX 602 at CB&I-H003002-03). In order to combat PDM's aggressiveness, CB&I forced PDM to "play in our 'sandbox'" by persuading Peoples to require that the project would require union labor. CB&I believed that the union labor requirement would prevent PDM from submitting a competitive price because PDM relied primarily on non-union labor. (CX 602 at CB&I-H003002-3).

Response to Finding No. 270:

The proposed finding is irrelevant and misleading for the reasons articulated in CB&I's Response to Finding Nos. 267 and 268. (*See* FOF 3.646, 3.647).

271. Due to extraneous business decisions, Peoples did not complete the project. (Blaumueller, Tr. 296).

Response to Finding No. 271:

The proposed finding is irrelevant and misleading for the reasons articulated in CB&I's Response to Finding Nos. 267 and 268. (*See* FOF 3.646, 3.647).

272. Another example of head-to-head competition between Respondents that resulted in approximately **[xxxxx]** lower prices is the Cove Point project. CCFF 785.

Response to Finding No. 272:

For the reasons set forth in RFOF 786 and RFOF 787, the proposed finding is factually incorrect, speculative, and mischaracterizes the evidence.

F. Competition Between Respondents Resulted in Lower Prices for LPG Customers

273. In 1998, Sea-3 requested Fluor to secure bids for LPG tanks to be constructed in Tampa, Florida. (Warren, Tr. 2275, 2303). Fluor obtained bids only from CB&I and PDM. (*Id.* at 2281, 2303). Fluor told CB&I and PDM that they were the only two bidders. (*Id.* at 2304-05). By leveraging Respondents against each other, Fluor obtained a lower LPG tank price. (*Id.* at 2303-04; *see also* Price, Tr. 556).

Response to Finding No. 273:

This finding is misleading and inaccurate. Contrary to Complaint Counsel's assertion, Ms. Warren actually testified that she *did not know* whether Fluor obtained a lower LPG tank price as a result of the competitive bidding process because she was not directly involved in the preparation of bid pricing. (Warren, Tr. 2303-04, 2307) (FOF 4.158). Further, this finding's reliance on the testimony of Mr. Price is irrelevant as he was not involved in the Sea-3 project, does not work for Fluor or Sea-3, and has had no involvement in the LPG market.

274. Dr. Simpson testified that CB&I's acquisition of PDM combines the two strongest sellers of LPG tanks in the United States. (Simpson, Tr. 3406). According to Dr. Simpson: "Prior to the acquisition ... CB&I's pricing was constrained principally by the presence of PDM EC. When CB&I acquired PDM EC, then CB&I's pricing would be constrained by much weaker competitors and constrained at a higher price." (Simpson, Tr. 3406). Dr. Simpson testified that he believed that CB&I's acquisition of PDM would lead to higher prices for LPG tanks. (Simpson, Tr. 3406).

Response to Finding No. 274:

This finding is misleading, irrelevant and contradicted by the actual record evidence of LPG customers in the market. First, testimony regarding the LPG market prior to the Acquisition is irrelevant to current competition in the market. Second, LPG customers have directly refuted Dr. Simpson, stating satisfaction with current price and competition levels and in the LPG market and not believing that the prices for LPG tanks will increase as a result of the Acquisition. (N. Kelley, Tr. 7090-92, 7135, 7137) (FOF 4.55, 4.58, 4.59). Finally, the most recent LPG project, ABB Lummus in 2001, demonstrates the inaccuracy of Dr. Simpson's testimony. (Scorsone, Tr. 5039-43). On that project, competition with AT&V and Wyatt forced CB&I to lower its margin from four percent to 2.5 percent. (Scorsone, Tr. 5041-42). Without meaningful competition, CB&I would never had lowered its price. Consequently, CB&I was also forced to create a new design innovation in an effort to reduce the total cost of the tank. (Scorsone, Tr. 5040-41). Based on this recent evidence, CB&I cannot impose a price increase in the future on LPG projects without losing projects to competitors. (Scorsone, Tr. 5043) (FOF 4.66-4.70).

275. Dr. Harris testified that prior to the acquisition, neither CB&I nor PDM could increase prices of LPG tanks in the United States without risking that each would lose sales to the other. (Harris, Tr. 7539-40, 7543-44).

Response to Finding No. 275:

Respondents do not dispute the truth of this finding. In addition, this finding holds true for post-Acquisition price increases as well, as evidenced by the ABB Lummus project in 2001. (*See* RFOF 274)

G. Competition Between Respondents Resulted in Lower Prices for LIN/LOX Customers

276. In order to compete against PDM, CB&I has set prices so low that if CB&I won the business, the project would generate "negative margins." (Crain, Tr. 2594).

Response to Finding No. 276:

The proposed finding is irrelevant because record evidence shows that current competition in the LIN/LOX market has driven CB&I prices to extremely low levels. CB&I has only won two of five post-Acquisition LIN/LOX projects and on those projects tight competition has forced CB&I to use razor thin margins. For example, despite the fact that the low cost supplier in today's market, AT&V, was absent from the bidding, CB&I was forced to cut its margin from four percent to less than one percent on MG's New Johnsonville project to beat the competition. (Scorsone, Tr. 5023-24) (FOF 5.151, 5.152). Further, when CB&I trimmed its margin zero on Air Liquide's Freeport project to remain competitive, it still lost to AT&V by $200,000. (Scorsone, Tr. 5023-5024; RX 627 at 2).

277. A CB&I document states that "PDM is the driver on negative margins on these LIN/LOX tanks. We understand that PDM can readily price the LIN/LOX work at -6% margin in the Gulf Coast and Southeast ... Unless there is a reason why PDM would be less aggressive or economical in NV, then I agree with Ron that -2% or -3% should get us on the high side of the target range." (CX 193 at CB&I-PL020339).

Response to Finding No. 277:

The proposed finding is irrelevant and misleading because current LIN/LOX competitors' low pricing and aggressive margins have kept CB&I from increasing prices, despite the exit of PDM from the LIN/LOX market. (RFOF 276).

278. CB&I responded to PDM's offensive by reducing prices to maintain business. In February 2000, in his quarterly report to PDM's Board of Directors, Mr. Scorsone wrote:

> "PDM EC has made significant market share increases against CB&I in both domestic and international markets. Disruptions are occurring at CB&I as a result of disconnects between their new senior management and long term CB&I personnel. PDM EC will take advantage of this by providing a more nimble and focused response to customer needs and market opportunities. ... As was done from time to time in 1999 PDM EC will force CB&I to take contracts at unattractive prices by exploiting this behavior."

(CX 23 at PDM-C 1002566).

Response to Finding No. 278:

The proposed finding is irrelevant and does not account for new entry in the LIN/LOX market. (RFOF 152). Further, the finding is misleading because CB&I has been constrained by market conditions and in fact lowered its prices and cut its margins due to fierce competition in today's LIN/LOX market. (RFOF 276). Whether or not CB&I responded to PDM's pricing strategies or not prior to the Acquisition have nothing to do with the current state of LIN/LOX competition.

279. LIN/LOX customers used the competition between CB&I and PDM to obtain lower prices. (Hilgar, Tr. 1357 (PDM met all Air Products' procurement criteria and generally offered a lower price than competing tank suppliers); CCFF 1087-1108 (MG Industries)).

Response to Finding No. 279:

The proposed finding is irrelevant because LIN/LOX customers have been able to use competition between current LIN/LOX suppliers CB&I, Matrix, AT&V, and CB&T to obtain prices which are very low. (FOF 5.79-5.185). For example, BOC awarded the Midland project to AT&V because of low cost and was satisfied with the price AT&V gave because the price was below BOC's budget for the project. (FOF 5.96).

Also, Air Liquide told CB&I it was in a competitive situation on the Freeport project and in response to that competitive situation CB&I lowered its margin from 2 percent to

zero percent. (FOF 5.128-5.130). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

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280. Linde used PDM's prices as its "benchmark" to compare other firms' prices. (Fan, Tr. 967). Linde was able to leverage PDM's lower prices to negotiate pricing and other concessions from other vendors. (Kistenmacher, Tr. 867-8; see Patterson, Tr. 356-9, 362-4 (uses PDM's low price to reduce tank prices even further)).

Response to Finding No. 280:

The proposed finding is misleading because it implies that, without PDM, LIN/LOX buyers are unable to leverage present competitive situations to negotiate low prices. However, the record is rife with empirical evidence establishing that current LIN/LOX buyers are receiving low prices and are pleased with the prices they have gotten post-Acquisition. (FOF 5.79-5.185) (RFOF 279).

281. Linde told CB&I that its "budget prices are always higher than PDM's, and that PDM always beats their budget price." (CX 182 at CB&I-PL012354; *see also* CX 222 at CB&I-PL037594 (PDM beat CB&I for a LIN/LOX tank for Linde in Louisiana by reducing the price in the last round of bidding)).

Response to Finding No. 281:

Respondents do not dispute the truth of the proposed finding.

282. In 1998, CB&I competed against PDM, BSL and Graver for a construction project in Baytown, Texas for Air Products. CB&I projected Graver's and PDM's prices to be at $1,650,000, and BSL's price at over $2,000,000. CB&I's price was $1,793,000. CB&I believed it would be difficult to make up the difference on price without adding additional products to the customer. (CX 198 at CB&I-PL023631; *see also* CX 197 at CB&I-PL023628 (customer confirmed BSL bid was $2,700,000)).

Response to Finding No. 282:

The proposed finding is irrelevant because pricing for a LIN/LOX project bid on in 1998 has nothing to do with the current state of competition in 2003. Initially, the document cited by Complaint Counsel may be unreliable. There is no testimony in the record regarding the information in Exhibit CX 198 or CX 197. Both exhibits are emails of meeting notes from Rich Kooy, a CB&I employee, and the prices cited in the emails may or may not be correct or accurate. At the end of the day, Complaint Counsel could have called any number of witnesses with knowledge of this email to testify about its contents, however Complaint Counsel chose not to do so and now wants to use the emails as evidence of pricing in 1998.

Further, the proposed finding is irrelevant because it has no bearing on the current state of competition in the LIN/LOX market. After the Acquisition, CB&I is still having difficulty competing with respect to price. In fact, CB&I has lost a majority of the LIN/LOX projects awarded post-Acquisition. (FOF 5.76-5.78).

283. A memo written to Mr. Scorsone in 1996, around the time that CB&I was spun off from Praxair, anticipates that CB&I will become "more active participant in the market, [and] this may push margins downward." (CX 1040 at PDM-HOU010888-89).

Response to Finding No. 283:

The proposed finding is irrelevant because Mr. Scorsone's predictions regarding the effect of CB&I's participation in the 1996 market for LIN/LOX tanks has nothing to do with the state of competition in 2003. In fact, current competition has forced CB&I to reduce its margins on several recent bids for LIN/LOX tanks. For example, Air Liquide communicated to

CB&I that it was in a competitive situation for the Freeport LIN/LOX project and in response to that competitive situation CB&I lowered its margin from 2 percent to 0 percent. (FOF 5.128-5.130). Moreover, in response to MG's comments made during negotiations, CB&I cut its margin from four percent to less than one percent on the New Johnsonville project. **[xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

284. In 1997, a customer in Georgia obtained an additional 4% price reduction because of PDM's aggressive price cutting against CB&I in the final round of bids. (CX 166 at CB&I-PL006870).

Response to Finding No. 284:

The proposed finding is irrelevant because the fact that a customer in Georgia obtained a four percent price reduction has no bearing on the market conditions which exist in the LIN/LOX market in 2003. First, there is no testimony regarding the contents of the email exhibit numbered CX 166. There is no way for the information in this email to be verified and if Complaint Counsel had wished to call its author, Rich Kooy, it could have. Not only did Complaint Counsel fail to question the author regarding the email, they also failed to call any of the recipients of the email message. Thus, nothing is known about the context or accuracy of the information being cited by Complaint Counsel for its proposed finding.

Moreover, the finding is irrelevant because empirical evidence produced at trial establishes that CB&I in fact still lowers its margins and reduces its prices in response to competition. Competition to which it has lost a majority of LIN/LOX jobs, post-Acquisition. (RFOF 279, 282, 283).

285. In May 2000, Luke Scorsone warned the Board of Pitt-Des Moines that "CB&I has been extremely aggressive on pricing work in North and South America. They have taken certain projects at levels which would be slightly over PDM EC's flat cost." (CX 64 at PDM-C 1002562).

<u>Response to Finding No. 285:</u>

The proposed finding is irrelevant because LIN/LOX customers have been able to use competition between current LIN/LOX suppliers CB&I, Matrix, AT&V, and CB&T to obtain prices which are very low. (FOF 5.79-5.185). Complaint counsel implies that in the absence of competition between CB&I and PDM customers cannot receive prices which are similar to pre-Acquisition levels, however empirical evidence admitted at trial proves otherwise. For example, BOC awarded the Midland project to AT&V because of low cost and was satisfied with the price because it was below BOC's budget for the project. (FOF 5.96). **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

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286. Other documents of Respondents reflect the competitive pressure that PDM regularly placed on CB&I. (*See* CX 614 at CB&I-PL039367 (for LOX tank project for Air Products in Eureka, Nevada, PDM's quoted price was "$100,000 lower than CB&I's and Matrix's price, and almost $200,000 lower than Graver's price"); CX 222 at CB&I-PL037594 (PDM won a bid from CB&I for a pair of LIN/LOX tanks by dropping their bid on their best and final offer

by $40,000); CX 191 at CB&I-PL018948 (Air Products had awarded a LOX tank to PDM, which "was the very low bidder and met all of the technical requirements.")).

<u>Response to Finding No. 286:</u>

The proposed finding is irrelevant because current LIN/LOX suppliers place competitive pressures on CB&I -- pressures which have constrained prices for field erected LIN/LOX tanks in the United States. (FOF 5.79-5.184). Post-Acquisition, CB&I has competed directly with AT&V on three competitively bid projects and lost to AT&V on the basis of low price each time. (FOF 5.76-5.78). Even absent AT&V, empirical evidence shows that competitive pressures are such that pricing in kept at pre-Acquisition levels for LIN/LOX tanks. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

H. Competition Between Respondents <u>Resulted in Lower Prices for TVC Customers</u>

287. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 242 at CB&I-PL 4003340, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxx]**. (*Id.*; *see also* Gill, Tr. 212, 213 (CB&I and PDM competition lowered prices to customers).

Response to Finding No. 287:

Complaint Counsel relies heavily on an internal CB&I memorandum from an low level line salesman (Dave Lacey) to support their argument (CC Br. at 31; *citing* CX 242). Mr. Lacy is not part of CB&I management, and in fact, he is a fairly lower-level marketing and salesperson at CB&I. (Scully, Tr. 1217; FOF 6.148). Mr. Lacey typically presented both the extreme case as well as the moderate case in his proposals, and his extreme suggestions were ignored by his superiors. (Scully, Tr. 1219-21; FOF 6.152). Mr. Lacey's ideas were ignored. (Scorsone, Tr. 5045-46; Scully, Tr. 1221; FOF 6.153).

288. XL Technologies viewed the competition between Respondents as "always relatively intense." (Scully, Tr. 1175). CB&I's desire to win TVC projects caused the "pricing [of TVCs] to go down." (*Id.*, Tr. 1175-6). The competition was so "intense" that XL Technologies and its partner CB&I worried that the prices to customers would not return a profit: "the costs incurred to get" a project were so high that "if the price of the system isn't high enough, you've lost your profit before you ever begin the job." (*Id.* at 1179-81).

Response to Finding No. 288:

Respondents have no specific response, except to note that Scully refers to the intensity of the competition only in the context of CB&I's attempt to enter the field-erected TVC market in 1998. (Scully, Tr. 1175).

289. Spectrum Astro saw CB&I and PDM "fighting against each other pretty hard to get []our business." (Thompson, Tr. 2115). After receiving CB&I's initial bid, Spectrum Astro was pleased to find that CB&I "had probably low-ended the profit to get the job." (*Id.* at Tr. 2074-75).

Response to Finding No. 289:

Respondents do not dispute the truth of this statement, and note that CB&I and PDM competed vigorously for the Spectrum Astro job. (FOF 6.142-6.146). Additionally, the substance of this finding runs counter to the arguments posed by Complaint Counsel elsewhere in its filing. (*See, e.g.* CCFF 1119-1164).

290. In August 1998, Orbital Sciences Corp. ("Orbital Sciences") requested bids for a TVC to be built in Virginia. PDM and CB&I were the only suppliers that bid. (Scully, Tr. 1175; *see also* CX 112 at PDM-HOU011527; CX 235 at CB&I-PL060195; CX 1196 at PDM-HOU011527). After CB&I learned there was a "significant difference" between its initial bid of $10.2 million and PDM's bid, CB&I further lowered its price by 15% to $8.6 million. (CX 235 at CB&I-PL060197; *see also* CX 272 at CB&I-H010889).

Response to Finding No. 290:

This finding is misleading and irrelevant. First, the email refers to a project to modify an existing 12' thermal vacuum chamber. (CX 272 at CB&I-H010889-90). Repair jobs are not relevant to this litigation, and are outside of the product market definitions. (*See* RFOF 6.1-6.10). Furthermore, this existing chamber is a shop-built TVC and not a relevant product, by Complaint Counsel's definition, thus exposing a direct contradiction in its findings. (*See* CCFF 84, 223).

I. Other Firms Cannot Replace PDM Because Entry into the Relevant Markets Is Not Easy

291. Respondents contend that the merger is not likely to substantially lessen competition because entry by foreign and domestic firms into the relevant markets will deter or counteract the anticompetitive effects of concern.

Response to Finding No. 291:

Respondents have no specific response to this finding, except to note that it is Respondents' position that entry has already had the aforementioned effects.

292. A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is "so easy" that market participants, after the merger, "could not profitably maintain a price increase above premerger levels." *Merger Guidelines* § 3.0.

Response to Finding No. 292:

Complaint Counsel's proposed finding 292 is misleading because the *Merger Guidelines* are not binding on this Court. *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 n.9 (S.D.N.Y. 1995); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353-54 (2d Cir. 1979); *Olin Corp. v. F.T.C.*, 986 F.2d

1295, 1300 (9th Cir. 1993). The approprite legal standards for evaluating entry are set forth in *United States v. Baker Hughes* and its progeny. 908 F.2d 981 (D.C. Cir. 1990).

293. "Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." *Merger Guidelines* § 3.0.

Response to Finding No. 293:

Respondents have no specific response to this finding, except to note that it is Respondents' position that entry has already had the aforementioned effects.

294. It is not enough for Respondents merely to point to some firm that might win one contract in the relevant markets. Entry that will deter or counteract the likely anticompetitive effects of this merger 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. "Entry that is sufficient to counteract the competitive effects of concern will cause prices to fall to their premerger levels or lower. Thus, the profitability of such committed entry must be determined on the basis of premerger market prices over the long-term." *Merger Guidelines* § 3.0.

Response to Finding No. 294:

This finding of fact is incorrect, because it assumes that Respondents have "merely point[ed] to some firm that might win one contract in the relevant markets." To the contrary, Respondents have pointed to a variety of large multinational conglomerates and domestic tank makers that have already entered the *relevant markets* in the past two years. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Further, Respondents have presented evidence that this new entry has restrained CB&I's prices over the past two years, and that it is likely to restrain CB&I's prices in the future. Complaint Counsel is incorrect in its assertion regarding hit and run entry, because if entry barriers are low, hit and run entry can be recurrent and form a price disciplining influence. *See United States v. Baker Hughes,* 908 F.2d 981 (D.C. Cir. 1990). Respondents have shown such

low entry barriers. Further, this so-called finding of fact is not based on record evidence in this case, nor is it based on a legal conclusion reached by any court. It is based on the Merger Guidelines, which were created by the government itself and are not binding on this Court.

295. Both economic experts agree that entry by new firms would not restore the competition lost through an anticompetitive merger if this entry is at a price above the pre-merger price. (Simpson, Tr. 3151-2; Harris, Tr. 7438).

Response to Finding No. 295:

Respondents have no specific response to this finding.

296. Dr. Simpson 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." (Simpson, Tr. 3151-2).

Response to Finding No. 296:

This finding is irrelevant, as Dr. Simpson's testimony assumes that new entry will not occur in the relevant markets, or that already-existing market players will not increase their efforts to win work in the relevant markets in the absence of a market participant. These assumptions are not borne out by the record evidence. As Respondents have proven, new entry has occurred in the relevant markets. Many of these new entrants have been successful in winning work in the relevant products, and have constrained CB&I's pricing in these markets. For example, the recent entry of AT&V, Matrix, and CB&T has created a competitive situation in which LIN/LOX tank customers have received good prices from competitors, including prices from CB&I that are equal to or lower than prices it has provided in the past. (*See* FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Further, the necessary implication of Dr. Simpson's theory is that a merger will always have an anticompetitive result.

297. Dr. Harris testified 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).

Response to Finding No. 297:

This finding is irrelevant, as it assumes that the new entry discussed by Respondents is not profitable at pre-merger prices. In fact, Respondents have presented evidence that new entrants can win jobs in the relevant markets at pre-merger prices. For example, Skanska/Whessoe provided Dynegy with a price so low that it refused to allow CB&I to bid on this project. (FOF 3.68, 3.75, 3.270, 3.297-3.306). Similarly, AT&V has provided prices to LIN/LOX customers on a variety of projects that easily beat CB&I's prices, suggesting that it can compete profitably at pre-merger levels. (FOF 5.76-5.78). Futher, Complaint Counsel ignores that this is a sealed bid industry with imperfect information. (Simpson, Tr. 3073, 3771; FOF 7.83). In this sealed bid environment, CB&I's state of mind regarding this entry is more important than actual pricing by the entrants. (FOF 7.82-7.88, 7.241). CB&I's state of mind is relevant (FOF 7.82-7.88, 7.241), and is one impact on the strength of post-Acquisition competition.

298. Both Dr. Simpson and Dr. Harris testified that the observation that buyers are willing to consider buying from new firms does not always imply that entry is sufficient. (Simpson, Tr. 3281-2; Harris, Tr. 7791). Both Dr. Simpson and Dr. Harris also testified that the observation that buyers sometimes buy from new firms does not, by itself, imply that entry is sufficient. (Simpson, Tr. 3280-1; Harris, Tr. 7792).

Response to Finding No. 298:

This finding mischaracterizes Dr. Harris' testimony regarding observations that buyers are willing to consider buying from new firms. In fact, Dr. Harris testified that such

evidence constitutes "important analysis" in determining the sufficiency of entry. (Harris, Tr. 7991).

299. Both Dr. Simpson and Dr. Harris also testified that the observation that new firms submit bids in a market does not always imply that entry is sufficient. (Simpson, Tr. 3282-4; Harris Tr. 7790). Both Dr. Simpson and Dr. Harris testified that the observation that new firms make some investments to sell into a market does not always imply that entry is sufficient. (Simpson, Tr. 3284-8 (citing RX 738); Harris, Tr. 7791).

Response to Finding No. 299:

Respondents have no specific response to this finding.

300. The economic literature recognizes that entry does not always quickly restore competition, *e.g.*, F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 366-67 (3rd ed. 1990)).

Response to Finding No. 300:

Respondents have no specific response to this finding, except to note this literature is not in evidence.

301. 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).

Response to Finding No. 301:

The finding is inaccurate and misleading, as it is does not identify a specific product market and is based solely on the testimony of Dr. Simpson, which was completely devoid of support to the record. In fact, the evidence shows that competition in the relevant markets post-Acquisition has led to prices equal to or lower than those received prior to the Acquisition. (*E.g.*, Patterson, Tr. 488; Kamrath, Tr. 2260-61) (FOF 5.158, 5.184). In fact, customers have observed that competition in some of the relevant markets has actually increased as a result of the Acquisition. (*E.g.*, Carling, Tr. 4494) (FOF 3.253). There is an extensive record of vibrant post-Acquisition competition in each market. (*See* FOF 3.68-3.227 (actual entry

has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

302. There are significant barriers in the relevant markets that make entry by new firms or expansion by existing firms not easy. CCFF 307-391.

Response to Finding No. 302:

This finding is patently false and lacks any credible evidentiary support. The evidence demonstrates that there are no significant barriers to entry in the relevant markets. (FOF 3.509-3.570). In fact, Complaint Counsel's proposed finding has been rejected by empirical evidence, as a wide variety of firms have actually entered the relevant markets since the Acquisition. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Further, the evidence is clear that entry barriers are low in each market. (*See* Opening Br. at. 46-61 (LNG), 90-94 (LPG), 107-09 (LIN/LOX); FOF 3.509-3.570 (LNG), 4.71-4.143 (LPG), 5.219-5.223 (LIN/LOX)).

303. Dr. Simpson testified that a new entrant would have to possess the same tangible and intangible assets that made CB&I and PDM such strong competitors in order to restore competition in the relevant markets to the level that existed prior to CB&I 's acquisition of PDM. (Simpson, Tr. 3278, 3155). Dr. Simpson identified these tangible assets as a large engineering staff, field erection crews in the U.S., and fabrication facilities in the U.S. (Simpson, Tr. 3155-56). Dr. Simpson identified these intangible assets as reputation, building experience, and bidding experience. (Simpson, Tr. 3214).

Response to Finding No. 303:

This finding is inaccurate and misleading, as it is based solely on the unsupported testimony of Dr. Simpson and does not identify a specific product market to which it refers. As Respondents discussed in their Opening Brief and Findings of Fact, the analysis of entry barriers

differs by product market. (*See* Opening Br. at. 46-61 (LNG), 90-94 (LPG), 107-09 (LIN/LOX); FOF 3.509-3.570 (LNG), 4.71-4.143 (LPG), 5.219-5.223 (LIN/LOX); *See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113). In addition, this finding is improperly based on the flawed premise that PDM must be replaced by a single firm, and excludes the possibility of several firms providing the competition that PDM did in the past. Further, the evidence shows that Dr. Simpson's claims are incorrect. For example, it is not necessary to have a large engineering staff or bidding experience to build an LPG tank. (*See*, *e.g.*, Maw, Tr. 6547-48, 6551-52, 6557-60; *see also* FOF 4.72, 4.73, 4.93). Dr. Simpson also ignores the fact that the new entrants identified by Respondents have access to the assets he identifies as so-called entry barriers. (Opening Br. at 20-46; FOF 3.56-3.227). For example, Technigaz/Zachry and TKK/AT&V have the necessary engineering staffs, experience, and reputation to build LNG tanks in the U.S. (Opening Br. at. 28-41; FOF 3.99-3.108, 3.141-3.172).

304. A new entrant would have to possess the same tangible and intangible assets that made CB&I and PDM such strong competitors in order to restore competition in the relevant markets to the level that existed prior to CB&I 's acquisition of PDM. (Simpson, Tr. 3278). Dr. Simpson testified: [F]or an entrant to acquire these tangible and intangible assets, the entrant would need to spend a lot of money and a lot of time." (Simpson, Tr. 3278). If the new entrant had to abandon the entry, certain types of investments, such as rented office space, might be recoverable. Other types of expenditures, such as the cost of buying projects, would not be recoverable. (Simpson, Tr. 3279). According to Dr. Simpson, the portion of the expenditure that would not be recoverable would make up a "significant portion" of the original investment. (Simpson, Tr. 3278).

Response to Finding No. 304:

This finding is inaccurate, misleading, and vague. It fails to analyze the issue of alleged entry barriers on a product by product basis. Further, it is based entirely on Dr. Simpson's testimony, and is unsupported by any credible record evidence. There is no evidence in the record that competitors must possess the *same* tangible and intangible assets that CB&I

and PDM possessed prior to the Acquisition. Indeed, CB&I and PDM possessed different assets prior to the Acquisition, yet were able to compete with each other in all but one of the product markets at issue. In addition, this finding is improperly based on the flawed premise that PDM must be replaced by a single firm, and excludes the possibility of several firms providing the competition that PDM did in the past. This finding also ignores the empirical evidence showing that the so-called "entry barriers" identified by Dr. Simpson. As discussed extensively in Respondents' Opening Brief and findings of fact, a variety of large, multinational conglomerates and domestic tank makers have entered the markets for the relevant products in the past two years. The fact that they have successfully entered these markets conclusively demonstrates that Dr. Simpson's alleged entry barriers simply do not exist. (Opening Br. at 64-79, 89-94, 98-107; *See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

305. Dr. Simpson testified that, to compete as effectively as CB&I and PDM had prior to the acquisition, an entrant would need tangible and intangible assets comparable to those possessed by CB&I and PDM. (Simpson, Tr. 3407, 3451). Dr. Simpson identified the tangible assets as fabrication facilities, an engineering staff, and field erection crews. (Simpson, Tr. 3407, 3451). Dr. Simpson identified the intangible assets as reputation, building experience, and bidding experience. (Simpson Tr. 3407, 3451). Dr. Harris agreed that an entrant would need to possess these intangible assets. (Harris, Tr. 7314 (testifies that it is "fair to say" that "it 's important to have a good reputation"; "that you have to be able to bid properly"; and that "there is learning by doing.")).

Response to Finding No. 305:

This finding is inaccurate, misleading, and vague. It fails to analyze the issue of alleged entry barriers on a product by product basis. Further, it is based entirely on Dr. Simpson's testimony, and is unsupported by any credible record evidence. There is no evidence in the record that competitors must possess the *same* tangible and intangible assets that CB&I

and PDM possessed prior to the Acquisition. Indeed, CB&I and PDM possessed different assets prior to the Acquisition, yet were able to compete with each other in all but one of the product markets at issue. In addition, this finding is improperly based on the flawed premise that PDM must be replaced by a single firm, and excludes the possibility of several firms providing the competition that PDM did in the past. This finding also ignores the empirical evidence showing that the so-called "entry barriers" identified by Dr. Simpson. As discussed extensively in Respondents' Opening Brief and findings of fact, a variety of large, multinational conglomerates and domestic tank makers have entered the markets for the relevant products in the past two years. The fact that they have successfully entered these markets conclusively demonstrates that they have these "certain tangible and intangible assets" and that Dr. Simpson's alleged entry barriers simply do not exist. (Opening Br. at 64-79, 89-94, 98-107; *See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

306. In selecting a supplier, customers weigh multiple criteria, including price, delivery schedule, quality, safety record and innovative engineering and design. (Gill, Tr. 206-07; Glenn, Tr. 4335; CX 1569 at 3). An entrant must possess all of these tangible and intangible assets to be able to replace PDM in the relevant markets.

Response to Finding No. 306:

This finding is inaccurate and misleading, as it is based on the flawed premise that PDM must be replaced by a single firm, and excludes the possibility of several firms providing the competition that PDM did in the past.

1. *The Lack of a Fabrication Facility in the United States Impedes Entry*

307. Foreign builders of LNG tanks do not have fabrication facilities in the United States. (Simpson, Tr. 3166). Having a fabrication facility in the United States gave CB&I and PDM a competitive advantage in bidding for LNG tanks in the U.S. (JX 37 (Newmeister, Dep.,

IHT.); RX 738 at 2). Building a fabrication plant would cost about $9 million and take about 9 months. (CX-922).

Response to Finding No. 307:

This finding is inaccurate because it incorrectly asserts that foreign builders of LNG tanks do not have fabrication facilities in the U.S. Consortia involving foreign entities, such as TKK/AT&V, have access to U.S.-based fabrication facilities. (*E.g.*, Cutts, Tr. 2457; FOF 3.103-3.108). Further, access to fabrication facilities is not an entry barrier to the LNG markets. Fabrication for LNG tanks takes place overseas, rendering a U.S. fabrication facility useless. (FOF 3.562). Even if U.S. fabrication facilities did provide any competitive advantage, that advantage would be minor. (FOF 3.564). Further, this finding is based on the testimony of John Newmeister of Matrix, a company that has never even participated in the LNG market and that competes against CB&I in other relevant markets. (*See* Opening Br. at 89, 103-05; FOF 4.63, 5.43-5.55; Newmeister IH, Tr. 1596-97 (JX 37)).

308. The fact that CB&I and PDM both possessed fabrication plants in the United States gave them a competitive advantage in bidding for the relevant products (Simpson, Tr. 3159, 3163, 3166). For example, when Matrix Services Company sold Brown Steel Company, a division of Matrix that possessed a fabrication facility, it lost some of its competitive strength as a tank builder. (Simpson, Tr. 3160-61 (citing JX 37 (Newmeister, IHT) (loss of Brown Steel's fab facility means more subcontracting), RX 738 (Technigaz is less competitive because it doesn't have a fabrication facility); CX 922 (it costs $9M to build a fab facility in U.S. and takes 9 months)).

Response to Finding No. 308:

This finding is inaccurate. First, there is no credible evidence in the record that having a fabrication facility in the U.S. gives any competitor an advantage in bidding for the LNG tanks. For example, Jean Pierre Jolly of Technigaz explained that a U.S. based fabrication facility did not provide any significant competitive benefit because steel fabrication for LNG tanks takes places overseas. Accordingly, any advantage with having such a facility in the U.S. is insignificant or minor. (*See* Opening Br. at 52-53; FOF 3.560-3.564). Further, Complaint

Counsel's finding is based on the flawed premise that CB&I's competitors in the relevant market do not have access to fabrication facilities. The evidence shows that AT&V, CB&T, and Matrix all have fabrication facilities necessary to build relevant products. (*See* Opening Br. at 98-107; FOF 3.103-3.108, 5.29, 5.45-5.46, 5.59, 5.63.) The finding is also flawed to the extent is implies that Matrix cannot compete with CB&I effectively. The evidence shows just the opposite; Matrix matched CB&I's price on a recent LIN/LOX project for Air Liquide in Freeport, Texas. (*See* FOF 5.124).

2. *Revenue Base and Scale Sufficient to Compete for Large Projects Impede Entry*

309. For a new entrant, having an adequate revenue base is critical. (Izzo, Tr. 6511-12). Substantial revenues are necessary to cover the sunk costs associated with preparing bids CCFF 310-312, and to meet customer demands for performance bonds and ability to pay any liquidated damages CCFF 313-317.

Response to Finding No. 309:

This finding is inaccurate to the extent it implies that having a large revenue base and bonding capacity is necessary to bid on and build smaller relevant products, such as LIN/LOX tanks and LPG tanks. In many cases, preparing a bid for these smaller products costs far less than preparing a bid for a large LNG facility. (*See, e.g.*, Maw, Tr. 6556-57; FOF 4.92).

310. A firm needs to expend significant resources in developing proposals and price quotations for the relevant products. For example, a CB&I document reports that CB&I expended $300,000 in design resources and $190,000 in other resources to prepare its TVC proposal for Orbital Sciences' planned chamber. (CX 235 at CB&I-PL060198).

Response to Finding No. 310:

This finding is inaccurate as it applies to smaller relevant products, such as LIN/LOX tanks and LPG tanks. In many cases, preparing a bid for these smaller products costs far less than preparing a bid for a large LNG facility. (*See, e.g.*, Maw, Tr. 6556-57; FOF 4.92).

311. Large amounts are required to conduct physical tests of materials and tank prototypes or components. For example, Matrix spent $200,000 - $300,000 testing cellular glass

and rigid insulation systems that form the ground insulation between the inner and outer tanks for a LIN/LOX tank. (Newmeister, Tr. 1584-5; Cutts, Tr. 2235-6 (AT&V's first project realized a net loss of about $100,000, resulting from the research and development costs AT&V incurred to enter the LIN/LOX market)).

Response to Finding No. 311:

This finding is irrelevant, because the alleged entry barrier identified by Complaint Counsel can be overcome, as empirical evidence shows. As the finding itself implicitly acknowledges, Matrix and AT&V have already spent money to conduct physical tests of materials and tank prototypes in the process of entering the LIN/LOX market.

312. If a new entrant is not successful in winning projects, the costs of preparing proposals and prototypes become sunk, non-recoverable costs. (CX 235 at CB&I-PL060198). A new entrant would need to be able to absorb those losses as a cost of entry in order to continue competing.

Response to Finding No. 312:

Respondents have no specific response to this finding.

313. An entrant must have a sufficiently large revenue base to secure bonds required by customers. Customers require the tank supplier "to provide a bond to the contractor ... that guarantees the project will get finished." (Stetzler, Tr. 6385). An entrant's ability to bond a project, or bonding capacity, "has to do with your financial strength, and also the size of your company, which how big of a contract are you used to handling." (Stetzler, Tr. 6385).

Response to Finding No. 313:

This finding is irrelevant, as the evidence has shown that new entrants have the bonding capacity to enter the relevant market they have entered. For example, Mr. Stetzler of CB&T -- cited by Complaint Counsel in this finding -- testified that CB&T has far more bonding capacity than is required to build a LIN/LOX tank. (Stetzler, Tr. 6385-87, 6391; *see also* FOF 5.64). Each of the new LNG entrants has adequate bonding capacity. (*See generally* FOF 3.56-3.227).

314. The amount of financial guarantee that is required varies with the risk profile of the tank supplier. (Izzo, Tr. 6485-86). Mr. Gill testified that, as a general rule, the cost for the bond is "a percentage rate based on your experience in the industry." (Gill, Tr. 198).

Response to Finding No. 314:

This finding is irrelevant, as the evidence has shown that new entrants have the bonding capacity to enter the relevant markets. For example, new entrants in the LNG markets have sufficient bonding capacity to compete. (*See* Opening Br. at 57; FOF [3.142], 3.371). Further, Mr. Gill's testimony is limited to his experience in the TVC market and has no application to the experience of the foreign LNG entrants.

315. LNG facility contracts often impose large liquidated damage provisions on the constructor if the project is completed late. (CX 891 at 46-47 (Glenn, Dep.); Izzo, Tr. 6485-86; Bryngelson, Tr. 6154-55).

Response to Finding No. 315:

Respondents have no specific response to this finding.

316. A large revenue base enhances the tank supplier's ability to offer the financial guarantees necessary to win contracts. (CX 891 at 43, 47 (Glenn, Dep.); Izzo, Tr. 6511-12). Customers want suppliers with a large asset base, because there is a larger target to go after if the contractor is late in completing the project and the customer sues for liquidated damages. (Bryngelson, Tr. 6154-55; Warren, Tr. 2297-98; JX 27 at 69 (N. Kelley, Dep.); Izzo, Tr. 6485-86; CX 1121 at CB&I-HWH 053087).

Response to Finding No. 316:

Respondents have no specific response to this finding as it relates to large projects. The evidence regarding bonding is different in each market, a fact Complaint Counsel obfuscates by melding all the markets into one.

317. Mr. Gill testified that his company, Howard Fabrication, with $2.5 million in annual revenues, could not effectively compete in the market for TVCs because it was not large enough to purchase the bonds for TVC projects. (Gill, Tr. 200-01, 234).

Response to Finding No. 317:

Respondents have no specific response to this finding.

318. An entrant would need a large engineering staff to design LNG tanks. (Simpson, Tr. 3156 (citing CX 258 at 1794; CX 1591 at 15262). Dr. Harris agreed that an entrant must have engineering capability. (Harris, Tr. 7249).

Response to Finding No. 318:

This finding is vague and irrelevant. The term "large" is not defined. Further, the finding is irrelevant, because it is undisputed in this case that all of the new entrants in the LNG market have the necessary engineering capability to compete effectively in the U.S. market. (FOF 3.28-3.29, 3.56-3.227). Additionally, Complaint Counsel flouts the rules set forth in this Court's Order by citing to a document which is not in evidence, i.e. "CX 1591."

319. LPG customers will not purchase LPG tanks from a supplier until they are assured that the supplier has sufficient personnel to design, engineer and construct an LPG tank. (RX 682 at MCG 000059 ("Texaco will verify that bidder is not overcommitted to perform that work."); Warren, Tr. 2295 (Before allowing a company to bid, Fluor reviews a potential LPG tank supplier's volume to ensure the supplier is capable of managing multiple projects simultaneously, and to ensure there is not too much backlog to prevent Fluor from accessing the supplier's resources promptly as needed); *see* CX 415 at 2).

Response to Finding No. 319:

This finding is irrelevant, as the evidence has demonstrated that current and potential entrants in the LPG market have the necessary personnel to design, engineer, and construct an LPG tank including Morse, a company that had never before built an LPG tank and to which RX 682 refers. (*E.g.*, N. Kelley, Tr. 7090, 7109, 7127-30) (FOF 4.40, 4.45-4.46, 4.61). This finding is also misleading to the extent that it implies such requirements constitute barriers to entry in the LPG market. (*See, e.g.*, FOF 4.90-4.128). For example, Morse had only 18 employees (two of which were engineers) and no salaried field crews when it built the Texaco Ferndale LPG facility. (Maw, Tr. 6551-52) (FOF 4.72).

320. LPG tank suppliers need sufficient personnel to handle adjustments to possible schedule changes. (Warren, Tr. 2296 (In order to bid on an LPG project, an LPG tank supplier needs enough staff to handle an adjustment if it becomes necessary to shorten the schedule or recover from delays); *see* CX 415 at 2).

Response to Finding No. 320:

This finding is irrelevant, as the evidence has demonstrated that current and potential entrants in the LPG market have the necessary personnel to construct an LPG tanks. (*E.g.*, N. Kelley, Tr. 7090, 7109, 7127-30) (FOF 4.40, 4.45-4.46, 4.61). This finding is misleading to the extent it implies that sufficient personnel includes experience or that it constitutes a barrier to entry. For example, Morse employed only two engineers without any LPG tank experience and had few other employees. (Maw, Tr. 6551-52; N. Kelley, Tr. 7120) (FOF 4.72, 4.128). There is no evidence in the record to suggest that any current or potential player in this market lacks this capability.

3. *Lack of Know-How Relating to the Relevant Products Impedes Entry*

321. A new entrant would also have to surmount the challenge of developing a sufficient knowledge base to compete in the relevant markets.

Response to Finding No. 321:

This finding is vague and irrelevant. It does not refer to a specific product market. Further, to the extent the finding implies that it is difficult to develop a sufficient knowledge base in the relevant markets, such a conclusion should be rejected. New entrants in the LNG, LPG, and LIN/LOX markets have already surmounted this challenge, as they have successfully won projects in these markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

322. A new entrant will need to establish the capability to perform specialized metal fabrication. (Hilgar, Tr. 1343-44 (fabrication of the pieces for a LIN/LOX tank is complex due to "the tolerances and the manufacturing processes.... [if the] pieces get to the field and don't fit, you have a major problem"); Kamrath, Tr. 1995 (customer "would be very concerned about how he manages that, the supervision he provides, the standards and guidance he provides. It's not something that eliminates a supplier, but certainly it raises a concern.")).

Response to Finding No. 322:

This finding is vague and irrelevant. It does not refer to a specific product market. Further, to the extent the finding implies that it is difficult to develop a capability to perform specialized metal fabrication, such a conclusion should be rejected. New entrants in the LNG, LPG, and LIN/LOX markets have already met this challenge, as they have successfully won and constructed projects in the relevant markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

323. A new entrant would need to develop the specialized construction capabilities necessary to successfully erect a tank. "The construction of field-erected storage tanks requires experienced engineers and construction workers with specialized know-how in welding techniques, metallurgy and design." (*see also* Hilgar, Tr. 1375).

Response to Finding No. 323:

This finding is vague and irrelevant. It does not refer to a specific product market. Further, to the extent the finding implies that it is difficult to develop these capabilities, such a conclusion should be rejected. New entrants in the LNG, LPG, and LIN/LOX markets have already met this challenge, as they have successfully won and constructed projects in the relevant markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); FOF 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

324. Because of the specialized nature of tank construction, customers look to deal with established, reliable suppliers. Air Liquide wants "to make sure the know-how that is involved is known by the people doing the work so that tank is safe and operable." (Kamrath, Tr. 1994, 1995; *see also* Hilgar, Tr. 1356-1357, 1377-1378 (very important that these tanks are meticulously designed and constructed)).

Response to Finding No. 324:

This finding is inaccurate to the extent it implies that being an established, reliable supplier is the most important consideration in selecting a tank supplier. For example, Michael **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Further, AT&V built a LIN/LOX tank for BOC, even though it had never built one before. (FOF 5.31-5.34).

325. The technology needed to supply TVCs is not readily available, and experience with the technology must be obtained while working for a company that supplies these products. (Scully, Tr. 1097-98). Additionally, new entrants would need to obtain "the ability to fabricate in the field a stainless steel vessel" and satisfy "the quality requirements of leak testing and cleanliness" for a TVC. (Higgins, Tr. 1272-3).

Response to Finding No. 325:

This finding is inaccurate. The first statement refers specifically to thermal vacuum systems, the portion of a field-erected TVC that CB&I does not build. (Scully, Tr. 1097-98; FOF 6.54-6.56). Secondly, CB&I has offered a remedy package which includes providing its technical knowledge relating to building field-erected TVC's to new entrants along with mentoring. (FOF 6.91-6.121). Thus, these alleged barriers to entry can be overcome via CB&I's remedy proposal.

326. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Cutts, Tr. 2379-80; Kistenmacher, Tr. 881-82; Fahel, Tr. 1628-29, *in camera*).

Response to Finding No. 326:

This finding is inaccurate on several fronts. First, the evidence shows that it is not necessary to hire "specially-trained construction workers" with "experience welding nine percent nickel steel." Peter Rano of CB&I explained that CB&I itself generally hires local labor to build LNG tanks, without regard as to whether that labor has prior experience in working on LNG

tanks. (FOF 3.533-3.540). Further, there is no credible evidence showing that it is necessary to use welders with prior experience with 9 percent nickel welding. For a variety of reasons, it is more effective to train welders on this type of metal than to actively seek them out. (FOF 3.528-3.540). Finally, to the extent this finding implies that CB&I's competitors in the LNG markets lack the necessary experience to build an LNG tank, it should be rejected. These competitors are large, sophisticated companies with deep experience in LNG and have these capabilities. (FOF 3.56-3.227).

327. Mr. Cutts testified that LNG tanks are "built out of fairly sophisticated materials. You don't just weld them up any old way....The equipment is quite expensive to develop. You can go buy it, but the stuff you buy has to be modified and tailored, and then you have to build procedures around it. So it's not like you can go buy an automobile. It's unique equipment...." (Cutts, Tr. 2379).

Response to Finding No. 327:

This finding is inaccurate. First, the processes and equipment used to weld an LNG tank is not materially different that those used on other types of tanks. (FOF 3.532). Second, to the extent this finding implies that CB&I's competitors in the LNG market lack the necessary equipment and procedures to build LNG tanks, it should be rejected. These competitors are large, sophisticated companies with deep experience in LNG and have these capabilities. (FOF 3.56-3.227).

328. **[xxxxxxx]** of **[xxxxxxx]** testified the lack of knowledge of the industry and the lack of a fabrication plant currently obstruct the **[xxxxxxxxxxxxxxx]** partnership's penetration of the LNG market. (**[xxxxx]**, Tr. 1635-34, 1654, *in camera*)).

Response to Finding No. 328:

This finding is inaccurate to the extent it implies that lack of knowledge of the industry and the lack of a fabrication plant prevent **[xxxxxxxxxxxxxxxx]** from entering the U.S. market for LNG facilities. While **[xxxxxxxxx]** identified these items as areas of concern, he did not indicate that they posed an insurmountable burden to being an effective competitor in the

LNG market. Further, **[xxxxxxxxxxxxxxxxxxxxxx]** contradicted **[xxxxxxxxx]**. He testified that **[xxxxxxxxx]** did have deep knowledge of the LNG industry, and that the lack of a fabrication facility in the U.S. was not a major impediment to **[xxxxxxxxxxxxxxxxxx]** entry into the U.S. market. (*See* FOF 3.141-3.154).

329. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (JX 30 at 180-81 (**[xxxxx]**), *in camera*).

<u>Response to Finding No. 329:</u>

This finding is misleading and inaccurate. The welding of nine percent nickel steel is not particularly difficult or special. It involves the exact same processes and techniques used to weld carbon steel, and is much easier to weld than stainless steel or aluminum. (Rano, Tr. 5872-73, 5947; *see also* Hall, Tr. 1792) (FOF 3.532). The testimony of Peter Rano on this point is particularly instructive, as he is the only trained welder to have testified in this case. (*See* Rano, Tr. 5872). Further, this finding is misleading to the extent it implies that CB&I's competitors in the LNG industry lack access to the techniques necessary to weld LNG tanks. The evidence on this point is squarely to the contrary. (FOF 3.528-3.540).

330. Other witnesses testified to the specialized expertise, including that relating to the welding of 9% nickel plate, required for the design and construction of LNG tanks. (Hall, Tr. 1792; JX 32 at 37-38 (Rapp Dep.)).

<u>Response to Finding No. 330:</u>

This finding is misleading and inaccurate for the reasons set forth in CB&I's Response to Finding 329. Further, Complaint Counsel's own citations contradict its argument. Mr. Hall agreed that the term "special" did not properly characterize the welding expertise necessary to build an LNG tank. (*See* Hall, Tr. 1792).

331. Peter Rano, a CB&I Vice President, concedes that CB&I considers its welding procedures for LNG projects to be proprietary work product which it does not want to fall into the hands of its competitors. (Rano, Tr. 6028-29).

Response to Finding No. 331:

This finding is misleading to the extent it implies that CB&I's competitors do not themselves have access to welding procedure for LNG projects. The evidence shows that they do, in fact, have such procedures available to them as they all have built LNG tanks successfully overseas using these methods. (*See* FOF 3.528-3.540).

332. PDM and CB&I have developed specialized welding procedures, equipment and techniques for welding nine percent nickel steel. For example, in 1999, PDM developed and implemented twin wire (two electrodes/one control) submerged arc for welding of horizontal seams of 9% nickel in cryogenic applications. (CX 109 at PDM-HOU006700).

Response to Finding No. 332:

The response to this finding is identical to RFOF 331 above.

333. PDM has also developed weld procedures and specific equipment for automatic stud welding of stainless steel studs to 9% nickel for use in concrete wall embedments for double and full containment LNG storage tanks. (*See* CX 109 at PDM-HOU006701; Knight, Tr. 2614-15).

Response to Finding No. 333:

The response to this finding is identical to RFOF 331 above.

334. A new entrant would need to hire engineers with previous experience in designing TVCs, which are "truly one-of-a-kind designs for very specific applications on very technical products." (JX 37 at 127 (Newmeister, IH.); *see also* Higgins, Tr. 1272-3).

Response to Finding No. 334:

Respondents have no specific response, except to note that such engineers have left CB&I since the Acquisition and are available. Further, CB&I will license all its TVC engineering and technology, making this finding irrelevant.

4. *Lack of Prior Experience Building Relevant Products Impedes Entry*

335. Both economic experts agree that the economic literature recognizes reputation as a barrier to entry. (Simpson, Tr. 3229-30; Harris, Tr. 7445-8). Carlton & Perloff explain: "Product differentiation (firms produce similar but not identical products) can create a long-run barrier to entry. For example, consumer goodwill toward established brand names may make it more difficult for a new brand to enter... For example, because the product of the first firm in the

market is familiar to customers, they may be reluctant to switch to a new brand." D. Carlton & J. Perloff, Modern Industrial Organization, at 80 (3d ed. 2000) (hereinafter "Carlton & Perloff"). Dr. Harris agrees. (Harris, Tr. 7445-6; *see* Harris, Tr. 7448 ("reputation matters").

Response to Finding No. 335:

This finding is irrelevant, because the new entrants identified by Respondents have already surmounted this alleged "entry barrier." Each new entrant has the necessary reputation to compete in the relevant markets, as evidenced by their recent success in penetrating these markets. (Opening Br. 20-45; *See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options); *See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113).

336. There are "tremendous safety considerations" regarding LNG tanks. (Price, Tr. 564-5). If LNG should leak from a tank, the vaporized LNG could lead to fires and death, and liability for losses. (Bryngelson, Tr. 6234-35; *see also* Blaumueller, Tr. 293-4).

Response to Finding No. 336:

Respondents have no specific response to this finding.

337. The same safety and liability considerations drive customers in the other relevant markets to look for tank builders with experience. (Newmeister, Tr. 1609-10; Glenn, Tr. 4073; CX 258 at CB&I-H001794; JX 27 at 69-70 (N. Kelley, Dep.); Warren, Tr. 2293-94; *see* CX 415 at 2).

Response to Finding No. 337:

This finding is irrelevant, because the new entrants identified by Respondents have already surmounted this alleged "entry barrier." Each new entrant has the necessary experience to compete in the relevant markets, as evidenced by their recent success in penetrating these markets. (FOF 3.56-3.227).

338. Leaks in a TVC can prevent the user from meeting the vacuum specifications required for satellite testing. (Proulx, Tr. 1904-05). In addition, defects in the welding of the

chamber can lead to the leakage of contaminants into the chamber, which can interfere with the accuracy of the test results. (Scully, Tr. 1143-44). If a TVC fails during a satellite test, the satellite within the chamber can be damaged. (Neary, Tr. 1454; (Scully, Tr. 1144). Operational problems with a TVC can have a "bad effect" on the satellite's program schedule, because the test may have to be restarted from the beginning after the problem is resolved. (Scully, Tr. 1145-46).

Response to Finding No. 338:

Respondents have no specific response, except to note that CB&I has an uneven track record in its field-erected TVC work. It's second-to-last field-erected TVC, the East Windsor, Long Island TVC built in 1981, was defective and never went into operation. (Thompson, Tr. 2113; Scully, Tr. 1188) (FOF 6.45).

339. To avoid these catastrophes, customers seek experienced tank suppliers. Mr. Hall of Memphis Light Gas & Water put it succinctly: "If you're going to be handling something like liquefied natural gas [LNG], you don't want some amateur putting it together. The results can be catastrophic." (Hall, Tr. 1789).

Response to Finding No. 339:

This finding is vague and misleading. It is vague because it does not refer to a specific product market. It is misleading the extent it implies that new entrants lack the necessary experience to be accepted by customers as a tank suppliers. For example, in the LNG market, the new entrants identified by Respondents are recognized by current customers as capable, experienced suppliers. (FOF 3.56-3.227). Further, Complaint Counsel's finding of fact lacks solid evidentiary support, as it is based entirely on the testimony of a former LNG customer who has not purchased an LNG tank since 1995.

340. Dr. Kistenmacher, a vice president at Linde BOC Process Plants, testified that risks associated with leakage cause Lotepro to subcontract the design and construction of LNG tanks to companies that have a long track record of experience in constructing these facilities. (Kistenmacher, Tr. 904-05).

Response to Finding No. 340:

This finding is irrelevant, as all of the new entrants identified by Respondents have a "long track record" of experience in constructing LNG facilities. (FOF 3.56-3.227).

341. Mr. Kelley of ITC testified that he will not purchase an LPG tank from a company with no prior experience because "I don't want to be a guinea pig." (N. Kelley, Tr. 7104-05; *see also* Warren, Tr. 2290-91; CX 415 at 2).

Response to Finding No. 341:

This finding is misleading and inaccurate in that it misstates the record evidence. Mr. Kelley testified that a tank supplier would be considered for an LPG project if it had built an API 620 tank, not necessarily an LPG tank. (N. Kelley, Tr. 7117-18) (FOF 4.121). In addition, Mr. Kelley further testified that such cryogenic tank experience was not required. (N. Kelley, Tr. 7117-18) (FOF 4.121). If a contractor had never built a cryogenic tank before, but had experienced personnel who had, then that contractor would get a chance to prove it could build the tank for ITC. (N. Kelley, Tr. 7131-32) (FOF 4.121). Even more, Mr. Kelley stated that he did not know if AT&V had previously built an LPG tank before the 2000 ITC project, as long as he had confidence in the contractor's ability to build the tank. (N. Kelley, Tr. 7104-05) (FOF 4.123). (*See also* Maw, Tr. 6550-51 (FOF 4.90) (Morse had never constructed an LPG tank before and specifically told Texaco it had no LPG experience. Nonetheless, Texaco requested Morse submit a bid on the Ferndale project)).

342. LPG customers want a tank supplier with a long track record building several LPG tanks. (Carling, Tr. 4512 (the last ten years would be the most relevant experience); JX 27 at 72 (N. Kelley, Dep.) (would "definitely want [an LPG tank supplier] to have had prior experience building an LPG tank before I would hire them to build an LPG tank for me.")).

Response to Finding No. 342:

This finding is misleading because while LPG customers would prefer a tank supplier with a long track record building several LPG tanks, the record evidence indicates that

such experience is not required. Mr. Kelley of ITC testified that such experience is not necessary. (N. Kelley, Tr. 7117-18, 7131-32) (FOF 4.121). In fact, he selected a contractor for the ITC LPG project without any knowledge as to AT&V's LPG track record, but had confidence in them from other API tank projects. (N. Kelley, Tr. 7104-05) (FOF 4.123). Further, Morse was selected for the Ferndale LPG project by Texaco with full disclosure regarding Morse's lack of any prior LPG experience. (Maw, Tr. 6550-51) (FOF 4.90). Complaint Counsel relies on the testimony of Mr. Carling in this finding; however, Mr. Carling's testimony related to the LNG market, not the LPG product market. (*See* Carling, Tr. 4512).

343. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 1995-96, [2236-7], *in camera*; *see also* Knight, Tr. 2628 ("[E]xperience building LIN/LOX tanks provides customers with confidence that the product will be designed and built the way it was requested"); JX 25 at 83-4 (Hilgar, Dep.) (describing safety hazards associated with LIN/LOX tanks).

<u>Response to Finding No. 343:</u>

Respondents have no specific response to this finding.

344. Mr. Scully, President of XL Technology Systems, testified that TVC customers want experienced suppliers with "knowledge as to how to deal with the architects and the construction people ... and ability to manage a project." (Scully, Tr. 1147; *see also* Higgins, Tr. 1272; Proulx, Tr. 1756; Neary, Tr. 1455).

<u>Response to Finding No. 344:</u>

Respondents have no specific response, except to note that Respondents have offered a remedy package that would provide inexperienced suppliers with the appropriate mentoring to be able to satisfy customers in this regard. (FOF 6.99-6.105).

345. Companies, such as Black & Veatch and Air Products, that provide the liquefaction systems and other components but not the LNG tanks, are unwilling to partner with an inexperienced LNG tank supplier. (CX 157 at CB&I-PL003348 (Black & Veatch "are looking to partner on a project with a firm which has better experience"); Davis, Tr. 3190-1 (Air Products chose to partner with PDM "because we needed to have somebody who would be competent to work with and capable of project execution, and they had demonstrated those capabilities")).

Response to Finding No. 345:

This finding is irrelevant and misleading, as it implies that new entrants identified by Respondents in the LNG market do not have the necessary experience to be able to compete in the U.S. LNG market. In fact, new entrants do have this experience. (FOF 3.56-3.227). U.S. process firms, including Black & Veatch, have found these new entrants to be acceptable partners. In fact, Black & Veatch has partnered with Skanska/Whessoe on the Dynegy project. (Puckett, Tr. 4579). Further, Black & Veatch has touted this alliance to other U.S. LNG customers, such as Freeport LNG, as a selling point. (*See* RX 935).

346. Customers will pay a premium for the lower risk from dealing with the more experienced supplier. (Fan, Tr. at 960-1, 1017-8 (did not purchase from AT&V even though AT&V's price was $200,000 lower than CB&I's)).

Response to Finding No. 346:

This finding is inaccurate and misleading. No customer has testified that they will pay a premium to deal with a more experienced supplier. In fact, the evidence shows **[xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]**. (*See* Patterson, Tr. 480; FOF 5.145). Further, Complaint Counsel's finding is wholly unsupported by the evidence. Contrary to Complaint Counsel's implication, Mr. Fan of Linde has never rejected AT&V as a supplier of LIN/LOX tanks. (Fan, Tr. 1018). In fact, the evidence demonstrates that Linde has never received a fixed, firm price bid from AT&V, or that Linde has ever analyzed AT&V's abilities in the LIN/LOX market. (Fan, Tr. 1018). The $200,000 figure to which Complaint Counsel refers was a preliminary budget price, not a firm bid. (Fan, Tr. 960-63). Mr. Fan didn't disregard AT&V's price because he wanted CB&I's experience; he just didn't trust the accuracy of AT&V's price and didn't want to use it in the budget for the air separation facility Linde was bidding on. (Fan, Tr. 963).

347. A CB&I customer survey notes that "the main weakness noted about other competitors is that they are generally less experienced and reliable than CB&I. Their expertise is generally narrow and limited compared to CB&I. Lacking the discipline and financial strength of a CB&I makes using smaller suppliers a more risky proposition. ... CB&I should be able to succeed by presenting itself as the low-risk, best value supplier who has the broadest and deepest capabilities." (CX 218 at CB&I-PL034532, CB&I-PL034537; *see also* Scully, Tr. 1146-47).

Response to Finding No. 347:

This finding ignores the fact that CB&I has an uneven track record in its TVC work. It's second-to-last field-erected TVC, the East Windsor, Long Island TVC built in 1981, was defective and never went into operation. (Thompson, Tr. 2113; Scully, Tr. 1188) (FOF 6.45). Further, this survey document is dated well before the Acquisition and does not reflect the current customer views expressed in sworn testimony before this Court. (FOF 3.565-3.567; 4.71-4.124; 5.22-5.78).

348. It would take an inexperienced supplier in the relevant markets several years to build a track record. (CX 167 at CB&I-PL007052). Developing a reputation similar to CB&I's for supplying cryogenic tanks can take as much as ten years. (Cutts, Tr. 2372, 2385).

Response to Finding No. 348:

This finding is vague, misleading, and inaccurate. It is vague because it does not identify which product market it refers to. It is misleading and inaccurate because it assumes that it is necessary to have a reputation similar to CB&I's in order to compete in the cryogenic tank market. This was neither true pre-Acquisition nor was it true post-Acquisition. Graver Tank was able to compete effectively both CB&I and PDM in the LIN/LOX market in the 1990s, despite the fact that its reputation was not as good as CB&I's or PDM's. Customers continued to purchase from Graver based on low price. (*See, e.g.*, **[xxxxxxxxxxxxxxxxxxxxx]**; FOF 5.146). Post-Acquisition, AT&V has successfully gained a majority share of the LIN/LOX market, despite the fact that it has not built as many LIN/LOX as CB&I. (*See, e.g.*, Scorsone, Tr. 5015-18; FOF 5.76-5.78).

349. Experienced suppliers minimize defects by learning through trial and error. Mr. Scully of XL Technologies has personally learned from engineering errors and construction errors experienced on TVC projects. Additionally, when working with CB&I, he observed that their employees learned from past mistakes made in the process of supplying TVCs. (Scully, Tr. 1140-41).

Response to Finding No. 349:

Respondents have no specific response, except to note that CB&I has not built a field-erected TVC since 1984, thus this alleged accumulated knowledge at CB&I is dated. CB&I has not built a TVC since 1984. (FOF 6.26; Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77).

350. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxx]**, Tr.] 1637-38, *in camera*).

Response to Finding No. 350:

This finding is misleading because it implies that CB&I's competitors in the LNG market would be building an LNG tank for the first time. In fact, CB&I's competitors in this market have deep experience in this area. In fact, in light of the recent upturn in demand for concrete LNG tanks, CB&I actually faces a disadvantage in that it has completed fewer such tanks than its competition. (FOF 3.43, 3.45, 3.152, 3.546).

351. CB&I has worked many "years" to "streamline its processes" and lower its costs. (CX 392 at 3).

Response to Finding No. 351:

Respondents have no specific response to this finding, except to note that its international LNG competitors and other competitors have also worked hard to streamline their processes.

352. The construction of an LNG import terminal, from the initial ground breaking to completion, takes four to five years. (Outtrim, Tr. 700; *see also* CX 162 at CB&I-PL006153; CX 214 at CB&I-PL033809).

<u>Response to Finding No. 352:</u>

Respondents have no specific response to this finding.

353. If FERC approval is required, the total time to complete the LNG peakshaving project would increase by an additional year, thereby delaying entry by another year. (CX 168 at CB&I-PL007235).

<u>Response to Finding No. 353:</u>

This finding is vague, as the meaning of "delaying entry by another year" is unclear. While the FERC process can delay the timetable of an LNG project, it does not necessarily do so. To the extent this finding implies that the FERC filing process will delay entry of new competitors in the market, this finding is inaccurate. The evidence shows that Skanska/Whessoe has already entered the market, winning an LNG EPC project despite the fact that a FERC application needed to be filed by Dynegy. (Puckett, Tr. 4548-49; *see also* FOF 3.244, 3.312).

354. Mr. Scully testified that a TVC with a 30-foot diameter can take about two years to design and construct. (Scully, Tr. 1108).

<u>Response to Finding No. 354:</u>

Respondents have no specific response to this finding.

355. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx]**. (CX 629 at CB&I-PL033069, *in camera*).

<u>Response to Finding No. 355:</u>

Respondents have no specific response to this finding.

356. Learning by doing represents a barrier to entry in each of the markets. (Simpson, Tr. 3237). Dr. Simpson testified that economic studies have found that producers in a number of industries (*e.g.*, air frame production, chemical processes, construction of nuclear power plants) become more efficient as their cumulative output increases. (Simpson, Tr. 3230) Dr. Simpson noted that as these producers produce more and more of a product, they learn better ways of producing that product. (Simpson, Tr. 3231).

Response to Finding No. 356:

This finding is inaccurate. As courts have recognized, experience is not a barrier to entry because it can be overcome. (Opening Br. at 9-10). Further, the evidence shows that learning by doing has not been an entry barrier in the LPG and LIN/LOX markets, as companies have successfully entered the market without prior corporate experience in building LIN/LOX tanks. (*See* FOF 4.9, 4.121, 4.123 (LPG); FOF 5.22-5.71 (LIN/LOX)). "Learning by doing" is also not an entry barrier in the LNG market, as all of the new entrants in this market have the necessary track record in building LNG tanks to compete effectively in the U.S. (FOF 3.56-3.227).

357. Builders of LNG tanks benefit from learning by doing. Samuel Leventry, CB&I's vice president of technology services, testified: "Again, if you have the same people doing the same work more continuously, there's going to be some efficiencies in that." (CX 497 at 68 (Leventry, Dep.); CX 392 at 4).

Response to Finding No. 357:

This finding is misleading to the extent it implies that CB&I's competitors in the LNG markets are at a disadvantage to CB&I in terms of learning by doing. All of the new entrants in this market have the necessary track record in building LNG tanks to compete effectively in the U.S. (FOF 3.56-3.227).

358. Learning by doing in each of the markets is specific to individual countries. Dr. Simpson testified that some learning by doing is specific to the United States. (Simpson, Tr. 3242) This learning includes becoming familiar with U.S. regulations, knowing the local work force and identifying who the better subcontractors are. (Simpson, Tr. 3242-43). A foreign company that has built LNG tanks overseas would therefore still need to learn by doing in order to compete in the United States LNG market. (Simpson, Tr. 3242 (citing CX 1204); CX 1204; CX 1575; RX 738 at 2).

Response to Finding No. 358:

This finding is inaccurate and not supported by record evidence. The process of building an LNG tank does not differ materially from country to country; the process of learning

applicable regulations, becoming familiar with the local work force, and identifying subcontractors is the same. (FOF 3.509-3.570). Further, this finding is misleading to the extent it implies that CB&I has a competitive advantage over its competitors in the LNG market in identifying suitable labor and subcontractors. Foreign entrants have chosen to partner with large U.S. construction firms, such as H.B. Zachry and S&B Engineers & Constructors. These partnerships give these entrants access to any advantages associated with knowing local workforces and working with local subcontractors. (FOF 3.550-3.559). Further, this finding is misleading to the extent it implies that CB&I's prior experience in building LNG tanks in the U.S. provides any sort of competitive advantage. Because the labor force for such a project is locally recruited, this prior experience is both dated and irrelevant. (FOF 3.552). This alleged CB&I advantage is not quantified and is paltry.

359. According to Dr. Simpson, CB&I and PDM had been building these tanks for about 40 years. Over time, as they built more of these tanks, they figured out ways to lower their costs. When CB&I bought PDM in 2001, CB&I bought the only other company that had worked its way down the learning curve. Thus, if an entrant were to enter now, it would have higher costs than CB&I because it has not worked its way down the learning curve. Because CB&I would have lower costs than this entrant, CB&I could increase its price by some amount without losing sales to this entrant. In this way, learning by doing represents an entry barrier in this industry. (Simpson, Tr. 3237-38).

Response to Finding No. 359:

This finding is inaccurate and not supported by record evidence. Complaint Counsel relies solely on the unsupported opinions of its hired expert witness to argue that CB&I has lower costs than its competitors because it has some type of "learning by doing" advantage. Contrary to Complaint Counsel's claims, new entrants have extensive experiences in building LNG tanks throughout the world. (FOF 3.56-3.227). Further, even if CB&I had such an advantage, Complaint Counsel assumes that it would preclude other companies from effectively competing in the U.S. This is wrong, as these competitors could still remain competitive in the

face of any alleged advantage identified by Complaint Counsel. The record evidence shows that new entrants have advantages over CB&I in terms of experience in the concrete portions of LNG tanks that could easily offset any advantages that CB&I may have. (*E.g.*, FOF 3.45, 3.66-3.67, 3.148-3.152).

360. Dr. Harris acknowledges that entry is more difficult if an incumbent firm has lower costs. (Harris, Tr. 7443). If a prospective entrant found that it has a substantial cost disadvantage, that would affect the likelihood that it would enter. (Harris, Tr. 7443).

Response to Finding No. 360:

This finding is irrelevant because there is no evidence that an "incumbent firm" has lower overall costs than new entrants. In fact, as discussed above in connection with Finding 359, new entrants have advantages over CB&I that could result in cost advantages. Further, the fact that companies are actually entering the market suggests that they do not believe they have cost disadvantages relative to CB&I. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); FOF 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

361. Both economic experts agree that the economic literature recognizes learning by doing as a barrier to entry. (Simpson, Tr. 3238; Harris, Tr. 7440).

Response to Finding No. 361:

This finding is irrelevant because there is no credible evidence to support the view that "learning by doing" is an entry barrier in this case, as companies have entered or become more active in the relevant markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); FOF 5.79-5.184 (LIN/LOX customers are satisfied with prices

received and available competitive options)). For example, learning by doing was not an entry barrier for AT&V in the LIN/LOX market, because it was actually able to enter the market.

362. Learning by doing can provide a cost advantage to incumbent firms in a market. Jean Tirole, an authority identified by Dr. Harris (Harris, Tr. 7416-7), cites Bain (1956) to explain how learning by doing can provide established firms an absolute cost advantage over entrants that would prevent supranormal profits of the established firms from being eroded by entry: "Absolute cost advantages The established firms may own superior production techniques, learned through experience (learning by doing) or through research and development (patented or secret innovations)." J. Tirole, *The Theory of Industrial Organization* 306 (1988); *id.* at 305. Dr. Harris agrees. (Harris, Tr. 7440).

Response to Finding No. 362:

This finding is irrelevant because there is no credible evidence to support the view that "learning by doing" is an entry barrier in this case, as companies have entered or become more active in the relevant markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). For example, learning by doing was not an entry barrier for AT&V in the LIN/LOX market, because it was actually able to enter the market.

363. If the learning-by-doing cost advantage is substantial enough, other firms may choose not to enter the market. Carlton & Perloff, at 363. Dr. Harris agrees. (Harris, Tr. 7441).

Response to Finding No. 363:

This finding is irrelevant because there is no credible evidence to support the view that "learning by doing" is an entry barrier in this case, as companies have entered or become more active in the relevant markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). For example, learning by doing was not an entry barrier for AT&V in the LIN/LOX market, because it was actually able to enter the market.

364. Dr. Harris further agreed with Scherer & Ross that it is possible that "when learning economies are important, the capturing of an initial advantage by some company could set in motion a dynamic process that ends with the relevant product more or less permanently monopolized." Scherer & Ross, at 372. (Harris, Tr. 7441).

Response to Finding No. 364:

This finding is irrelevant because there is no credible evidence to support the view that "learning by doing" is an entry barrier in this case, as companies have entered or become more active in the relevant markets. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). For example, learning by doing was not an entry barrier for AT&V in the LIN/LOX market, because it was actually able to enter the market. Further, the outcome predicted by Scherer and Ross simply did not occur in this case. The relevant products are not "monopolized" as Complaint Counsel implies; vibrant competition exists in each of the product markets in which demand exists. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54, 4.59-4.62 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

5. *Inability to Complete Projects on Schedule Impedes Entry*

365. According to CB&I's 1995 10-K, "competition is based primarily on performance and the ability to provide the design, engineering, fabrication, project management, and construction required to complete projects in a timely and cost-efficient manner. Chicago Bridge believes its position is among the top in its field." (CX 1030 at 7).

Response to Finding No. 365:

Respondents have no specific response to this finding.

366. According to Mr. Kelley, whether a tank supplier can construct a tank on schedule "is often a critical factor." (JX 27 at 67 (N. Kelley, Dep.)). An LPG customer, such as ITC, relies on a tank supplier's expected completion date to accept shipments of LPG, delays in

schedule exposes the customer to the risk of financial loss for each day the customer cannot accept shipment: "there's monthly rental that you don't get ... and your money is hanging out there not making money for you for that period of time." (JX 27 at 66 (N. Kelley, Dep.)).

Response to Finding No. 366:

This finding is misleading to the extent that a tank contractor's ability to construct a tank on schedule poses a barrier to entry. CB&I notoriously did not meet their schedules on time for LPG customers. (Cutts, Tr. 2510-11) (FOF 4.132). PDM did not deliver the Sea-3 project in Tampa on time. (Warren, Tr. 2308) (FOF 4.137). However, despite these flaws, ITC would be willing to accept bids in the future once these problems have been corrected. (N. Kelley, Tr. 7126-27) (FOF 4.136). Moreover, this finding is irrelevant because all of the new entrants identified by Respondents have a demonstrated ability to deliver tanks on schedule. For example, AT&V is one of the best tank makers in the U.S. as measured by schedule. (Cutts, Tr. 2510-12) (FOF 5.39). Mr. Kelley, cited by Complaint Counsel, confirmed that AT&V completed a recent LPG project for ITC on schedule. (N. Kelley, Tr. 7130; FOF 4.39-4.40). Finally, PDM's experience on the Sea-3 LPG project and the Penuelas LNG project shows that the market need not replace PDM with a firm with a perfect on-time track record. (Izzo, Tr. 6482; Carling, Tr. 4474-75; FOF 4.137, 4.139, 4.142).

367. To minimize the risk of delays, Fluor reviews a potential LPG tank supplier's referrals to ensure that in the past the supplier performed adequately, was able to meet the schedule, and avoided problems, before it allows a tank supplier to bid on an LPG project. (Warren, Tr. 2291-92; *see* CX 415 at 2).

Response to Finding No. 367:

This finding is irrelevant because all of the new entrants identified by Respondents have a demonstrated ability to deliver tanks on schedule. For example, AT&V is one of the best tank makers in the U.S. as measured by schedule. (Cutts, Tr. 2510-12) (FOF 5.39). This finding is also irrelevant because it is based on the testimony of a Fluor witness.

Fluor is not a current customer for LPG tanks, nor does Fluor have any expectation of procuring an LPG tank in the future.

This finding is misleading to the extent Complaint Counsel is asserting that tank supplier referrals are a barrier to entry. In addition, Fluor's prequalification practice is irrelevant to the current LPG market and lacks foundation. The last time Fluor procured an LPG tank was in 1998. (Warren, Tr. 2284, 2318) (FOF 4.148). In fact, Fluor's prequalification process was not even utilized on the Tampa Sea-3 project in 1998. (Warren, Tr. 2281) (FOF 4.145). Moreover, Fluor has no plans to procure a field-erected LPG tank in the future, and Ms. Warren is not aware of any other LPG projects that Fluor has been involved in other than Sea-3. (Warren, Tr. 2315-16) (FOF 4.154, 4.155).

368. TVC customers are also concerned about the supplier's ability to meet the project schedule, as delays in testing a satellite can engender financial liabilities for satellite manufacturers. A key procurement criteria for **[xxxxx]** when selecting a supplier for the **[xxxx xxxx]** was the supplier's ability to meet its expedited schedule on prior projects. (**[xxxxx]**, Tr. 1897-98, *in camera*). To mitigate the risk of a delay in the construction of the **[xxxxxxxxxx]**, **[xxxxx]** spent an additional **[xxxxxx]** million to ensure that it could test its new **[xxxxxx]** at **[xxxxx]** if the **[xxxxxx]** was not completed on time. (**[xxxxx]**, Tr. 1898-99, *in camera*).

Response to Finding No. 368:

Respondents have no specific response to this finding.

369. TRW's selection criteria requires potential suppliers to show a history of successfully performing five chamber projects, financial viability including the ability "to pay their bills for this venture," and "technology innovation." (Neary, Tr. 1443-44, 1492).

Response to Finding No. 369:

Respondents have no specific response to this finding.

6. *Lack of Knowledge about Tank Construction Business Conditions in the United States Impedes Entry*

370. LNG tank suppliers have a "home court advantage" when supplying tanks in their own countries. (Simpson, Tr. 3227). Dr. Simpson demonstrated this with a world map on which Dr. Simpson identified the locations where various firms have built LNG tanks. (CX 1649; Simpson, Tr. 3227-8). One explanation for this home court advantage is that purchasers in a

particular area want to buy from companies that have previously supplied tanks in that area. (Simpson, Tr. 3229).

Response to Finding No. 370:

This finding lacks any support in the evidentiary record. It is based solely on the speculation of Complaint Counsel's expert witness. Further, this finding is irrelevant and contrary to the evidence, as there is no evidence in the record that any alleged "home court advantage" has prevented an LNG tank builder from entering the U.S. market. Indeed, those companies already entering the market have been well-received by U.S. LNG customers. (FOF 3.247-3.255).

371. In order to compete for the relevant products, an entrant will need to establish a local presence in the United States. Respondents and customers perceive that familiarity with the United States, its codes, and local labor, provides a company that has experience building the relevant products in the markets with a competitive advantage. CCFF 373-386.

Response to Finding No. 371:

This finding is irrelevant and inaccurate. It is irrelevant because virtually all of the new entrants identified by Respondents have a "local presence in the United States." (*E.g.*, FOF 3.57, 3.63, 3.66-3.73, 3.102-3.108, 3.155-3.178, 3.195-3.227). Further, the great weight of the evidence demonstrates that customers do not believe that a company with experience building LNG tanks in the U.S. have any competitive advantage. (*E.g.*, Izzo, Tr. 6505-06, 6511-12; Bryngelson, Tr. 6146, 6160; Carling, Tr. 4487-96; *see also* FOF 3.247-3.255; RFOF 373-386).

372. Prior to the acquisition, CB&I and PDM had a competitive advantage over other firms because they had an efficient core group of workers for projects, and other workers that repeatedly interacted with those workers and were familiar with CB&I and PDM's procedures. (Simpson, Tr. 3207-08, 3212).

Response to Finding No. 372:

This finding is vague, irrelevant, and unsupported by the evidence. It is vague because it does not identify which product market it refers to. Further, Complaint Counsel cites no evidence to support its finding of fact, other than the unsupported conclusions of its hired expert witness. Finally, this finding is irrelevant because the competitive advantages enjoyed by PDM and CB&I over its competitors (if any) in the past do not necessarily exist today.

373. Dr. Simpson testified that by hiring workers throughout the U.S. and using these workers on projects, CB&I and PDM have learned over time who the good workers are and thus learn which workers to hire for which projects. Over time, the workers learn what procedures CB&I and PDM use. As these workers become familiar with these procedures, they become more productive. (Simpson, Tr. 3167, 3207-10 (citing CX 615 at 72-73 and Hall, Tr. 1797-78)).

Response to Finding No. 373:

This finding is irrelevant and unsupported by the evidence. It is irrelevant because the evidence proves that companies other than CB&I have similar access to "good workers." In fact, the evidence is squarely to the contrary. For example, AT&V currently employs a number of PDM and CB&I field workers. (Cutts, Tr. 2426-27). Similarly, CB&T also employs former CB&I and PDM employees, and boasts a workforce that is even more capable than CB&I's. (*See* Stetzler, Tr. 6322-23). Similarly, competitors in the LNG markets have equal access to good workers. In fact, it is likely that CB&I's competitors in the LNG markets have even better access to good construction workers. For example, Zachry advertises itself as the largest open-hire shop in the U.S. (FOF 3.141-3.194; RX 256 (state of mind)). Further, this finding not based on credible evidence, as it relies primarily on the testimony of a hired expert to generate factual findings.

374. Regional companies are generally limited to knowledge of the work force in their regions. (Simpson, Tr. 3210-12). Because they do not know the work forces in other regions, they would have some difficulty in doing work in those regions. (Simpson, Tr. 3210-12) (citing to CX 485 at 97).

Response to Finding No. 374:

This finding is irrelevant and unsupported by the evidence. It is irrelevant because none of the new entrants identified by Respondents are "regional companies." For example, AT&V recently won a LIN/LOX tank job for BOC in Hillsboro, Oregon, even though it is based in Houston. (FOF 5.116). Further, AT&V has an international presence, as do all of the entrants in the LNG markets. (FOF 3.56-3.227). Further, this finding is unsupported by credible evidence, as it relies on the testimony of a paid expert for factual assertions.

375. Respondents' ordinary course of business documents and statements to the investment community emphasize that they are uniquely positioned to take advantage of their local knowledge of localized business conditions in the United States. This local knowledge gives Respondents a competitive advantage. CCFF 377-386.

Response to Finding No. 375:

This finding of fact is vague, irrelevant, and misleading. It is vague because it does not refer to a specific document or a specific product market. It is irrelevant because it assumes that any alleged "competitive advantage" will preclude new entry from occurring in the relevant markets. As Respondents have amply demonstrated, this conclusion is false because entry has already occurred in the relevant markets.

376. On Texaco's Ferndale project, Mr. Raymond Maw of Morse and Mr. James Crider of Texaco testified that Morse's proximity to Texaco's Ferndale facility gave Morse a competitive advantage over other bidders. (Maw, Tr. 6599-600; Crider, Tr. 6721).

Response to Finding No. 376:

This finding is misleading and inaccurate to the extent that it applies to the overall Ferndale project. As stated in this finding, Morse's proximity to Texaco's Ferndale facility gave Morse a transportation cost advantage of $70,000. However, this transportation cost advantage was outweighed by the labor cost disadvantage of $180,000 due to Morse's union collective bargaining agreement obligations. (Maw, Tr. 6563-64, 6565-66, 6680) (FOF 4.99, 4.108-4.111).

As set forth in RFOF 179, this union obligation results in a higher wage payment, greater benefits, and subsistence cost obligations incurred by Morse that a nonunion employer, such as CB&I and PDM, would not be required to pay. (Maw, Tr. 6553-56) (FOF 4.99-4.109). In fact, Dr. Simpson even admitted that he did not know Morse was a union employer, that Morse in fact paid subsistence costs on the Ferndale project, and that the Ferndale project was a nonunion project. (Simpson, Tr. 5554-57). Dr. Simpson explicitly stated that Morse would have been "at a disadvantage on a merit [nonunion] job." (Simpson, Tr. 5555). Even Dr. Simpson noted that he did not know if Morse's disadvantage outweighed any locational cost advantage. (Simpson, Tr. 5557).

377. Morse's local presence also gave Morse "a $70,000 cost advantage for transportation" over the other bidders on the Ferndale project. (Maw, Tr. 6564-5).

Response to Finding No. 377:

Respondents do not dispute the truth of this finding. However, this local transportation cost advantage was outweighed by the labor cost disadvantage of $180,000 due to Morse's union collective bargaining agreement obligations, as set forth in RFOF 179 and RFOF 376. (Maw, Tr. 6563-64, 6565-66, 6680) (FOF 4.99, 4.108-4.111).

378. Mr. Norman Kelley confirmed that a local presence is preferred, because local companies are "just more accessible [] and it 's easier to do business." (JX 27 at 91 (N. Kelley, Dep.)). Mr. Kelley stated that "it would be hard [for an LPG company with no local presence in the United States]... to get business to start out with." (JX 27 at 73 (N. Kelley, Dep.)). "If they don't have anything in the [S]tates for you to go look at, why, I'm not going to go to France to look at their stuff." (JX 27 at 73-74 (N. Kelley, Dep.)).

Response to Finding No. 378:

This finding is misleading because Mr. Kelley also testified that a local contractor does not hold a competitive advantage as compared to another domestic supplier. For instance, he cited AT&V as ITC's (Houston) most competitive supplier and AT&V is located in Alabama. (N. Kelley, Tr. 7121) (FOF 4.130). Likewise, ITC dealt with PDM, who was located in

Pittsburgh at the time. Moreover, Mr. Kelley testified that domestic LPG customers would consider foreign suppliers of LPG tanks. In fact, some domestic LPG customers, such as ITC, are foreign owned. (N. Kelley, Tr. 7111) (FOF 4.54). In addition, Mr. Kelley testified that he would travel to France or Tokyo if he could take his wife. (CX 689 at 73-74 (N. Kelley, Dep.)).

379. Mr. Blaumueller testified that it is not a "prudent risk" to purchase from a supplier with no experience building LNG tanks in the United States. (Blaumueller, Tr. 310).

Response to Finding No. 379:

This finding is irrelevant. Mr. Blaumueller has not been involved in the purchase or construction of an LNG tank since 1973 and lacks the necessary foundation to discuss the LNG market. (FOF 3.642-3.649). Further, Mr. Blaumueller's views have been forcefully contradicted by virtually every current customer for LNG facilities in the U.S. (FOF 3.247-3.255).

380. For Black & Veatch, until a new entrant has built an LNG tank in the United States, "the risks, potential risks, have not gone away." (Price, Tr. 578).

Response to Finding No. 380:

This finding is irrelevant because it is based on the testimony of a witness with a personal bias against CB&I. (Opening Br. at 85-87). It is also irrelevant because Black & Veatch is not a customer for LNG tanks; rather, it is a competitor to CB&I in the LNG markets. (Opening Br. at 85-87).

381. An inexperienced supplier can incur delays in securing the necessary regulatory approvals from FERC. Mr. Blaumueller testified that the FERC approval process can add approximately twelve months to the process of building an LNG tank. (Blaumueller, Tr. 316).

Response to Finding No. 381:

This finding is irrelevant and lacks evidentiary support. Mr. Blaumueller has not been involved in the purchase or construction of an LNG tank since 1973 and lacks the necessary foundation to discuss the LNG market. (FOF 3.642-3.649). Further, Mr. Blaumueller's views

have been forcefully contradicted by customers actually participating in the LNG market. Current customers have explained that they, not the tank contractor, are responsible for "securing the necessary regulatory approvals from FERC." (FOF 3.519-3.527). Current customers who have used foreign suppliers to assist in the FERC process have been satisfied with their work and have not experienced any delays in the FERC process caused by the tank contractor. (*E.g.*, Eyermann, Tr. 6975) (FOF 3.519-3.527).

382. Customers place a premium on the value of CB&I and PDM's substantial experience in obtaining project approval. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]**. (Sawchuk, Tr. 6072-73; *see also* **[xxxxxxxxxx]**, Tr. 719, *in camera* **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx]**, Tr. 703, *in camera* **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**).

<u>Response to Finding No. 382:</u>

This finding is inaccurate and not supported by the evidence. Current customers have testified that owners, not tank contractors, are responsible for "obtaining project approval." (FOF 3.519-3.527). Further, Complaint Counsel's argument is contradicted by the evidence. Two current U.S. customers have used foreign tank suppliers to assist it in preparing FERC permit applications. These customers have found foreign tank builders' work product in this regard to be of good quality. (*E.g.*, Eyermann, Tr. 6975) (FOF 3.519-3.527). Finally, Complaint Counsel's finding is suspect because it relies on the testimony of Patricia Outtrim, who has little to no foundation to discuss the specifics of the LNG markets and CB&I's alleged advantages relative to other competitors. (Opening Br. at 86-87; FOF 3.683-3.696).

383. **[xxxxxxxxxxxxxxxxxxxxxxxxxxx]** testified that it is "too big of a hurdle" for a new entrant to come in and beat CB&I; it will take years before foreign LNG tank firms can establish themselves as effective competition to CB&I: **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (**[xxxxx],** Tr. 703, 716, 727, *in camera*).

<u>Response to Finding No. 383:</u>

Complaint Counsel's finding is irrelevant and not supported by the weight of the evidence. It is irrelevant because it relies exclusively on the testimony of Patricia Outtrim, a competitor of CB&I. Further, Ms. Outtrim acknowledged that she had no useful information regarding the abilities of foreign firms vis a vis CB&I. (FOF 3.683-3.696). Perhaps more importantly, Ms. Outtrim's theories regarding entry barriers have been proven wrong, as new entry has already occurred in the LNG market. (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market)).

384. Bidding experience is another country-specific intangible asset that gives CB&I a competitive advantage over other firms.

<u>Response to Finding No. 384:</u>

Complaint Counsel's finding is wholly unsupported by record evidence and should be rejected out of hand.

385. If a firm that is bidding for a particular project lacks good information about the actual cost of completing that project, there would be some error in its estimate of the cost of completing the project. The firm might bid too low, or it might bid too high. If the firm bids too low, it runs the risk of winning the project at a price at which it would lose money. This type of error is called the winner's curse. To guard against the winner's curse, a firm that is uncertain of the actual cost of completing a project will include a cushion in its bid. As the firm's uncertainty increases, the size of the cushion increases. Given this, economic theory would predict that bid quotations from firms that are less knowledgeable about the cost of completing projects in the United States, such as recent entrants, will tend to have a larger cushion than bids from firms that are experienced and knowledgeable about costs in the United States, such as CB&I and PDM. These larger cushions translate into higher bids for recent entrants. (Simpson, Tr. 3249-50 (citing Eric Rasmussen, *Games & Information*, 590-91, 588-89 (1989))).

Response to Finding No. 385:

This finding is irrelevant because none of the firms know their competitors' costs, including CB&I. (FOF 7.82-7.88). Dr. Simpson himself has done no cost analysis whatsoever, so this proposed finding is totally meaningless in this case. (FOF 7.150-7.156).

7. *Entrants Face Higher Sunk Costs Because They Must Buy their Way into the Markets*

386. Dr. Simpson testified that an entrant seeking to develop building experience, bidding experience, and a reputation faces a "catch-22" situation. Dr. Simpson testified that, in order to win projects, a firm must have a good reputation and be a low-cost provider. However, it is difficult for a firm to establish a good reputation and become a low-cost provider until that firm has actually won projects. (Simpson, Tr. 3252-53). In order to overcome the "catch-22 situation," a new firm may try to buy its way into the market by offering prices that are lower than its costs. (Simpson, Tr. 3254).

Response to Finding No. 386:

This finding is vague because it does not refer to a specific product market. It is inaccurate and misleading because it assumes that new entrants do not already have the necessary building experience, bidding experience, and reputation, and would have to "buy in" to the market. This assumption is incorrect. All of the new entrants identified by Respondents already have these assets. In the LNG markets, new entrants are large, sophisticated companies with deep experience in LNG bidding contests. (FOF 3.56-3.227). In the LIN/LOX market, AT&V and Matrix have already successfully bid on and built LIN/LOX to the satisfaction of customers. (FOF 5.31-5.34, 5.45-5.50). The same is true for AT&V in the LPG market. (FOF 4.17-4.19).

387. Dr. Harris conceded that foreign LNG tank companies may have to buy their way into the U.S. LNG tank market in order to overcome reputation barriers and higher costs (Harris, Tr. 7252-53).

Response to Finding No. 387:

This finding is a distortion of Dr. Harris' testimony. Dr. Harris did not testify that LNG tank companies "may have to buy their way" into the LNG market. He merely pointed out that it was an option available to any new entrant. (*See* Harris, Tr. 7252-53).

388. A process by which a new firm would attempt to buy its way into a market would represent a significant cost of entry. (Simpson, Tr. 3254 (citing CX 1204)). Because projects in the relevant markets are infrequent, it would take an entrant a number of years to buy several projects, enter the market, and recover its original investment. (Simpson, Tr. 3257; CX 1204). In Dr. Simpson's expert opinion, the expectation that it would take several years for an entrant to recover its original investment would make entry less likely. (Simpson 3257).

Response to Finding No. 388:

For the reasons set forth in CB&I's Response to Finding 386, this finding should be rejected.

389. Dr. Simpson's review of the record indicates that U.S. LNG tank customers would prefer a U.S. supplier over a foreign supplier at the same price, due to the fact that U.S. suppliers know the market, have experience in constructing the tanks, and will be more likely to meet the projects' schedules. (Simpson, Tr. 3257).

Response to Finding No. 389:

This finding is inaccurate. It is based solely on the testimony of Complaint Counsel's hired expert, which contradicts the great weight of the evidence. Current LNG customers are willing to consider foreign LNG tank builders on a equal footing with CB&I. They do not perceive that CB&I has any advantage over foreign companies in terms of knowing the market, scheduling, or experience. (FOF 3.565-3.570).

390. Based on his examination of the pre-merger contribution margins and profit margins in the relevant markets Dr. Simpson concluded that it would not have been profitable for a firm to buy its way into the market before the acquisition. (Simpson, Tr. 3257-58). Because the contribution margins, or the profit that new entrants would make on the last units sold, on the relevant products were small (under 15 percent) prior to the acquisition, a new firm 's cost of entry would likely not be offset by the contribution margins that it would make on projects. (Simpson, Tr. 3258).

Response to Finding No. 390:

For the reasons set forth in CB&I's Response to Finding 386, this finding should be rejected.

391. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxx]**, Tr. 4752-53, *in camera*).

Response to Finding No. 391:

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (FOF 3.150-3.151).

J. Other Firms Cannot Replace PDM **<u>Because of Respondents' Competitive Advantages</u>**

392. CB&I and PDM were the only two companies that had extensive experience building the relevant products in the United States. CCFF 136, 151, 172, 192. As a result of their extensive localized experience and knowledge, Respondents have a distinct competitive advantage against other firms, particularly foreign suppliers. CCFF 400-418.

Response to Finding No. 392:

Complaint Counsel's finding number 392 is incorrect because Respondents do not have a distinct competitive advantage against other firms, particularly foreign suppliers. RFOF 400-418. For example, as has been noted already, foreign firms such as Technigaz may have a distinct competitive advantage over CB&I for the construction of LNG tanks since increasingly LNG tanks are double and full containment, which requires an expertise in concrete that CB&I lacks. (Jolly, Tr. 4439-40; RFOF 119). Further, since the Acquisition, AT&V has won *more than half* of all LIN/LOX tank projects. (Harris, Tr. 7308). CB&I has no competitive

advantages in the LPG market. (FOF 4.120-4.143). Moreover, CB&I and PDM were not the only companies with experience; many other competitors have experience. (*E.g.* Harris, Tr. 7213; FOF 3.57-3.227). Finally, this proposed finding is vague since Complaint Counsel does not specify product market.

393. Respondents have emphasized in this proceeding the value of their experience as a source of competitive advantage. As CB&I's Chief Engineer described in Respondents' Motion for Perpetual *In Camera* Treatment of certain engineering documents, "CB&I has, for many years, **worked to streamline its processes to reduce costs and improve quality**." (CX 392 at 3 (emphasis supplied)). CB&I expressed concern that information regarding its own and PDM's "best practices initiative would be valuable to a competitor." (CX 392 at 3). Indeed, as Respondents pointed out, "CB&I has been in business for over a hundred years; it was unable to develop the best practices from PDM without combining the two companies." (CX 392 at 3).

Response to Finding No. 393:

Complaint Counsel's finding number 393 indicates that there is indeed a high level of competition in the alleged product markets; that CB&I went to great lengths to shield its best practices from competitors indicates that CB&I does not have the market power Complaint Counsel alleges. Further, other firms testifying at trial similarly request *in camera* treatment for testimony and documents. If CB&I had market power in the alleged markets, and if there were barriers to entry prohibiting competitors from entering the alleged markets, CB&I would not have filed a motion for *in camera* treatment. Further, CB&I's competitors have worked towards the very same goals for years. As Respondents have shown, there is competition in the alleged product markets; accordingly CB&I is protective of any competitive strengths it may have.

394. CB&I went on to describe how "In the storage tank business, **innovations provide benefit to the innovator for a lengthy period of time**. In this way, our business is different than high-technology business, which involve technologies that quickly become obsolete over time. Because of the long-lasting benefits that our innovations will generate, I believe it is imperative that information regarding these innovations be protected from public view indefinitely." (CX 392 at 4) (emphasis supplied)).

<u>Response to Finding No. 394:</u>

Complaint Counsel’s finding number 394 is irrelevant because it does not suggest that any “innovations” of CB&I are not surpassed by the innovations of its competitors; indeed there is evidence in the record that CB&I’s competitors’ “innovations” place them at a competitive advantage over CB&I. (*E.g.* Jolly, Tr. 4439-40; Glenn, Tr. 4141).

395. In a March 2000 presentation, CB&I stated that its "110 years of industry experience" gave CB&I a "Competitive Advantage." (CX 230 at CB&I-PL055446).

<u>Response to Finding No. 395:</u>

Complaint Counsel’s finding number 395 is misleading. Competitors of CB&I presently have competitive advantages. For example, Skanska/Whessoe offers a combination of skills for the LNG and associated markets that “few can rival.” (RX 870, at 6/138) (FOF 3.60). TKK is the “world’s leader” in constructing double and full containment LNG tanks. (Cutts, Tr. 2572-73) (FOF 3.101). CB&T has stated that it has competitive advantages in the LIN/LOX market. (FOF 5.66, 5.67). Further, it is inappropriate to cite commercial puffery as verified fact.

396. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 111 at PDM-HOU008396, *in camera*).

<u>Response to Finding No. 396:</u>

Complaint Counsel’s finding number 396 is irrelevant. This expresses what PDM thought -- it does not make it true. Further, whether PDM was differentiated from “certain” competitors in 1995 does not indicate whether CB&I’s acquisition of PDM’s EC division in 2001 will lessen competition in 2003 or thereafter.

397. Mr. Price testified that Respondents' experience in the United States gave them a competitive advantage over other companies because both companies "know the lay of the land, if you will, in the U.S. and are, in our opinion, better able to quantify that and price accordingly." (Price, Tr. 589-90).

Response to Finding No. 397:

Complaint Counsel's finding number 397 is irrelevant because the new entrants all have experienced U.S. partners who have experience in the U.S. know the lay of the land. (FOF 3.57-3.227). Further, Brian Price's testimony lacks foundation and is biased. First, Mr. Price personally has a patent on technology that competes head-to-head with CB&I. (Price, Tr. 642) (FOF 3.659). Further, Black & Veatch, for whom Mr. Price works, is a head-to-head competitor of CB&I's. (Price, Tr. 641) (FOF 3.659). Mr. Price and Black & Veatch directly gain from a decision in this case adverse to CB&I. Further, Mr. Price lacks the requisite first-hand knowledge to make such a statement; neither Black & Veatch nor Brian Price have procured an LNG tank since 1990. (Price, Tr. 643-44) (FOF 3.665).

398. CB&I's acquisition of PDM has only increased this local knowledge competitive advantage. In a 2002 bid proposal, CB&I emphasized that its acquisition of PDM "has also increased our abilities and expertise for projects such as yours." (CX 449 at 7403).

Response to Finding No. 398:

Complaint Counsel's finding number 398 is irrelevant. First, CB&I's sales pitches are just that: sales pitches. Complaint Counsel's use of puffery to prove substantive facts is weak at best. Further, even if it is true that the Acquisition increased CB&I's abilities and expertise, it is not quantified and cannot negate the fact that it is in highly competitive markets competing against capable entrants.

1. *Respondents Have Unequaled Competitive Advantages in the LNG Market*

399. According to CB&I's Chief Engineer, CB&I has worked "years" to "streamline its processes" and lower its costs. (CX 392 at 3). CB&I's acquired "experience with special materials," as characterized by a March 2000 presentation, gave CB&I a "strong position with proprietary technology" in LNG. (CX 230 at CB&I-PL055440).

Response to Finding No. 399:

The proposed finding mischaracterizes and inaccurately cites CX 230. Page CB&I-PL055440 of CX 230 does not even mention "experience with special materials" or "proprietary technology." Complaint Counsel is mischaracterizing the information on CX 230 because it failed to question any witnesses or deponents about this document. For example, there is nothing in CX 230 which suggests that CB&I's alleged experience with "special materials" has given CB&I a "strong position in propietary technology". Nor does it account for the similar experiences of CB&I global competitors.

400. These efforts have resulted in a cost advantage over other competitors on LNG projects. When asked, post-acquisition, about CB&I's ability to compete for LNG projects, Mr. Glenn informed investors that for LNG tanks "we can win the work every time technically." (CX 1731 at 44; Glenn, Tr. 4380, emphasis added).

Response to Finding No. 400:

The proposed finding is ambiguous, misleading, and is not supported by the evidence. Complaint Counsel fails to cite any evidence supporting its conclusory remark that "these efforts" have resulted in a cost advantage over other competitors on LNG projects. Further, Complaint Counsel mischaracterizes Mr. Glenn's statement by attributing them to the LNG market. Mr. Glenn's statement is classical commercial puffery and referred to CB&I's global business across all of its products lines, not just the LNG market. (Glenn, Tr. 4402).

401. Mr. Glenn recognized that other companies could not compete at CB&I's cost level without going out of business, saying "if [other companies] 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." (CX 1731 at 44; Glenn, Tr. 4380).

Response to Finding No. 401:

The proposed finding is ambiguous, misleading, and is not supported by the evidence. Complaint Counsel has failed to demonstrate Mr. Glenn's foundation for making a statement relating to "other companies" "costs." Complaint Counsel also mischaracterizes Mr.

Glenn's statement by attributing them to the LNG market. Mr. Glenn's statement referred to CB&I's global business, across all of its products lines, not the LNG market. (Glenn Tr. 4402) (RFOF 401).

402. Mr. Newmeister of Matrix testified that a new entrant into LNG tanks would be likely to operate at a higher cost level than an experienced supplier like CB&I for some time while the entrant learned from its mistakes. (Newmeister, Tr. 1605-6).

Response to Finding No. 402:

The proposed finding is misleading, and mischaracterizes the testimony of Mr. Newmeister. Mr. Newmeister's testimony is solely limited to his speculation about Matrix's ability to compete with CB&I for LNG projects; his testimony does not refer to "a new entrant". (Newmeister, Tr. 1605-06).

403. In actual LNG tank bidding projects where foreign firms competed against CB&I, foreign competitors have bid at higher prices than CB&I did (or could have) and have been unable to match CB&I's prices. This can be seen in the stories of the Dynegy project CCFF 979-1007, the **[xxx]** projects CCFF 832-883, and the Memphis project CCFF 930-944.

Response to Finding No. 403:

The proposed finding grossly misrepresents the evidence, and is speculative. CB&I never submitted a bid for the Dynegy project. Dynegy received bids from TKK/AT&V, Skanska/Whessoe, and Technigaz/Zachry; not only is there no evidence that the foreign competitors bid a a higher price than CB&I could have, each of the three foreign bids were within Dynegy's expected price range, and Dynegy was satisfied with the prices. (Puckett, Tr. 4556-57, 4559-60; Glenn, Tr. 4137) (FOF 3.287-3.288, 3.303) Further, **[xxx]** has not even held a bidding process for any of its proposed LNG projects. (**[xxxxxxxxxxx]** 6091) (FOF 3.422). The Memphis project is not relevant because the bidding process occurred in 1994, almost nine years ago, when foreign companies such as Noell Whessoe were reluctant to enter the U.S. LNG

market. (Hall, Tr. 1771, 1778-80; Scorsone, Tr. 5014; Kistenmacher, Tr. 895, 939-40) (FOF 3.493-3.508).

2. *Respondents Have Unequaled Competitive Advantages in the LPG Market*

404. CB&I and PDM were each other's closest competitors because they enjoyed the same cost advantages, as a result of their similarly extensive experience. CCFF 113, 122-123, 304-307, 322-420.

Response to Finding No. 404:

This finding is misleading, inaccurate and repetitive for the reasons set forth in RFOF 113, 122-123, 304-307, and 322-420.

405. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 486; CX 824; CX 1210, *in camera*; CX 1212 at 7, *in camera*; CX 397 at 1, *in camera*; RX 757).

Response to Finding No. 405:

This finding is misleading, inaccurate, incomplete and duplicative of CCFF 172. Accordingly, Respondents refer this Court to RFOF 171-173.

406. There are no LPG tank suppliers in the United States that can match Respondents' track record. (CX 152). (*See* CX 160 at CB&I-PL004768; CX 171 at CB&I-PL009817; CX 172 at CB&I-PL009975; CX 179; CX 190 at CB&I-PL017044; CX 207 at CB&I-PL031456; CX 217 at CB&I-PL 034420; CX 244 at CB&I-PL4005377; CX 417 at CB&I 026845-52-HOU).

Response to Finding No. 406:

This finding is misleading and irrelevant because it ignores the current state of competition in the LPG market and current LPG customer preferences. For instance, Mr. Kelley of ITC testified that such experience is not necessary. (N. Kelley, Tr. 7117-18, 7131-32) (FOF 4.121). In fact, he selected a contractor for the ITC LPG project without any knowledge as to AT&V's LPG track record. (N. Kelley, Tr. 7104-05) (FOF 4.123). Further, Morse was selected for the Ferndale LPG project by Texaco with full disclosure regarding Morse's lack of any prior LPG experience. (Maw, Tr. 6550-51) (FOF 4.90). This finding is also misleading because the

record evidence demonstrates that, other LPG suppliers have recently matched CB&I in the LPG market. (N. Kelley, Tr. 7092, 7137 ("AT&V beat the socks off of CB&I.")) (FOF 4.56).

407. CB&I is recognized as one of the leading tank builders in the world and markets itself as the "largest tank builder in the world." (CX 258 at CB&I-H001794). CB&I has been building refrigerated storage tanks, such as LPG tanks, since World War II. (CX 258 at CB&I-H001794). CB&I has built over 1100 field-erected low-temperature and cryogenic tanks, which includes LPG tanks. (CX 258 at CB&I-H001793).

Response to Finding No. 407:

This finding is misleading and irrelevant for a variety of reasons. First, marketing materials are unreliable given their puffery and self-serving nature. Second, the fact that CB&I has been building LPG tanks since World War II is irrelevant to the current state of competition in the LPG market. In fact, most of the current competitors in that market were not in the LPG market during World War II, let alone in existence, such as AT&V and Matrix. (N. Kelley, Tr. 7088-89, 7085, 7090; Cutts, Tr. 2334; Stetzler, Tr. 6355, 6365; CX 394 at 8 (Cutts, Dep.), CX 396, CX 397) (FOF 4.17-4.19, 4.43-4.46, 4.47-4.49). Further, such historical data does not account for the lack of demand and virtually non-existent market for LPG tanks. (Harris, Tr. 7281-82) (FOF 4.10-4.15).

408. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]**. (CX 890 at CB&I 069832 ("Schedule is a major advantage for CB&I."); CX 124 at PDM-HOU 2011161 (**[xxxxxxxxxxxxxxxxxxxxxxxxx]**CX 217 at CB&I-PL-034447, *in camera*.

Response to Finding No. 408:

This finding is misleading, inaccurate and contrary to the record evidence. For instance, Mr. Kelley of ITC testified that such experience is not necessary. (N. Kelley, Tr. 7117-18, 7131-32) (FOF 4.121). In fact, he selected a contractor for the ITC LPG project without any knowledge as to AT&V's LPG track record. (N. Kelley, Tr. 7104-05) (FOF 4.123). Further, Morse was selected for the Ferndale LPG project by Texaco with full disclosure regarding Morse's lack of any prior LPG experience. (Maw, Tr. 6550-51) (FOF 4.90). Despite this alleged

"extensive experience," CB&I notoriously does not meet their schedules on time for LPG customers, and makes mistakes in the design of tanks. (Cutts, Tr. 2510-11; N. Kelley, Tr. 7124-25) (FOF 4.132, 4.134). Similarly, PDM did not deliver the Sea-3 project on time due to poor engineering of the tank, resulting in late procurement of equipment and materials. (Warren, Tr. 2308; Scorsone, Tr. 4826-28) (FOF 4.137-4.143).

409. Customers know of no competitive suppliers, other than CB&I and PDM, of field-erected LPG tanks in the United States. (Newmeister, Tr. 1614; Warren, Tr. 2307-08, 2309, 2283-4 (post-acquisition, CB&I is now the only supplier that is prequalified to bid on LPG tanks)).

Response to Finding No. 409:

This finding is grossly misleading, inaccurate, and blatantly ignores the record evidence in this case. The direct testimony of customers in this case reveals that not only has AT&V successfully built an LPG tank, but "AT&V beat the socks off of CB&I." (Cutts, Tr. 2455-56; N. Kelley, Tr. 7092, 7130-31, 7137) (FOF 4.22, 4.56). Further, post-Acquisition activity demonstrates that CB&I is not the only prequalified LPG supplier, as AT&V and Wyatt fiercely competed with CB&I on the ABB Lummus project in 2001. (Scorsone, Tr. 5039-43) (FOF 4.66-4.70). Moreover, Ms. Warren lacks foundation regarding the LPG market: she has not been involved in the LPG market or the procurement of such a tank since 1998; she is not aware of any plans to construct an LPG tank; she has no knowledge of current companies with the ability to construct LPG tanks; and has no knowledge of companies Fluor would prequalify to build an LPG tank. (Warren, Tr. 2284, 2309, 2315-18) (FOF 4.148-4.157). In fact, Ms. Warren was not even the customer on the Sea-3 projects -- the actual customer responsible for selecting a contractor was Sea-3. (Warren, Tr. 2275, 2280, 2316) (FOF 4.149). Similarly, Mr. Newmeister is not an LPG customer, but a direct competitor at Matrix. As a result, his testimony

should be discounted as biased, self-serving and financially motivated. (Newmeister, Tr. 2180-82; N. Kelley, Tr. 7085, 7090) (FOF 4.43-4.46).

410. Dr. Harris stated that he has no evidence that any of the foreign tank companies that he (Dr. Harris) identified on his demonstrative exhibit RX-948 have chosen to construct LPG tanks in the United States. (Harris, Tr. 7779). Dr. Simpson testified that neither TKK, Skanska-Whessoe, nor Technigaz would be sufficient to restore the preacquisition level of competition in the LPG market. (Simpson, Tr. 3407; see RX 738 at ¶ 15, *in camera* **[xxxxxxxxxxxxxxxx]** as "no plans" to compete for single containment LNG tanks, LIN/LOX tanks, LPG tanks or TVCs)).

Response to Finding No. 410:

This finding is misleading and irrelevant because LPG customers in the U.S., those actually competing in the market, testified that foreign tank contractors have solicited business for LPG tanks constructed in the U.S. (N. Kelley, Tr. 7126) (FOF 4.53). Further, the actual evidence in the current LPG market as demonstrated on the only post-Acquisition LPG project indicates sufficient competition exists to force a price decrease on the project from a four percent margin to a 2.5 percent margin as well as spur innovation in the tank design. (Scorsone, Tr. 5039-43) (FOF 4.66-4.70).

411. Dr. Simpson testified that firms such as AT&V, Matrix Services, and Wyatt Field Services would not be able to restore the preacquisition level of competition in the LPG market. (Simpson, Tr. 3408-9). Dr. Simpson noted that AT&V is much smaller than PDM was and that all three firms lack the building experience and the reputation that PDM possessed. (Simpson, Tr. 3409).

Response to Finding No. 411:

This finding is misleading and irrelevant in light of the current events in the LPG market post-Acquisition, as set forth in RFOF 182 and 410. On the ITC project, AT&V constructed a *field-erected* LPG tank, a project that was completed on time, without any defects, to the satisfaction of the customer, at a fair price, and through a competitive bidding process that did not include PDM. (N. Kelley, Tr. 7088-89, 7130-31; Cutts, Tr. 2455-56, 2495) (FOF 4.16-4.42). Moreover, Mr. Kelley of ITC testified that such experience is not necessary. (N. Kelley,

Tr. 7117-18, 7131-32) (FOF 4.121). In fact, he selected a contractor for the ITC LPG project without any knowledge as to AT&V's LPG track record. (N. Kelley, Tr. 7104-05) (FOF 4.123). Further, Morse was selected for the Ferndale LPG project by Texaco with full disclosure regarding Morse's lack of any prior LPG experience. (Maw, Tr. 6550-51) (FOF 4.90).

3. Respondents Have Unequaled Competitive Advantages in the LIN/LOX Market

412. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx]**. (*See* CX 171 at CB&I-PL009817; CX 244 at CB&I-PL005377; CX 449 at CB&I-E 007403, CX 471 at PDM-CH 003456; CX 1152 at CB&I-HWH 075021; CX 1486 at CB&I 059970; CX 1488 at CB&I 059894; CX 224 at CB&I-PL-039363-390; CX 244 at CB&I-PL-4005377 ("CB&I has built over 600 field erected cryogenic storage tanks of all types.")).

<u>Response to Finding No. 412:</u>

The proposed finding is irrelevant and has little bearing on the competitive successes of LIN/LOX tank suppliers in the United States today because LIN/LOX customers purchase tanks largely on the basis of low price. As Michael Patterson, of MG Industries, said "low price will always get you there." (Patterson, Tr. 480) (FOF 5.145). This quote has been proven true through evidence admitted at trial. Post-Acquisition, AT&V has won three of the four competitively-bid LIN/LOX projects based on low prices. (FOF 5.76-5.78, 5.96, 5.124). Moreover, testimony from other customers support the fact that LIN/LOX buyers purchase on price. For example, Victor Kelly testified that BOC was satisfied with AT&V's "low cost" price for LIN/LOX tanks and BOC plans to use AT&V for future projects. (V. Kelley, Tr. 4599-4600, 5272, 5282). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.]**

413. PDM's lower cost structure for LIN/LOX tanks gave it a cost advantage over CB&I. In its Marketing Analysis, CB&I admitted that its "[c]ost structure [in low temperature and cryogenic] is too high, particularly on small jobs." (CX 217 at CB&I-PL034421).

Response to Finding No. 413:

The proposed finding is irrelevant because current competitors also enjoy the ability to price below CB&I's cost structures. Specifically, AT&V knows it has an advantage over CB&I and can sell LIN/LOX tanks at a lower price. (Cutts, Tr. 2572). Further, CB&I recognized that AT&V has, on recent projects in the relevant markets, offered pricing that "is below [CB&I's] flat cost." (RX 273).

414. CB&I and PDM personnel comparing pricing data on a LOX tank for Air Liquide in Longview, Texas, three weeks after the acquisition had occurred, "found that the PDM cost was much lower than the CB&I cost for the same project. PDM bid this work for 9% S&GA and 1 or 2% profit. CB&I's final number included about 9.5% S&GA and -12% profit." (CX 136 at CB&I 014195-HOU).

Response to Finding No. 414:

The proposed finding is unreliable and irrelevant. First, no testimony is cited by Complaint Counsel explaining what the document is or providing context for the numbers which they chose to pull out. The statement is unreliable because it is merely an excerpt from an Exhibit CX 136 that has never been testified on or put into context. Complaint Counsel never called a witness to testify regarding CX 136, despite the fact that it easily could have. Therefore, the record is devoid of information with which to place these figures into context and to understand them.

Moreover, the finding is irrelevant because AT&V has replaced PDM as the low cost provider of LIN/LOX tanks. (**[xxxxxxxxxxxxxxxxxx]** V. Kelley, Tr. 4599-4600, 5272; RX 208). AT&V has beaten CB&I on three of the four competitively bid LIN/LOX projects awarded post-Acquisition. (Opening Br. at 99) (Scorsone, Tr. 5017-5018) (FOF 5.78).

415. Post-acquisition, CB&I now enjoys the competitive advantages of CB&I and PDM's combined experience and PDM's low cost structure. CCFF 1082.

Response to Finding No. 415:

The proposed finding is misleading because since CB&I's Acquisition of PDM in 2001, CB&I has won only two of the five LIN/LOX projects have been awarded by U.S. LIN/LOX customers. (Scorsone, Tr. 5015-16) (RFOF 154, 156, and 157). In fact, post-Acquisition, AT&V has filled the role of low cost LIN/LOX provider. **([xxxxxxxxxxxxxxxxxx]** V. Kelley, Tr. 4599-4600, 5272; RX 208). All told, AT&V has won three of the four competitively-bid LIN/LOX projects since the Acquisition. (Opening Br. at 99) (Scorsone, Tr. 5017-5018) (FOF 5.78). CB&I has attempted to compete against AT&V on three of the competitively bid projects and lost to AT&V each time. CB&I has yet to win a LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018). Complaint Counsel's own expert economist, Dr. Simpson admitted that he may have underestimated the competitive strength of AT&V in the LIN/LOX market. (Simpson, Tr. 3703-3707).

4. ***Respondents Have Unequaled Competitive Advantages in the TVC Market***

416. PDM gained efficiencies and reduced costs by assigning experienced employees on TVC projects. In an e-mail written relating to the Spectrum Astro TVC project, Mr. Scorsone wrote that "[t]he retirement of Fred Dilliott will hurt our ability to manage [the Spectrum Astro project]" and "Bob Watson has left the company and this will hurt our ability to manage the engineering and startup program." (CX 1685 at CB&I/PDM-H 4000903).

Response to Finding No. 416:

Complaint Counsel cites CX 1685 which is not evidence which has been admitted into the record. Since it relies on non-record evidence, this Court must reject this finding.

417. Mr. Scully testified that CB&I and PDM's extensive experience in TVC has established an industry-wide confidence level in the two firms that has evolved over the years. (Scully, Tr. 1110, 1040).

Response to Finding No. 417:

This finding misstates Mr. Scully's testimony. In fact, Mr. Scully never testifies that this industry-wide level of confidence applies to CB&I or PDM. (Scully, Tr. 1110, 1040).

Furthermore, Mr. Scully lacked the foundation to speak for the "industry." Complaint Counsel also ignores record substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxxxxxxx]** (FOF 6.40).

418. According to a CB&I marketing analysis document, **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx]**. (CX 217 at CB&I-PL034470, *in camera*).

<u>Response to Finding No. 418:</u>

CB&I marketing documents contain "puffery." (FOF 6.31, 6.33). Additionally, Complaint Counsel ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I had already exited from the TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxxxxx]** (FOF 6.40).

419. CB&I does not consider Howard capable of fabricating a TVC, let alone having the capability to design, engineer, and field erect a TVC. (Scorsone, Tr. 5061 ("I think that would be a real stretch for Howard, very much so.")

<u>Response to Finding No. 419:</u>

Respondents have no specific response, except that it only applies to the past assessment of Howard Fabrication and that this assessment could change in the future.

K. Foreign and Domestic Firms Cannot Replace PDM

1. *CB&I Does Not Foresee Other Firms Restraining Its Market Power*

420. Respondents argue to the Tribunal that any number of foreign and domestic firms can replace PDM. However, Respondents have not produced any business records or statements from executives inside or outside of the courtroom that any one of these "entrants" have restrained CB&I's market power since the merger, or that one of these firms has replaced PDM as CB&I's closest competitor to the same extent as PDM did before the merger.

Response to Finding No. 420:

Complaint Counsel's finding number 420, which is without citation, is untrue and irrelevant. First, Respondents are not required to prove that entrants "have restrained CB&I's market power since the merger, or that one of these firms has replaced PDM as CB&I's closest competitor. A showing of actual entry is not even necessary. The mere threat of entry can rebut a prima facie case. *Baker Hughes*, 908 F.2d at 988. The "mere threat" of entry could rebut a prima facie case if "these firms would exert pressure on the United States . . . market even if they never actually entered the market." *Id.* Evidence of the absence of entry barriers to the relevant markets rebuts a prima facie case. *Id.* at 989. Respondents have shown actual entry, and even Dr. Simpson admits that there has been actual entry. (Simpson, Tr. 3952-53, 5605) (FOF 7.227, 7.229). Finally, CB&I documents do indicate that prices have been constrained. (*E.g.* RX 208, RX 627). In any case, whether CB&I's documents talk about whether their prices are constrained does not bear on whether CB&I's prices have in fact been constrained and whether prices have increased. Finally, specific examples where CB&I's pricing was constrained include a projects for MG Industries, (FOF 5.151-5.158), Air Liquide, (FOF 5.123-5.125), CMS and Southern LNG (FOF 3.470-3.480, 3.485-3.486), ABB/Lummus (FOF 4.66-4.70) and in Trinidad (FOF 3.140, 3.327-3.331).

421. Respondents ordinary course of business documents and communications to the public prior to the commencement of this proceeding uniformly characterize the competitive landscape as dominated by CB&I and unthreatened by foreign and domestic firms.

Response to Finding No. 421:

Complaint Counsel's finding number 421, completely unsupported by evidence or citation, is false. First, as noted above, there are documents specifically discussing competition and how it is difficult for CB&I to compete. (*E.g.* RX 208, RX 627). Further, Complaint Counsel has never presented a document or communication since the announcements of potential entrants were made of plans to enter that characterizes the competitive landscape as dominated by CB&I and unthreatened. Further, this proposed finding is clearly irrelevant. because the foreign entrants/joint ventures had not publicly announced plans to enter the U.S. market until after the date any CB&I documents presented by Complaint Counsel.

422. Although Respondents suggest that international companies, *e.g.*, TKK, IHI, Hyundai, Technigaz, and Whessoe, are competitors who can compete effectively at pre-merger prices, a PDM document identifies these firms as competitors only on international projects. (CX 116 at PDM-HOU019181; *see* CX 96 at PDM-HOU 2009785).

Response to Finding No. 422:

Complaint Counsel's finding number 422 is blatantly misleading because the cited documents all predate foreign entry and fail to consider joint ventures or mergers of these firms. (CX 116). CX 116 dates from 1999 or earlier, and similarly, CX 96 dates from 1998. The above listed foreign firms had not yet expressed any intent to enter the domestic markets in 1998 or 1999. (*See, e.g.* RX 818, RX 82, RX 306. RFOF 421).

423. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]**. (CX 213 at CB&I-PL033084, *in camera*).

Response to Finding No. 423:

Complaint Counsel's finding number 423 is irrelevant because CB&I was wrong when it stated that nearly five years ago. There has not, is not, and will not be a competition void. (Harris, Tr. 7192). The comment is further irrelevant because entry sufficient to fill the

void within two years is considered under the *Merger Guidelines*. CB&I clearly expected entry to occur, but it occurred faster than expected -- within one year.

424. In its 2001 10-K, CB&I represents to its investors that "Because of our long-standing presence in numerous markets around the world, we have a prominent position as a local contractor in those markets." (CX 1033 at 4).

Response to Finding No. 424:

Complaint Counsel's finding number 424 is irrelevant because it clearly addresses "numerous markets around the world," and does not specify the domestic market or the alleged product markets. (CX 1033 at 4). The alleged product markets are only a very small percentage of CB&I's overall business. (Scorsone, Tr. 4844; Glenn, Tr. 4168) (FOF 9.14). Thus, the document more likely refers to other markets.

425. This "long-standing presence" has provided CB&I with a competitive advantage over other competitors. CB&I management believes that CB&I is a "leading competitor in its markets," and that "it is viewed as a local contractor in a number of regions it services by virtue of its long-term presence and participation in those markets. *This perception may translate into a competitive advantage* through knowledge of local vendors and suppliers, as well as of local labor markets and supervisory personnel." (CX 1033 at 8; CX 1032 at 8; CX 1575 at 6-7 (emphasis added))

Response to Finding No. 425:

Again, Complaint Counsel's finding number 425 is irrelevant because "its markets" clearly refers to the "numerous markets around the world" quoted in finding number 425 and does not specify the domestic market or the alleged product markets. (CX 1033 at 4). The alleged product markets are only a very small percentage of CB&I's overall business. (Scorsone, Tr. 4844; Glenn, Tr. 4168) (FOF 9.14). Thus the document more likely refers to other markets. Further, it says such a perception "*may* translate into a competitive advantage," not that it *does*. This supposed advantage is not quantified. Finally, the foreign entrants are not perceived by customers as having a disadvantage to CB&I in the US because of CB&I's longer

presence here. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227; 4.16-4.54; 5.79-5.184).

426. In its amended 10-K, filed April 1, 2002, CB&I notes that "[o]ur experience, particularly in risk management and project execution, enables us to recognize and capitalize upon attractive opportunities in our primary end markets...We believe that our ability to identify attractive customers and rapid growth markets *will provide a competitive advantage* during changing market conditions." (CX 1033 at 5 (emphasis added))

Response to Finding No. 426:

Complaint Counsel's finding number 426 is irrelevant because CB&I's "primary end markets," to which CB&I is referring in this 10-K, are not the alleged tank markets which provided CB&I over 1.5% in revenue in FY 2002. (Scorsone, Tr. 4844; Glenn, Tr. 4168) (FOF 9.14).

427. According to CB&I's 10-K, filed April 1, 2002, "[b]ecause of [CB&I's] long and outstanding safety record, we are invited to bid on projects for which other competitors do not qualify." (CX 1033 at 4).

Response to Finding No. 427:

Complaint Counsel's finding number 427 is irrelevant because CB&I is clearly referring to its overall business, which is comprised primarily of projects *not* in the alleged product markets. (CX 1033 at 4; Scorsone, Tr. 4844; Glenn, Tr. 4168) (FOF 9.14). All of the entrants identified by respondents are in fact being qualified to bid in the U.S.. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

428. On October 31, 2002, Mr. Glenn touted CB&I's competitive advantage over other competitors in a conference call with the investment community: "[W]e're really proud of the fact that, you know, a lot of owners out there, if they go to build a sophisticated project, like an LNG project or an LNG tank, they don't want to take a chance on a low price and a potential

second class job or shoddy welding or any of that kind of stuff ... We have an excellent track record." (CX 1731 at 44-45).

Response to Finding No. 428:

Complaint Counsel's finding number 428 is irrelevant because CB&I is not the only supplier capable of building LNG tanks who has an excellent track record. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

429. Mr. Glenn added that CB&I has a pricing advantage: "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." (CX 1731 at 44-45).

Response to Finding No. 429:

Complaint Counsel's finding number 429 is irrelevant because CX 1731 does not in any way suggest CB&I has a pricing advantage. It suggests that CB&I does not understand its competitors' ability to price low when CB&I cannot earn a profit on the same price. Further, Mr. Glenn does not have foundation to make statements about competitors' costs. Complaint Counsel has not provided any evidence that indicates that CB&I knows its competitors costs. Conversely, the evidence indicates that CB&I does *not* know its competitors' costs. If CB&I knew its competitors' costs and had a cost advantage, it would win every project. However, CB&I has lost more than half the jobs available post-merger. (Harris, Tr. 7223). There is simply no support for the notion that CB&I is only losing because competitors are simply "taking a big dive," and Mr. Glenn has never offered testimony suggesting that he is knowledgeable about competitors' costs. Finally, ultimately customers will pay less *if* what Mr. Glenn is saying is true -- and it represents the competitive environment CB&I would be competing in.

430. Mr. Glenn described CB&I's "high" margin levels and faith that CB&I can maintain its position against competitors because "we can still be low bidder and make more money on it than most of our competitors, if not all of them." (CX 1731 at 41-42).

Response to Finding No. 430:

Complaint Counsel's finding number 430 is irrelevant because Complaint Counsel completely misses the point of what Mr. Glenn was saying when he described CB&I's high margin levels. In fact, CB&I is realizing high *overall* profits margins, but this is based mostly on CB&I's acquisition of Howe-Baker, and on profits in its *overall* business, which is comprised primarily of products not in the alleged markets. (*See* CX 1527, Glenn, Tr. 4392-93).

431. Mr. Glenn expressed little concern about CB&I's future competitiveness against foreign and domestic competitors: "The results speak for themselves, so I will only comment that our markets and prospects appear more attractive to us today than at any time in our recent past... I would give you a general comment that our prospect list and the projects that we're attracting looks better to us today than at any time since the IPO [initial public offering of stock in 1997] certainly. If you had to pick a number, I don't know, maybe it's 30 percent or something, but it's a big number." (CX 1731 at 4, 27-28).

Response to Finding No. 431:

Complaint Counsel's finding number 431 is irrelevant for the same reasons as its finding number 430: it fails to say anything about the alleged product markets. (*See* CX 1527, Glenn, Tr. 4392-93). Further, the question Mr. Glenn was answering had nothing to do with CB&I's future competitiveness against foreign and domestic competitors in the U.S., let alone in these markets. (*See* CX 1731 at 4, 27-28).

432. A key merger planning document acknowledges that Respondents have a "pricing advantage" against competitors, and it is the plan of Respondents to use this "pricing advantage as necessary to not lose market share to competitors during the merger." (CX 1544 at CB&I 057941).

Response to Finding No. 432:

Complaint Counsel's finding number 432 is a grotesque distortion of the record because it fails to mention that Mr. Glenn explicitly testified that this document reflects goals for

CB&I's overall business, not particularly the alleged product markets. (Glenn, Tr. 4321-22). The fact that this is a goal of CB&I does not make it accurate; the record suggests CB&I has no pricing advantage. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (*See* FOF 3.68-3.227, 4.16-4.54, 5.22-5.71, 5.79-5.184.

433. Another key merger planning document states that one of the "objectives" of the merger is to "ensure that we do not allow smaller competitors to take share and pursue business in our attractive markets." (CX 101 at PDM-HOU002359).

Response to Finding No. 433:

Complaint Counsel's finding number 433 is irrelevant because of course PDM would have wanted to keep its market share; that is not to say that its desire to protect its business means it could prevent entry. Further, finding number 433 is not market specific, and therefore fails to provide evidence useful to an analysis of the relevant product markets. Finally, that PDM hoped to retain market share is irrelevant; it was acquired and ceased to exist.

434. The same merger planning document states that foreign and domestic firms will not impinge CB&I's post-merger growth because "barriers to entry" will be created. (CX 1544 at CB&I 057941).

Response to Finding No. 434:

Complaint Counsel's finding number 434 is irrelevant because CB&I has no power to create barriers to entry. Further, the evidence supports a finding that entry is easy. (FOF 3.509-3.563; 4.71-4.136; 5.219-5.223).

435. Mr. Scorsone's business conduct reflects Respondents' inattention to foreign or other domestic companies. Mr. Scorsone admitted that he could not recall whether Respondents actually maintained a file of press releases concerning the activities of foreign LNG suppliers (Scorsone, Tr. 5096). Mr. Scorsone further admitted that the press releases relating to joint ventures with foreign LNG tank suppliers were received from attorneys, and testified that if he ever did receive these releases in the course of business, he "probably threw them out." (Scorsone, Tr. 5097).

Response to Finding No. 435:

Complaint Counsel's finding number 435 is utterly false. Mr. Scorsone testified that he did try to track the foreign LNG suppliers. (Scorsone, Tr. 5226-5233). Further, in an early 2000 document, prior to the Acquisition, Mr. Scorsone wrote of his concern that an increase in demand for LNG might cause the foreign firms to enter. (Scorsone, Tr. 5233, CX 1737). Mr. Scorsone also said he read LNG Express regularly, and saw the press releases in there. (Scorsone, Tr. 5227-28). Finally, Mr. Scorsone is a high level executive; filing is not typically the province of Presidents of companies. Whether CB&I keeps a file of something is irrelevant to whether the Acquisition substantially lessens competition in the relevant markets.

2. *The Firms Cited by Respondents as Entrants Cannot Replace PDM*

436. An entrant faces two disadvantages in competing against CB&I. It lacks the reputation that CB&I has, and it lacks the cost advantages that CB&I has gained through learning by doing. (Simpson, Tr. 3259). If an entrant decides that it will not buy its way into the market, then it will have to wait for a project where, for some reason, its services are preferred to the incumbent firm. (Simpson, Tr. 3258-9). Dr. Simpson then noted that foreign LNG tank builders had not been able to win projects in the U.S. when CB&I and PDM were competing. Dr. Simpson then noted that CB&I is the "best positioned company to win a particular project," and that it will win projects if it bids at or near its cost of constructing the project. (Simpson, Tr. 3261). If, however, CB&I bids double its cost, it is more probable that a foreign entrant will be able to win projects. (Simpson, Tr. 3261).

Response to Finding No. 436:

Complaint Counsel's finding number 436 is false. It is important to note that Dr. Simpson is not a fact witness, thus that Dr. Simpson states something factual does not make it so. First, the evidence indicates that there are entrants with good reputations. For example, Skanska/Whessoe has a good reputation (*See* Izzo, Tr. 6496-98; [**xxxxxxxxxxxxxxxxxxxxx];** Sawchuck, Tr. 6062; Eyermann, Tr. 6994; Rapp, Tr. 1333; Bryngleson, Tr. 6130; Carling, Tr. 4485-86; Hall, Tr. 1805, 1845). (FOF 3.63, 3.77, 3.78-3.85). **[xxxxxxxxxxxxxxxxxxxxxxx**

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xxxxxxxxxxxxx] (Jolly, Tr. 4700-01) (FOF 3.93). Another example is TKK/AT&V, who also has an excellent reputation. (*See* Cutts, Tr. 2572-73; Puckett, Tr. 4584-85; Bryngleson, Tr. 6128; Carling, Tr. 4522-23; Rapp, Tr. 1326) (FOF 3.101-3.140). Technigaz/Zachry is yet another example of an entrant who has a good reputation. (*See* Puckett, Tr. 4557-78; Izzo, Tr. 6499, 6505; Sawchuck, Tr. 6062-63, 6092; Rapp, Tr. 1325; Carling, Tr. 4487) (FOF 3.178-3.186). Clearly, there are entrants with good reputations.

Second, Complaint Counsel has presented no evidence whatsoever indicating that CB&I has a cost advantage over any competitors or entrants. Certainly Dr. Simpson offered no cost analysis whatsoever. (*See* Harris, Tr. 7339). There is economic evidence, however, suggesting that CB&I does *not* have a cost advantage over its competitors. (Harris, Tr. 7317, 7322-23).

437. Dr. Simpson testified that a new entrant would not gain sufficient learning by doing and reputation from "winning a single job or a small number of jobs" to compete on an equal footing with CB&I in the United States. (Simpson, Tr. 3253-4, 3261). As evidence for this, Dr. Simpson cited two examples. Dr. Simpson noted that Morse Tank was successful in winning a project to build an LPG tank in Washington state in 1994. However, after having completed that project, Morse Tank did not win any other projects to build LPG tanks in the U.S. Dr. Simpson then noted that later PDM documents identifying competitors for LPG tanks in the U.S. do not list Morse Tank as a competitor. (CX 116 at PDM-HOU019181; CX 859 at PDM-HOU 017571) Based on this, Dr. Simpson testified: "the Morse Tank experience suggests that it was a one-time job that this Morse Tank company was able to win, but winning that job did not make them a competitor on an equal footing with CB&I or PDM EC." (Simpson, Tr. 3262).

Response to Finding No. 437:

Complaint Counsel's finding number 437 does not make sense. If Morse Tank did not build another LPG tank, it would be impossible to assess whether Morse Tank "learned by doing" the Ferndale, Washington project. Further, Complaint Counsel has presented no evidence that Morse Tank ever bid on another LPG tank; thus it is impossible to say that Morse Tank would not have won another LPG project. In fact, Morse Tank never did bid on another LPG project. (Maw, Tr. 6588-89). Finally, CB&I has never claimed that Morse Tank is now a

competitor. Morse Tank simply serves to illustrate how easy entry is in the LPG market -- Morse bid, won, built the project, and made money, without the so-called learning by doing advantages. This stands as direct evidence refuting Dr. Simpson's theory that there are significant learning by doing advantages.

438. Dr. Simpson testified that ATV's entry into the market for pressure spheres represents a second example where winning one or two jobs did not allow an entrant to compete on an equal footing with an established incumbent firm. (Simpson, Tr. 3262-3). Pressure spheres are large, field erected structures for storing gases under pressure. (Simpson, Tr. 3263). Dr. Simpson noted that respondents cite a partnership between TKK, a Japanese engineering firm, and ATV, a U.S. construction firm, as being a new entrant into the LPG market whose presence would help discipline CB&I's pricing. (Simpson, Tr. 3263).

Response to Finding No. 438:

Complaint Counsel's finding number 438, comprised of two non-sequiturs, is irrelevant. First, pressure spheres should not be included in this case at all. (*See* Harris, Tr. 7301-02). The issue of pressure spheres has been dropped by Complaint Counsel and there is no record evidence regarding competition or entry in the pressure sphere market. Second, AT&V's success in the pressure sphere market is irrelevant to its success in the alleged product markets, and is irrelevant to its ability with TKK to enter the LNG market.

439. Dr. Simpson noted that although ATV won and completed three projects to build pressure spheres in the mid 1990s, it has not won any subsequent pressure sphere projects. (Simpson, Tr. 3263). Dr. Simpson then analyzed the sales of pressure spheres from 1995 to the time of the acquisition. According to Dr. Simpson, ATV won its first pressure sphere project in 1993. By January 1995, ATV should have completed this project. If completing one project placed ATV on an equal footing with incumbent firms, then ATV should have had a one-third chance of winning subsequent pressure sphere projects. Of the 57 pressure sphere projects awarded between 1995 and the time of the acquisition, CB&I won 31, PDM won 25, and ATV won 1. Given this sample, Dr. Simpson computed the probability that ATV would have won 1 or fewer pressure sphere projects if it had a one-third chance of winning. Dr. Simpson calculated this probability as being extraordinarily small. (Simpson, Tr. 3274-7 (citing CX 1651)). Dr. Simpson testified: "[b]ased on this, I inferred that you cannot assume that a company competes on an equal footing with established firms simply because it has completed one project." (Simpson, Tr. 3276).

Response to Finding No. 439:

Complaint Counsel's finding number 439 is irrelevant because AT&V's competitiveness in the pressure sphere market has no bearing on its competitiveness in the alleged product markets. And, it has won far more than one project in the LIN/LOX market. Further, unlike the pressure sphere market, regarding which there is no evidence, there is ample evidence of AT&V's LIN/LOX and LNG capabilities in today's markets. (*See* Harris, Tr. 7301-02).

440. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Simpson, Tr. 3265 (citing to CX 86 at CH002617; CX 1163 at CB&I-H001114, *in camera*)). Dr. Simpson concluded that buyers of pressure spheres do not regard ATV as a good substitute for CB&I (Simpson, Tr. 3277).

Response to Finding No. 440:

Complaint Counsel's finding number 440 is irrelevant because AT&V's competitiveness in the pressure sphere market has no bearing on its competitiveness in the alleged product markets. (*See* Harris, Tr. 7301-02). Further, there is no record evidence indicating that AT&V ever performed poorly on a pressure sphere job. Dr. Simpson relies on a CB&I document for this conclusion -- whether CB&I documents suggest this does not support a conclusion that AT&V ever performed poorly on a pressure sphere project. Finally, the perceptions of buyers in the LIN/LOX and LPG markets is very favorable. (FOF 4.55-4.58, 5.79-5.164).

441. Foreign LNG tank suppliers, such as Skanska/Whessoe, and partnerships between foreign LNG tank suppliers and domestic firms, such as AT&V/TKK and Technigaz/Zachry, cannot replace PDM because these firms have higher costs and lack the experience necessary to effectively compete against CB&I for LNG projects. CCFF 448-482, 555-7 (AT&V/TKK); CCFF 530-541 (Whessoe); CCFF 542-556 (Technigaz/Zachry).

Response to Finding No. 441:

Complaint Counsel's finding number 441 is wrong. First, Complaint Counsel has presented no evidence or analysis of CB&I's current or pre-Acquisition costs, PDM's costs, or its competitors costs. Further, what evidence there is indicates that CB&I does not have a cost advantage, and that competitors are well situated to compete. (*See* Izzo, Tr. 6496-98; **[xxxxxxxx xxxxxxxx];** Sawchuck, Tr. 6062; Eyermann, Tr. 6994; Rapp, Tr. 1333; Bryngleson, Tr. 6130; Carling, Tr. 4485-86; Hall, Tr. 1805, 1845). (FOF 3.63, 3.77, 3.78-3.85); (Jolly, Tr. 4700-01) (FOF 3.93); (*See* Cutts, Tr. 2572-73; Puckett, Tr. 4584-85; Bryngleson, Tr. 6128; Carling, Tr. 4522-23; Rapp, Tr. 1326 (FOF 3.101-3.140); (*See* Puckett, Tr. 4557-78; Izzo, Tr. 6499, 6505; Sawchuck, Tr. 6062-63, 6092; Rapp, Tr. 1325; Carling, Tr. 4487) (FOF 3.178-3.186). (*See* Harris, Tr. 7317, 7322-23, 7339).

442. Dr. Simpson testified that Skanska/Whessoe and the partnerships of TKK/ATV and Technigaz/Zachry appear to be best positioned of the possible entrants to compete in the U.S. To the extent that these companies have problems, other possible entrants would have even greater problems. (Simpson, Tr. 3329).

Response to Finding No. 442:

Complaint Counsel's finding number 442 does not make sense. Complaint Counsel only cites Dr. Simpson, who is not a fact witness. There is no evidence that any companies have "problems" -- whatever these so-called "problems" may be. This proposed finding, which fails to identify what it is even talking about, is false. The evidence shows that Skanska/Whessoe and TKK/AT&V and Technigaz/Zachry can compete on an equal footing with CB&I. (*See, e.g.* Harris, Tr. 7211, 7240, FOF 3.68-3.227).

443. Dr. Simpson testified that partnerships between foreign engineering firms and U.S. construction firms would be at a competitive disadvantage when compared with an integrated firm. (Simpson, Tr. 3212-13 (citing to CX 1033 at 4-5)). Dr. Simpson noted that when foreign engineering firms partnered with U.S. construction firms in 1994 to bid for the Memphis LNG peak shaving project, their bids were much higher than those of CB&I and PDM. (Simpson, Tr. 3213-14).

Response to Finding No. 443:

Complaint Counsel's finding number 443 is irrelevant; Skanska/Whessoe and (in LPG and LIN/LOX) AT&V, CB&T, Matrix, and others are integrated firms. Further, there is no evidence that being an integrated firm creates any competitive advantage.

444. Dr. Simpson testified that the economic literature recognizes circumstances where an integrated firm would be more efficient than a loose partnership. (Simpson, Tr. 3214). According to Dr. Simpson: "In any type of business environment, certain contingencies would arise. With an integrated firm, you have one decision-maker who can look at this contingency and determine how the firm is going to meet it, but if it's a partnership and one of these contingencies arise, they have to look at the contract to *see* how each party is going to behave under this contingency, and the contract may not specify that, and in that case, they have to sit down and negotiate again. So, what the economic literature says is that integrated firms will be more efficient in this regard." (Simpson, Tr. 3214).

Response to Finding No. 444:

Complaint Counsel's proposed finding number 444 is irrelevant; Complaint Counsel has presented no evidence that the joint ventures actually have had any of these problems or that they will have any of these problems. The issue is not whether integrated firms have some advantages under "certain contingencies" but whether they have those advantages in the relevant markets. Complaint Counsel has made no such showing. Instead the evidence indicates that the joint ventures are poised for success. Further, not all entrants are joint ventures. Skanska/Whessoe, AT&V, CB&T, Matrix, and others are integrated firms. Finally, Dr. Harris identified economic examples where it is more efficient not to be integrated. (Harris, Tr. 7250).

445. Foreign companies have not replaced the competition provided by PDM, and in fact, have not won any LPG tank contracts in the United States for the last decade. (Scorsone, Tr. 2842-43). Among domestic firms, the only firms to have built an LPG tank in the United States since 1990 were AT&V and Morse, neither of whom are able to replace PDM. AT&V lacks the track record and reliability that PDM and CB&I provided, and is not as competitive on quality. CCFF 467. Morse has since been acquired by CB&I and no longer competes. CCFF 529.

Response to Finding No. 445:

Complaint Counsel's finding number 445 is false and misleading. AT&V is perfectly capable of replacing PDM in the LPG market. For example, this proposed finding fails to account for AT&V's success in the LPG market from 2000 to the present as well as viable competitors such as Matrix and Chattanooga Boiler & Tank. (N. Kelley, Tr. 7088-89, 7085, 7090; Cutts, Tr. 2334; Stetzler, Tr. 6355, 6365; CX 396, CX 397) (FOF 4.17-4.19, 4.43-4.46, 4.47-4.49). Further, this proposed finding does not account for the lack of demand and virtually "non-existent" market for LPG tanks. (Harris, Tr. 7281-82) (FOF 4.10-4.15).

446. Firms such as Matrix, AT&V and BSL have sought LIN/LOX business from time to time, but were not significant competitors to CB&I and PDM. These firms have not competed on a regular basis, lack the experience and reliability that PDM and CB&I provided, and are not as competitive regarding pricing or quality. CCFF 512-525; CCFF 448-482; CCFF 483-489.

Response to Finding No. 446:

Complaint Counsel's number 446 is false. AT&V is presently dominating the LIN/LOX market. Matrix is also a strong competitor, as admitted by Dr. Simpson. (Simpson, Tr. 4034-35; FOF 7.227). Complaint Counsel's continued insistence that CB&I is dominant in the LIN/LOX market is directly contradicted by the fact that CB&I has lost the majority of the post-Acquisition LIN/LOX jobs -- a fact which Complaint Counsel conveniently ignores completely.

447. Smaller companies, such as Howard Fabrication and XL Technology Systems lack the size and the capability to replace PDM in the TVC market. CCFF 502-511, 569-570. Mr. Scully of XL Technologies is not aware of any foreign companies that have either supplied or bid on a TVC in the United States. (Scully, Tr. 1147-48).

Response to Finding No. 447:

Respondents have no specific response to this finding except to note that larger companies such as Matrix could replace CB&I.

3. ***AT&V Cannot Replace PDM***

448. Respondents cite AT&V as a potential replacement for PDM in the LNG market the LPG market and the LIN/LOX market.

Response to Finding No. 448:

Respondent does not dispute the truth of the proposed finding. (FOF 5.26-5.42, 5.76-5.78).

449. AT&V faces numerous problems that make it unlikely to replace PDM as CB&I's closest competitor.

Response to Finding No. 449:

The proposed finding is contradicted by evidence elicited at trail. In fact, the evidence shows that, post-Acquisition, AT&V has filled the role of low cost LIN/LOX provider. **[xxxxxxxxxxx]** V. Kelley, Tr. 4599-4600, 5272; RX 208). First, Complaint Counsel ignores evidence showing that CB&I has attempted to compete against AT&V on three of the competitively bid projects and lost to AT&V each time. Complaint Counsel cannot dispute that since the Acquisition CB&I has yet to win a LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018) (FOF 5.76-5.78). In fact, AT&V's success has been so great and its prices so low that CB&I documents reflect pessimism as to CB&I's ability to even compete in this market. (RX 208). Moreover, LIN/LOX customers have been pleased with prices they have received from AT&V. **[xxx]** and BOC, two customers who awarded LIN/LOX projects after the Acquisition to AT&V, were satisfied with the prices they received. (FOF 5.96, 5.157, 5.158).

450. **[xxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 460 at CB&I-E 007235; JX 23 at Exh. 1 **[xxxx]**; Simpson, Tr. 3292-3315). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]**. (CX 460 at CB&I-E 007235; JX 23 at Exh. 1, *in camera* **[xxxx]**; CX 1033 at 28). CB&I employs approximately 1,000 engineers. (CX 460 at CB&I-E 007235). CB&I estimates that AT&V has only a small engineering staff. (CX 460 at CB&I-E 007235).

Response to Finding No. 450:

The proposed finding is irrelevant. Regardless of AT&V's size it has proven to be a strong competitor in the LIN/LOX market. (Opening Br. at 98-103) (FOF 5.26-5.42). Complaint Counsel cannot dispute evidence in the record showing that AT&V has won a majority of the LIN/LOX tank projects awarded post-Acquisition and CB&I has yet to win a LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018) (FOF 5.76-5.78). In fact, AT&V's success has been so great and its prices so low that CB&I documents reflect pessimism as to CB&I's ability to even compete in this market. (RX 208).

451. **[xxxxxxxxxxxxxxxxxx]**. (Simpson, Tr. 3315 (citing JX 23a at 44, *in camera* **[xxxxxxxxx]**). Dr. Simpson testified that capacity constraints at AT&V would prevent AT&V from working on as many projects as PDM had worked on prior to its acquisition by CB&I. (Simpson, Tr. 3316-7).

Response to Finding No. 451:

The proposed finding is inaccurate and baseless because AT&V's success in the post-Acquisition LIN/LOX market demonstrates otherwise. First, while Complaint Counsel claims that AT&V lacks "capacity", the evidence shows that AT&V is committed to this market and has provided firm bids and budget prices for numerous LIN/LOX projects in the U.S. (Cutts, Tr. 2452-53) (FOF 5.35). Further, AT&V has won three out of four competitively bid LIN/LOX jobs since the Acquisition. (Scorsone, Tr. 5018) (FOF 5.76-5.78). In short, the evidence demonstrates that AT&V's capacity is sufficient to be a major player in this market.

452. Respondents' cast a negative image of AT&V in their profile of competitors. A PDM "Competitor Profile" states that AT&V's "quality" and "safety" are "poor." (CX 86 at PDM-CH 002617). Another PDM document notes that on past projects, AT&V "performed poorly in terms of supplying a quality tank or sphere and has not met customer safety standards. Kellogg and Bechtel threw AT&V off projects due to poor quality or poor safety practices. Moreover, in the past, Dupont, Shell-Norco and Exxon (Baton Rouge) would not let AT&V to bid on their projects." (CX 606 at PDM-CH 002617). CB&I describes AT&V's safety practices as "severely lacking ... and are being labeled as an undesirable risk by many." (CX 263 at CB&I-HOU-004606).

Response to Finding No. 452:

The proposed finding is irrelevant. First, the documents cited by Complaint have little bearing on AT&V's recent success in the LIN/LOX market. Further, Complaint Counsel provides no detail as to when the projects it refers to were completed, if the projects referenced were even in the relevant markets, or what the outcome of any alleged disputes were. The competitor files cited by Complaint Counsel are also untrustworthy because they are based on second hand intelligence gleaned by competitors and not by authoritative sources, such as the customers themselves. While Complaint Counsel could have called witnesses about these documents, Complaint Counsel did not and cites no testimony regarding the documents quoted above, which deprives the Court of any context or explanation regarding the passages selected by Complaint Counsel.

Second, direct evidence from customers details the success of AT&V and establishes customers' satisfaction with AT&V's recent work. (FOF 5.32, 5.97-5.115). BOC told AT&V, after the construction of the Midland project, that AT&V's "quality was exceptional, the schedule was good, and the safety was exceptional." (Cutts, Tr. 2453). Victor Kelley, of BOC, stated that "BOC was quite satisfied with the work AT&V did at Midland." (V. Kelley, Tr. 5287). Further validation of the quality of AT&V's work is the fact that after AT&V's performance on the Midland project it was awarded two more LIN/LOX projects, another one by BOC and one by Air Liquide. (Cutts, Tr. 2504-2506; Scorsone, Tr. 5017; Kamrath, Tr. 2006) (FOF 5.34, 5.37, 5.97-5.115).

453. AT&V has recently experienced significant construction problems on-going projects that has customers wary of ever doing business with AT&V. CCFF 466, 477-479.

Response to Finding No. 453:

The proposed finding is irrelevant. First, Complaint Counsel cites no authority for the proposed finding and names no customers who are weary of ever doing business with AT&V. Second, AT&V has had success building recent LIN/LOX tanks and customers such as BOC have been satisfied with AT&V's performance. (V. Kelley, Tr. 5287) (FOF 5.97-5.112). BOC even contracted with AT&V to build another project after AT&V's successful completion of the Midland project. (V. Kelley, Tr. 4601, 5281-5282, 5291-5292; RX 813) (FOF 5.113-5.116). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Patterson, Tr. 464) (FOF 5.161-5.164).

454. **[xxxxxxxxxxxxxxxxxxxxxxx]**, admits his firm faces reputational and marketing disadvantages compared to Respondents. (**[xxxx]**, Tr. 2421-22, *in camera*). "**[xxx]** is not a household name for cyrogenic tanks." (**[xxx]**, Tr. 2385, *in camera*). Mr. **[xvvxx]** contrasts CB&I by comparing it to the "Coca-Cola" brand-name. (**[xxxxx]**, Tr. 2385, *in camera*). **[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx]**. (**[xxxx]**, Tr. 2389, *in camera*).

Response to Finding No. 454:

The proposed finding is misleading and irrelevant. The finding is irrelevant because AT&V's track record since the Acquisition belies any implication that it cannot compete with CB&I and/or the former PDM. In fact, CB&I has yet to win a LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018) (FOF 5.76-5.78). AT&V's success has been so great and its prices so low that CB&I documents reflect pessimism as to CB&I's ability to even compete in this market. (RX 208).

Further, the proposed finding is misleading because Mr. Cutts also testified that AT&V has competitive advantages over CB&I including: AT&V's ability to sell tanks at low

prices, the quality of its construction, a low weld rejection rate, and its completion schedule. (FOF 5.38-5.40).

455. AT&V has had financial problems in the past that caused some suppliers to put them on a cash-only basis. (CX 606 at PDM-CH 002617).

Response to Finding No. 455:

The proposed finding is misleading and irrelevant because it relies upon a "problem" that occurred in 1994, almost ten years ago. (CX 606 at PDM-CH 002617). Complaint Counsel fails to present any evidence to support its contention that some suppliers put AT&V on a cash-only basis. In fact, despite the supposed "problem" in 1994, the customer specifically stated that AT&V would be allowed to bid in the future. (CX 606 at PDM-CH 002617). Additionally, the proposed finding fails to acknowledge that current U.S. LNG customers and market participants have accepted the TKK/AT&V alliance. (*See* FOF 3.123-3.133).

456. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxx]**, Tr. 2393-94). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. CCFF 557. **[xxx]** has never built an LNG tank in the United States. (**[xxx]**, Tr. 2336, *in camera*).

Response to Finding No. 456:

The proposed finding is misleading and incomplete to the extent it fails to acknowledge that TKK has extensive LNG experience outside the U.S. and AT&V is an experienced U.S. contractor. (*See* FOF 3.99-3.108). Furthermore, current U.S. LNG customers and market participants have accepted the TKK/AT&V alliance. (*See* FOF 3.123-3.133).

457. **[xxx]** does not view AT&V as an LNG tank supplier, and concludes that AT&V **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 691 at **[xxxxxx]** 01 032).

Response to Finding No. 457:

The proposed finding is misleading and incomplete to the extent it fails to acknowledge that the document it relies on is from August of 2001 prior to the TKK/AT&V alliance. (RX 818; Cutts, Tr. 2437-38; *see also* FOF 3.105) (AT&V did not enter into its alliance with TKK until November of 2001).

458. It is unlikely that AT&V will be able to effectively replace PDM because PDM & CB&I are able to build larger field-erected LPG tanks than AT&V. (CX 303, CB&I/PDM-H 4001285 (CB&I is PDM's "only competition on tanks over 100,000 [barrels])). AT&V 's competitiveness is generally limited to "small tanks...$500K & under." (CX 86, PDM-CH 002618).

Response to Finding No. 458:

This finding is misleading and irrelevant in light of the current events in the LPG market post-Acquisition. Complaint Counsel in this finding relies on evidence that is unreliable and irrelevant. CX 303 is an email that quotes Fluor's view on competition in the LPG market as of 2000. (*See* CX 303). As demonstrated above, Fluor's last involvement in procuring an LPG tank was in 1998. (Warren, Tr. 2284, 2318) (FOF 4.148). Moreover, CX 86 asserted for AT&V's competitiveness was prepared in 1994. (*See* CX 86). Since 1994, AT&V has established itself as a key player in the LPG market. (Cutts, Tr. 2495; N. Kelley, Tr. 7088-89, 7130-31; CX 396, CX 397) (FOF 4.17-4.22). Finally, demand in the LPG market is extraordinarily thin and virtually nonexistent. (Harris, Tr. 7281-82) (FOF 4.10).

459. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 397 at 1, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 397 at 1, *in camera* (AT&V tank measured **[xxxxx]** in diameter and **[xxxxx]** high, which translates into an approximate volume of **[xxxxxxx]** cubic feet, or **[xxxxxxx]** barrels.).

Response to Finding No. 459:

This finding is misleading, inaccurate and unsupported by the record evidence. This finding relies on CX 397. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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460. Large LPG tank projects require substantial engineering work and require several crews for various tasks, such as procurement, estimating, construction, piping and electrical. (CX 258 at CB&I-H001794).

Response to Finding No. 460:

This finding is misleading and irrelevant in light of the current events in the LPG market post-Acquisition. Morse demonstrates that engineering experience and field crews are not a barrier to entry or an obstacle in competing for an LPG project. For instance, Morse had no experience prior to the Ferndale project. (Maw, Tr. 6546) (FOF 4.73). However, Morse timely completed the Ferndale project, as planned, without any major defects, and no delays. (Crider, Tr. 6714-16; Maw, Tr. 6585) (FOF 4.86). Morse did not incur any additional expenses than it normally would on any other tank project. (Maw, Tr. 6556-57) (FOF 4.92, 4.96, 4.98).

461. Dr. Harris concedes that AT&V has "capacity constraints that would prevent it from building an LPG tank while working on other projects." (Harris, Tr. 7595).

Response to Finding No. 461:

This finding is wholly inaccurate, unsupported by the evidence, and improper. Absolutely no quote, statement, or reference relating to AT&V appears in the trial record in page

7595. (Harris, Tr. 7595). Therefore, this finding is unsupported by the record evidence and is inaccurate and improper.

462. Industry participants do not consider AT&V to be a competitive supplier of LPG tanks in the United States. Fluor has not accepted AT&V as a qualified bidder on LPG tank projects. (Warren, Tr. 2309 (Fluor had never considered sole sourcing a field-erected LPG tank from any supplier other than CB&I or PDM.)). Matrix does not consider AT&V as a competitor for LPG tanks. (Newmeister, Tr. 2202 (Mr. Newmeister is "not aware of any [LPG tanks] that [AT&V] ha[s] built.")).

Response to Finding No. 462:

This finding is inaccurate, lacks foundation, is misleading and improper because it ignores the record evidence. First, Fluor is not an industry participant. Sea-3 was the client and was responsible for selecting the LPG tank supplier. (Warren, Tr. 2316) (FOF 4.149). In addition, Ms. Warren has not been involved in the LPG market since 1998, and admits that it does not know who would be currently qualified by Fluor on an LPG project. (Warren, Tr. 2284, 2318) (FOF 4.148, 4.157). Second, Mr. Newmeister lacks foundation to testify as an LPG industry participant. Matrix actually bid, and lost to AT&V, on the ITC Deer Park LPG project in 2000. (N. Kelley, Tr. 7083-84) (FOF 4.34). The only LPG customer to testify stated that AT&V had an excellent reputation and completed the project on time, as planned, and to ITC's satisfaction. (N. Kelley, Tr. 7088-89, 7130-31) (FOF 4.38, 4.42).

463. Dr. Harris does not think it is accurate to say that "AT&V could constrain CB&I's pricing in ... LPG tanks." (Harris, Tr. 7596).

Response to Finding No. 463:

This finding is inaccurate and misleading; it mischaracterizes Dr. Harris' testimony. Dr. Harris was asked "[y]ou contend that ATV could constrain CB&I pricing in LNG tanks, LPG tanks and LIN/LOX/LAR tanks. Do you remember that?" Dr. Harris responded "No, I don't remember that. I don't think that's exactly what my testimony is. Again, if you want any explanation, it's because the way you've stated it I don't think is consistent. I think they are

part of the constraint, but I don't think -- I don't think the way you stated it is accurate." (Harris, Tr. 7596).

464. It is unlikely that AT&V will be able to replace PDM in the LIN/LOX market. AT&V performed poorly on recent projects for BOC. CCFF 466 and Air Liquide CCFF 477-479.

Response to Finding No. 464:

The proposed finding is inaccurate. First, AT&V has been the most successful LIN/LOX competitor post-Acquisition. (Scorsone, Tr. 5018) (FOF 5.76-5.78). AT&V has won three of the four LIN/LOX tank awards competitively bid and has beaten CB&I each time they were competitors in a bidding contest for a LIN/LOX tank. (Scorsone, Tr. 5018) (FOF 5.31-5.34, 5.76-5.78). Moreover, AT&V has been the low price provider of LIN/LOX tanks post-Acquisition and customers have been satisfied with the price AT&V has given them. (FOF 5.32, 5.123-5.125).

Second, Complaint Counsel reference regarding AT&V's performance on jobs for BOC and Air Liquide is vague and ambiguous. The evidence shows that BOC has been satisfied with AT&V's performance. (V. Kelley, Tr. 5287) (FOF 5.97-5.112). BOC even contracted with AT&V to build another project after AT&V's successful completion of its first LIN/LOX project for BOC. (V. Kelley, Tr. 4601, 5281-5282, 5291-5292; RX 813) (FOF 5.113-5.116). **[xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx]**

465. BOC awarded a LIN/LOX contract to AT&V in 2000 for a LIN/LOX tank in Midland, NC. (RX 290 at CB&I 046596-NEW; RX 291 at CB&I-046598).

Response to Finding No. 465:

Respondents have no specific response.

466. BOC had to budget 500 man-hours of additional BOC engineering time to ensure that AT&V delivered the LIN/LOX tanks "on time, on schedule, on budget"; this was AT&V's first experience building LIN/LOX tanks. (JX 28 at 43-46 (V. Kelley, Dep.); RX 290 at CB&I 046596-NEW).

Response to Finding No. 466:

The proposed finding is irrelevant and misleading to the extent it implies that BOC was not pleased with the performance with AT&V on its LIN/LOX projects. Complaint Counsel ignores the fact that BOC said it was satisfied with AT&V's performance on the Midland project. Kelley stated that BOC was "satisfied with both [AT&V's] execution of the contract and the execution of their schedule" and "was satisfied with the approach that they took and to meeting the various time lines that they had stated." (V. Kelley, Tr. 5288) (FOF 5.110). The most powerful evidence which shows BOC's satisfaction is the fact that BOC chose AT&V for the very next project in Hillsboro, Oregon. (FOF 5.113, 5.116-5.121).

467. Dr. Kistenmacher of Linde BOC testified that AT&V has "a very poor track record." (Kistenmacher, Tr. 862). Although AT&V originally quoted a very low price on its projects for BOC, "they had many change orders, [so] that in the end the price was higher than of the conventional vendors." (Kistenmacher, Tr. 932).

Response to Finding No. 467:

The proposed finding is irrelevant and Dr. Kistenmacher lacks foundation with which to comment on AT&V's recent performance for BOC on LIN/LOX tanks. Kistenmacher testified that he is unaware that BOC awarded AT&V two LIN/LOX tank projects in Midland, North Carolina, and Hillsboro, Oregon. (Kistenmacher, Tr. 922). Moreover, testimony from BOC's Victor Kelley clearly establishes that BOC was satisfied with AT&V's performance and that BOC would hire AT&V again. In fact, BOC hired AT&V for the next LIN/LOX tank project they had in Hillsboro, Oregon. (RFOF 466).

468. Mr. Victor Kelley of BOC testified that "there was a design run of pipe [on the BOC project] that could have caused liquid oxygen to settle and then dissipate, creating a hazardous atmosphere in that location." (V. Kelley, Tr. 5269). During the construction, there was also a "welding error" that caused the steel plate that comprises the tank to buckle at a weld joint. (V. Kelley, Tr. 5273-74).

Response to Finding No. 468:

The proposed finding is misleading and inaccurate to the extent it implies that BOC was not satisfied with the performance of AT&V on the Midland project. As an intitial matter BOC was very satisfied with the job AT&V did at Midland. (RFOF 466). Further, Kelley testified that BOC was satisfied with AT&V's performance on the pipe looping. Despite Complaint Counsel's attempt to imply that AT&V was at fault for problems on the project, Kelley said that BOC did not know who was responsible for the pipe looping difficulties, BOC or AT&V. (V. Kelley, Tr. 5269-5271, 5293-5294). Kelley said that BOC was satisfied with AT&V's performance in correcting the pipe looping issue and believes it is an example of "strength in terms of the two companies working together to overcome an issue." (V. Kelley, Tr. 5293-5294) (FOF 5.101). In the end, BOC asked AT&V to replicate its piping on a future project, so AT&V does not believe there were any issues with its piping. (Cutts, Tr. 2553-2555) (FOF 5.103).

469. Linde BOC Process Plants does not appear likely to purchase LIN/LOX tanks from AT&V in the future. Dr. Kistenmacher testified that AT&V's track record of building "one plant for BOC [and] one for an undisclosed client" is "not sufficient for me" to purchase a tank from AT&V. (Kistenmacher, Tr. 861-2 ("PDM has built many more tanks, many, many more, and it was never a question that PDM didn't have the proper track record.")).

Response to Finding No. 469:

This finding is flatly contradicted by record evidence. BOC purchased a LIN/LOX tank from AT&V soon after AT&V completed its work on the Midland project. BOC stated that they would use AT&V in the future and in fact hired AT&V to build a LIN/LOX tank in Hillsboro, Oregon. (FOF 5.113-5.121).

470. Like Linde, **[xxxxxxxxxx]**, is unlikely to award future projects to AT&V because of problems with AT&V' s performance. CCFF 477.

<u>Response to Finding No. 470:</u>

The proposed finding is irrelevant to the extent it implies that customers are unlikely to award future projects to AT&V. Recent customers such as BOC and MG Industries have expressed satisfaction with AT&V and have placed AT&V on the bidders list for future LIN/LOX projects. (RFOF 464).

471. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxxxxxxxx]**, Tr. 2235-36, *in camera*).

<u>Response to Finding No. 471:</u>

Respondents have no specific response.

472. **[xxxxxxxxxxxxxxxxxxxxxxx]** admitted, "If PDM were in existence at that time and had a credible and competitive bid, we would have been far less likely to take the risk of developing a new supplier." (**[xxxxxxxxxx]**, Tr. 2236, *in camera*).

<u>Response to Finding No. 472:</u>

The proposed finding is irrelevant to the extent that it implies that AT&V is not a successful and viable competitor in the LIN/LOX market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** In addition to price, **[xxxxxxxx]** reviewed and took into account AT&V's earlier success with BOC. (FOF 5.126-5.127). Also, CB&I submitted a bid in which it cut its margin to zero percent. **[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (FOF 5.125, 5.128-5.130). Despite this competitive bid, AT&V, not CB&I, was selected by **[xxxxxxxxxx]** to build the Freeport project.

473. **[xxxxxxxxxxx]** testified that **[xxxxxxxxxx]** has "not performed well from our perspective," and that **[xxxxxxxxx]** "ability to manage a project is far worse than I would have possibly imagined." (**[xxxxxxxx]**, Tr. 2251, 2253, *in camera*).

<u>Response to Finding No. 473:</u>

The proposed finding is irrelevant to the extent that it implies AT&V is not a capable LIN/LOX supplier for several reasons. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] In fact, in contrast to AT&V, BOC, another large LIN/LOX tank purchaser, has stated it is satisfied with AT&V's performance to date and plans to award them tanks in the future. (RFOF 466).

474. While **[xxxxxx]** bid to **[xxxxxxxxx]**'s specifications, ... it's been very difficult to get them to actually execute to those specifications." (**[xxxxx]**, Tr. 2241; *see also* **[xxxxxx]**, Tr. 2241-46, *in camera* (listing other construction problems with **[xxxxx]**), 2246-47, *in camera* (discussing delays in schedule **[xxxxx]**).

Response to Finding No. 474:

The proposed finding is irrelevant to the extent it implies AT&V is not a technically capable LIN/LOX tank provider. (RFOF 473).

475. **[xxxxxxxx]** has informed AT&V it would not go forward on the **[xxxxxxx]** project unless AT&V "conformed to the manufacturer's specifications." (**[xxxx]**, Tr. 2246).

Response to Finding No. 475:

The proposed finding is irrelevant to the extent it implies AT&V is not a technically capable LIN/LOX tank provider. (RFOF 473). Moreover, the fact that Air Liquide feels AT&V has not met Air Liquide's specifications is not evidence that AT&V does not meet the industry standard specifications for LIN/LOX tanks. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** In fact, in contrast to AT&V, BOC, another large LIN/LOX tank purchaser, has stated it is satisfied with AT&V's performance to date and plans to award them tanks in the future. (RFOF 466).

476. **[xxxxxx]** has refused to agree to provide liquidated damages in the event they do not perform the contract. (**[xxx]**, Tr. 2250).

Response to Finding No. 476:

The proposed finding is irrelevant to the extent it implies AT&V is not a capable LIN/LOX tank provider. Moreover, the proposed finding is further evidence of the commercial nature of the dispute between Air Liquide and AT&V. The dispute does not change the fact that Air Liquide and other LIN/LOX customers believe AT&V to be technically a technically capable LIN/LOX tank provider. (RFOF 473).

477. Based on its experience on the **[xxxxxx]** project, **[xxxxxxx]** has no interest in working with **[xxxxx]** on any other projects. (**[xxxxx]**, Tr. 2255-56).

Response to Finding No. 477:

The proposed finding is irrelevant to the extent it implies that customers are unlikely to award future projects to AT&V. First, the reason that **[xxxxxxxx]** may be dissatisfied with AT&V is a business dispute and not because **[xxxxxxxxx]** feels that AT&V is technically incapable. (RFOF 473). Further, recent customers such as BOC and MG Industries have expressed satisfaction with AT&V and a willingness to hire AT&V in the future. Both MG and BOC have placed AT&V on the bidders list for future LIN/LOX projects. (RFOF 464).

478. **[xxxxxxxxxxxx]** testified that if **[xxxxxxxx]** terminated **[xxxxxxxx]**, "[t]he only people I'd feel confident in completing this for us is [CB&I], ... [b]ecause of their technical capability, because of their history, because of our good performance and good relationship we've had with them over many years." (**[xxx]**, Tr. 2252).

Response to Finding No. 478:

The proposed finding is irrelevant to the extent it implies that customers are unlikely to award future projects to AT&V. Recent customers such as BOC and MG Industries have expressed satisfaction with AT&V and have placed AT&V on the bidders list for future LIN/LOX projects. (RFOF 464).

479. **[xxxxxxxx]** recently asked **[xxxxxx]** to take over the project, but CB&I refused. (Scorsone, Tr. 5036).

Response to Finding No. 479:

The proposed finding is misleading and incomplete. Evidence has shown that in response to Air Liquide's inquiries regarding the Freeport project, CB&I told **[xxxxxxxxx]** the reason it was unwilling to take over the Freeport contract was due to the risk and difficulty that is involved in assuming a contract. (Scorsone, Tr. 5036) (FOF 5.140). It is CB&I's corporate policy not to take over contracts from another company due to problems that may occur. (Scorsone, Tr. 5036) (FOF 5.140). Moreover, the fact that, in response to a business dispute,

[xxxxxxxxxxx] asked CB&I about the **[xxxxx]** job does not change the fact that Air Liquide and other customers view AT&V as a capable LIN/LOX provider. (RFOF 464, 473).

480. Based on word-of-mouth regarding AT&V's performance on the BOC and **[xxxxxxxx]** projects, other LIN/LOX customers are reluctant to work with AT&V. Air Products has not qualified AT&V as a LIN/LOX tank supplier, due to its concern over AT&V's performance and poor reputation. (Cutts, Tr. 2355-56; Hilgar, Tr. 1369).

<u>Response to Finding No. 480:</u>

The proposed finding is irrelevant to the extent it implies that customers are unlikely to award future projects to AT&V. Recent customers such as BOC and MG Industries have expressed satisfaction with AT&V and have placed AT&V on the bidders list for future LIN/LOX projects. (RFOF 464).

481. **[xxxxxxxxx]**, of **[xxxxxxxxx]** testified that he would have concerns about working with AT&V on a LIN/LOX project. (**[xxxxxx]**, Tr. 472, *in camera*). **[xxxxxxxxx]** further testified that "**[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx]**." (**[xxx]**, Tr. 472, *in camera*); *see* CX 41 at CB&I-E 007336, *in camera* (August 2001 report by CB&I salesman stating that **[xxxxxxxxxx] [xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**)).

<u>Response to Finding No. 481:</u>

The proposed finding is irrelevant to the extent it implies that customers are unlikely to award future projects to AT&V. Recent customers, such as BOC, have expressed satisfaction with AT&V and have placed AT&V on the bidders list for future LIN/LOX projects. (RFOF 464). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

482. AT&V has never constructed a TVC. (Cutts, Tr. 2334).

Response to Finding No. 482:

Respondents have no specific response, except to note that AT&V could be a TVC competitor in the future with the assistance of Respondent's remedy proposal for the TVC market. (FOF 6.99-6.121).

4. *BSL Cannot Replace PDM*

483. BSL has never built a tank in any of the relevant product markets in the United States. CCFF 136, 146, 151, 164, 172, 180, 192. (Hilgar, Tr. 1380).

Response to Finding No. 483:

Respondents have no specific response.

484. Because it is based overseas, CB&I observed that it is difficult for BSL to build tanks cost-effectively in the United States. (*See* CX 164 at CB&I-PL006714 ("BSL can supply very good material at a very competitive price from their shop in France but their field cost are outrageous.")).

Response to Finding No. 484:

Respondents have no specific response other than to state that Complaint Counsel incorrectly attributed the above quoted statement to CB&I. A plain reading of CX 164 demonstrates that a CB&I employee was repeating a statement that he heard from an employee of Air Products. (*See* CX 164).

485. On a LIN/LOX project in Baytown, Texas, BSL's price was "very high," more than 10% over the third-highest bid. (CX 608 at CB&I-PL023631).

Response to Finding No. 485:

Respondents have no specific response other than to state that Complaint Counsel's finding is incomplete because the Baytown project occurred in 1998. (CX 608).

486. Mr. Fan testified that, in a 1999 bid, BSL's price was "more than 15% higher" than PDM. (Fan, Tr. 954-5).

Response to Finding No. 486:

Respondents have no specific response other than to illustrate that Complaint Counsel's finding is incomplete because it fails to state that the proposed 1999 project in Nashville, Tennessee, was never actually constructed. (Fan, Tr. 954-55).

487. In response to Air Products' request that BSL lower its pricing for U.S. projects, BSL developed an arrangement with InterFab, a U.S. construction firm. (Hilgar, Tr. 1379-80). Under this arrangement, BSL would design, manufacture and ship the tank components from France and InterFab would perform the field erection of the tanks in the U.S. (Hilgar, Tr. 1378-79).

Response to Finding No. 487:

Respondents have no specific response.

488. BSL bid on a LIN/LOX tank project for Air Products in partnership with InterFab. (Hilgar, Tr. 1378-79). BSL's pricing on this project was off "by 30 percent, something higher or close to that 20 percent." (Hilgar, Tr. 1379). BSL's arrangement with InterFab "did not provide an economically viable solution" for Air Products. (Hilgar, Tr. 1378-79).

Response to Finding No. 488:

Respondents have no specific response other than to state that Complaint Counsel's finding is incomplete and fails to state that the project occurred in 1998.

489. After the bidding experience with InterFab, BSL stopped submitting bids to Air Products for LIN/LOX projects in the United States. (Hilgar, Tr.1380)). BSL has exited the U.S. LIN/LOX market. (Harris, Tr. 7323).

Response to Finding No. 489:

Respondents have no specific response.

5. *Chart Industries Cannot Replace PDM*

490. Prior to the acquisition, Chart Industries partnered with PDM on some TVC projects. (Higgins, Tr. 1269-70).

Response to Finding No. 490:

Respondents have no specific response.

491. Chart has never built an LNG, LIN/LOX or LPG tank in the United States. CCFF 136, 146, 151, 164, 172, 180, 192.

Response to Finding No. 491:

Respondents have no specific response.

492. According to Mr. Higgins, the President of the Chart division that supplies the systems and equipment attached to TVCs, Chart is not "capable" of field-erecting a TVC by itself. (Higgins, Tr. 1266-67).

Response to Finding No. 492:

Respondents have no specific response.

493. Chart is not interested in supplying TVCs. (Higgins, Tr. 1267, 1272). It wants to partner with an experienced chamber builder and considers CB&I as "[t]he only experienced players out there at this time." (Higgins, Tr. 1272).

Response to Finding No. 493:

Complaint Counsel's finding is misleading because it ignores substantial record evidence that CB&I was a fringe competitor compared to PDM because of CB&I's lack of recent experience and its lack of commitment to the field-erected TVC market. (FOF 6.26-6.64; Opening Br. 121-122). Indeed, CB&I has not built a field-erected TVC since 1984. (Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Furthermore**,** CB&I exited the field-erected TVC market in the late 1980's, which left PDM as the only competitor for field-erected TVCs in the U.S. until 1997. (Scully, Tr. 1189; **[xxxxxxxxxxxxxxxxxx]** (FOF 6.40).

494. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 242 at CB&I-PL 4003340, *in camera*).

Response to Finding No. 494:

This finding is misleading and inaccurate as set forth in RFOF 6.150-6.153. Mr. Lacey was an entry-level marketing employee at CB&I who worked primarily in the aerospace

business during the time that XL was owned by CB&I. (Scully, Tr. 1125; Scorsone, Tr. 5045). Mr. Lacey generated a large volume of ideas for management to consider with regard to the TVC business, but only part of these ideas were ever acted upon. (Scully, Tr. 1218; CX-242). Mr. Lacey typically presented both the extreme case as well as the moderate case in his proposals. (Scully, Tr. 1219-21). Mr. Lacey's ideas were ignored. (Scorsone, Tr. 5045-46; Scully, Tr. 1221).

6. *Chattanooga Boiler & Tank Cannot Replace PDM*

495. Chattanooga Boiler & Tank ("Chattanooga") cannot replace PDM as a competitor in the LIN/LOX market. Chattanooga is unable to provide LIN/LOX tanks at pre-merger price levels CCFF 500-501, and industry participants do not consider Chattanooga to be a competitor in the LIN/LOX market. CCFF 501-502.

<u>Response to Finding No. 495:</u>

The proposed finding is misleading and irrelevant. First, CB&T believes it has competitive advantages over CB&I with respect to fabricating LIN/LOX tanks, which may help it to provide tanks at low price levels. (FOF 5.66-5.67). Moreover, industry participants do consider CB&T a competitor and have permitted CB&T to bid on recent LIN/LOX tank opportunities. (FOF 5.69, 5.70). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

496. Chattanooga has never built an LNG or LPG tank or a TVC in the United States.[3] CCFF 136, 146, 172, 180, 192.

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[3] Chattanooga once built a vacuum facility that is used by NASA to refuel the space shuttle booster engines store. (Stetzler, Tr. 6341). The facility creates a vacuum condition to prevent an explosion during the refueling process. (Stetzler, Tr. 6341). The facility does not support hot or cold temperatures necessary to test satellites, which is the purpose of TVCs. (CX 623 at FTC000400; Stetzler, Tr. 6406).

Response to Finding No. 496:

The proposed finding is incorrect. CB&T has built LNG tanks before. (Stetzler, Tr. 6331-6336) (FOF 5.56). CB&T's experience building LNG tanks translates to CB&T's ability to build LIN/LOX tanks as well. For example, the ability to fabricate components in a clean environment and the ability to weld materials of certain quality are skills used in fabrication of both types of tanks. (Stetzler, Tr. 6336-6337) (FOF 5.57).

Further, the finding is irrelevant to the extent that it implies CB&T is incapable of building such structures or, more specifically, LIN/LOX tanks. CB&T has constructed tanks and structures significantly more difficult than LIN/LOX tanks. CB&T estimates that some of the structures they have built are 20 times more difficult than a LIN/LOX tank. (Stetzler, Tr. 6337-6339) (FOF 5.56).

497. Chattanooga has not built a LIN/LOX tank since at least 1990. (CX 623 at FTC0000399; Stetzler, Tr. 6413-15).

Response to Finding No. 497:

Respondents have no specific response to this finding.

498. Chattanooga has never created any strategic plans or pricing strategy for designing, engineering, fabricating, or erecting LIN/LOX tanks. (Stetzler, Tr. 6421-22, 6426). Mr. Stetzler, Chattanooga's president, testified that the supply of LIN/LOX tanks is "not really a business that we've been participating in" because Chattanooga's marketing staff has told Mr. Stetzler that there isn't "sufficient demand" to enter the LIN/LOX market. (Stetzler, Tr. 6422).

Response to Finding No. 498:

The proposed finding is incorrect to the extent it implies CB&T is not prepared, able, and intending to build LIN/LOX tanks in the United States. First, CB&T has recently entered the market for LIN/LOX tanks when it bid on projects post-Acquisition for BOC and MG Industries. (FOF 5.69, 5.70). Also, CB&T has been visiting LIN/LOX customers such as Air Products to discuss future LIN/LOX opportunities. (RX 273) (FOF 5.71). Finally, there is

no question that currently CB&T has the ability to design and build a field erected LIN/LOX tank. (Stetzler, Tr. 6312-6313). In fact, CB&T has the requisite facilities, equipment and personal on hand right now to build a LIN/LOX tank. (Stetzler, Tr. 6314-6316) (FOF 5.59-5.65). Therefore, to imply that CB&T is unprepared or unwilling to enter the LIN/LOX market is not accurate -- CB&T is in the LIN/LOX market today.

499. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 189 at CB&I-PL015105; **[xxxxxxxxxxx]**, Tr. 457, *in camera* (Chattanooga's price was **[xxx]** higher than **[xxxxxxx]**).

Response to Finding No. 499:

The proposed finding is irrelevant for several reasons because the New Johnsonville bids are not necessarily indicative of future bidding in the LIN/LOX market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

500. In discussing how customers would react to Chattanooga, CB&I questioned whether the customer will "trust a 'newbie' firm like CBT to do cryo tanks." (CX 40 at CB&I-

E007246). An August 2001 report from a CB&I salesman reports that MG Industries "has doubts" of Chattanooga's "abilities." (CX 41 at CB&I-E007336).

Response to Finding No. 500:

The proposed finding is contradicted by empirical evidence in the record. Customers have permitted and continue to solicit bids from CB&T for field erected LIN/LOX tank opportunities. (RFOF 498).

501. Mr. Cutts of AT&V does not consider Chattanooga as a competitor for LIN/LOX tanks in the United States. (Cutts, Tr. 2333).

Response to Finding No. 501:

The proposed finding is contradicted by empirical evidence in the record. Customers have permitted and continue to solicit bids from CB&T for field erected LIN/LOX tank opportunities. (RFOF 498).

7. *Howard Fabrication Cannot Replace PDM*

502. Howard Fabrication is a domestic company that supplies shop-fabricated thermal vacuum chambers and thermal vacuum systems. Howard Fabrication has never supplied, and does not have the capability necessary to supply, a TVC with a diameter greater than 20 feet. (Gill, Tr. 182, 193).

Response to Finding No. 502:

Respondents have no specific response except to state that that Howard could become a competitor in the field-erected TVC market in the future.

503. Howard has never built an LNG, LPG or LIN/LOX tank in the United States. CCFF 136, 146, 151, 164, 172, 180.

Response to Finding No. 503:

Respondents have no specific response.

504. Mr. Gill does not consider Howard to be a competitor of CB&I or, prior to the acquisition, of PDM. (Gill, Tr. 195, 201). Mr. Gill does not believe his firm has a "real chance" to win a contract for a TVC. (Gill, Tr. 192; *see* Simpson, Tr. 3514-15 (Howard is not a competitor in the market for TVCs).

Response to Finding No. 504:

Respondents have no specific response except to state that that Howard could become a competitor in the field-erected TVC market in the future.

505. Mr. Scorsone agreed: supplying a TVC of the size needed by TRW "would be a real stretch for Howard." (Scorsone, Tr. 5061).

Response to Finding No. 505:

Respondents have no specific response.

506. Although Howard has submitted bids on past TVC projects, it has been eliminated from the final bidding phase. (Gill, Tr. 212). As a result, Mr. Gill does not believe that his pricing had a material effect on competitive bidding. (Gill, Tr. 212).

Response to Finding No. 506:

Respondents have no specific response.

507. With only $2.5 million in annual revenues, Howard does not have the financial resources to obtain the financial performance guarantee bonds required by customers for large projects. (Gill, Tr. 181; CX 261 at CB&I-H004031; Neary, Tr. 1470). A TVC project customer may require a $13.5 million bond to guarantee the completion of the project, and Howard Fabrication cannot obtain such a bond because it does not have the necessary "security or liquid assets equal to about three times of that bond." (Gill, Tr. 199-200). Howard was not even able to obtain a bond of $5 million for a large, shop-fabricated thermal vacuum chamber procured by Aerojet. (Gill, Tr. 234).

Response to Finding No. 507:

Respondents have no specific response except to state that Howard could become a competitor in the field-erected TVC market in the future.

508. Howard does not employ any engineers with experience engineering and designing a TVC. (Gill, Tr. 194-95). To replicate PDM, Howard would need "35-40 engineers with support staff and general administration staff to go along with that; the computerized design equipment for finite element analysis; the construction equipment; the large shop to support that; and, you know, it's a — just a completely different animal." (Gill, Tr. 249).

Response to Finding No. 508:

Respondents have no specific response except to state that Howard could become a competitor in the field-erected TVC market in the future.

509. Howard's shop resources only allow it to fabricate chambers with diameters at or below 20 feet. (Gill, Tr. 192).

Response to Finding No. 509:

Respondents have no specific response except to state that Howard could become a competitor in the field-erected TVC market in the future.

510. Howard does not own the type of equipment necessary to fabricate and erect a thermal vacuum chamber in the field, such as gantry burners, large plate rolls, annular rolls, post stress treat furnaces, automatic profile blasters, preblast and prime units, large horizontal boring mills, vertical boring mills, shape burning machines, and transportable cranes. (Gill, Tr. 196-97).

Response to Finding No. 510:

Respondents have no specific response.

511. Mr. Gill of Howard considers gaining the resources and capability that PDM had in TVCs as "a big jump" for his company. (Gill, Tr. 248-249). He described this "big jump" as going from "a couple million dollars in sales to many hundred millions of dollars of sales." (*Id.*)

Response to Finding No. 511:

Respondents have no specific response except to state that Howard could become a competitor in the field-erected TVC market in the future.

8. *Matrix Cannot Replace PDM*

512. Matrix is a less experienced and less reliable supplier than either CB&I or PDM for LIN/LOX tanks. CCFF 514-518. Customers and industry participants consider Matrix to be a weaker competitor than PDM, CCFF 519-526, 241. and there is evidence that Matrix's costs are higher than CB&I or PDM. CCFF 156, 524, 403, 1067, 1101-1103, 1108. Therefore, it is unlikely that Matrix will be able to replace PDM in the LIN/LOX market.

Response to Finding No. 512:

Complaint Counsel's finding is a collection of inaccurate, misleading and unsupported statements. The record evidence has shown that Matrix is a viable competitor in the LIN/LOX market that has successfully completed four LIN/LOX projects, received recommendations from LIN/LOX customers, and continues to offer competitive pricing. (*See* FOF 5.43-5.55).

Contrary to Complaint Counsel's claim that "[c]ustomers and industry participants consider Matrix a weaker competitor," LIN/LOX customers believe Matrix to be a viable and accomplished LIN/LOX supplier. Matrix has successfully constructed four LIN/LOX tanks in the U.S. for Praxair and Air Products, and won those jobs when PDM was still in the market. (Newmeister, Tr. 2213-14, 2173-74; FOF 5.47-5.50). Both Praxair and Air Products were satisfied with Matrix's performance. (Newmeister, Tr. 2173-74, 2176-77; FOF 4.48-4.50). Air Products informed CB&I that they consider Matrix to be "a player in the [LIN/LOX] market" and certainly consider them to be a "viable competitor." (RX 273; FOF 5.54). Air Liquide also believes that Matrix is a viable LIN/LOX supplier and has solicited bids from Matrix on at least two projects, Freeport and Longview, Texas. (Kamrath, Tr. 2005-06; FOF 5.53). **[xxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

Evidence has shown that Matrix does not have higher costs than CB&I. In 2001, Air Liquide solicited bids for a LIN/LOX project in Freeport, Texas, from AT&V, CB&I, Matrix and BSL. (Cutts, Tr. 2569; Scorsone, Tr. 5032; RX 627 at 2; FOF 5.122). **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** FOF 5.124).

513. Matrix has never built an LNG tank or an LPG tank in the United States. (Newmeister, Tr. 1596, 1609).

<u>Response to Finding No. 513:</u>

Respondents have no specific response.

514. **[xx]** 2001 analysis of Matrix's competitiveness concluded that "to our knowledge, **[xxxxxx]** has not supplied tanks for LNG or Cryogenic Liquid service especially in the large tanks (100,000 m3 plus) used for the LNG Import Terminals." (CX 691 at **[xx]** 01 032). "[T]he reality for today is that in the US, **[xxxxxxxxxxxx]** are the leading company in the LNG Tank

business and **[xxxxx]** will need to demonstrate [its] capabilities in this market" first. (CX 691 at **[xx]** 01 032).

<u>Response to Finding No. 514:</u>

Respondents have no specific response.

515. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 705 at 8; Kamrath, Tr. 1987 (Longview, TX in 2001); **[xxxxxxxxxxxxxx]**, Tr. 456-57, *in camera* (**[xxxxxxxxxxx]**); Fan, Tr. 960-962, 1018 (Farmington, NM in 2002, and "many" other pricing proposals to Linde)).

<u>Response to Finding No. 515:</u>

Complaint Counsel's finding is incorrect in that it states Matrix has "bid" on six projects. Record evidence demonstrates that some of the pricing Matrix submitted to LIN/LOX customers was budget pricing or some other form of preliminary pricing. (Scorsone, Tr. 5020-21 (New Mexico); Fan, Tr. 1078 (New Mexico); FOF 5.178-5.179, 5.195).

By way of comparison, CB&I submitted pricing on four competitively bid LIN/LOX projects since the Acquisition and only won one. (FOF 5.76-5.78).

516. Matrix believes that it has not won these projects either because its pricing has been too high or because the customer did not believe that Matrix was sufficiently qualified. (Newmeister, Tr. 2155-58; Kamrath, Tr. 2000-01; *see also* Hilgar, Tr. 1381-82).

<u>Response to Finding No. 516:</u>

This finding is inaccurate to the extent it implies that Matrix has bid on all "those projects." (RFOF 515). Further, this finding is irrelevant to the extent it relies on Martix's unsupported beliefs.

517. Matrix has not been price competitive, and its bids have been too high on recent projects. (Newmeister, Tr. 2156-58; Fan, Tr. 960-62 (on 2002 project, Matrix bid over $900,000, while CB&I bid $814,000); Kistenmacher, Tr. 860; Fontenot, Tr. 2029 (CB&I was at least 5% below Matrix on Air Liquide's recent Longview, Texas project); Patterson, Tr. 457 (*in camera*) **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**).

<u>Response to Finding No. 517:</u>

Complaint Counsel's finding is incorrect because Matrix has in fact submitted competitive pricing. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** FOF 5.124). Additionally, Complaint Counsel cites to the testimony of Mr. Fan for support that "on 2002 project, Matrix bid over $900,000, while CB&I bid $814,000." Respondents have demonstrated that Linde did not request "bids" but rather budget pricing for its proposed project in New Mexico. (Scorsone, Tr. 5020-21 (New Mexico); Fan, Tr. 1078 (New Mexico); FOF 5.178-5.179, 5.195). Further, Complaint Counsel's reliance on the Matrix bid to MG is misplaced. CB&I's final bid price was the result of negotiations between MG and CB&I after the first round of bidding. (Scorsone, Tr. 5023-5024) **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Patterson, Tr. 482-483) (FOF 5.151-5.157).

518. Air Liquide's representative testified that Matrix's prices have "never been below what we'd seen from any of the other competitors." (Kamrath, Tr. 2000-2001; *see* CX 289 at CB&I/PDM-H4000815)).

<u>Response to Finding No. 518:</u>

Respondents have no specific response.

519. Since 1996 when it began developing engineering and marketing expertise for the LIN/LOX market, Matrix has designed and constructed only four LIN/LOX tanks. (Newmeister, Tr. 1587).

<u>Response to Finding No. 519:</u>

Respondents have no specific response. (*See* RFOF 512; FOF 5.43-5.55).

520. Two major purchasers of LIN/LOX tanks, Air Liquide and Linde, do not consider Matrix experienced enough to qualify it as their LIN/LOX tank supplier. (Fontenot, Tr. 2021-2022 (pre-acquisition, the companies on Air Liquide's "bid slate" included CB&I, PDM "and a little bit lower would be Matrix;" "I didn't feel as comfortable ... with Matrix," as the "number of references they had weren't nearly what the other two suppliers had."); Kamrath, Tr. 2022).

<u>Response to Finding No. 520:</u>

Complaint Counsel's finding is incorrect, misleading and not supported by the record. As an initial matter, Complaint Counsel's proposition that Linde does not believe Matrix is a qualified LIN/LOX supplier is untrue. For example, Complaint Counsel failed to provide record citations to testimony by any Linde employee or any Linde documents. In fact, the evidence is to the contrary, as Linde has sought bids from Matrix repeatedly on LIN/LOX tanks. (Kistenmacher, Tr. 854)

Complaint Counsel's assertion with respect to Air Liquide is also unsupported by the record evidence. Complaint Counsel relies on the testimony of Mr. Fontenot, a former employee of Air Liquide who has no knowledge of post-Acquisition activity in the LIN/LOX market. (Fontenot, Tr. 2232-33). Mr. Fontenot testified that he has no knowledge of which companies Air Liquide has currently pre-qualified or permits to bid for its LIN/LOX projects. (Fontenot, Tr. 2232-33).

In contrast to Mr. Fontenot's unreliable opinions, Mr. Kamrath, the current CEO of Air Liquide, testified that Air Liquide believes that Matrix is a viable LIN/LOX supplier and has solicited bids from Matrix on at least two projects, Freeport and Longview, Texas. (Kamrath, Tr. 2005-06; FOF 5.53; *see* RFOF 512; FOF 5.43-5.55).

521. **[xxxxxxx]** testified that, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 2253, *in camera*).

Response to Finding No. 521:

Respondents have no specific response.

522. Air Products, who purchased a LIN tank from Matrix, believes that Matrix has "more limited capacity to produce field-erected cryogenic storage tanks," as compared to CB&I or PDM, and that the former PDM is "much deeper in crews and manufacturing capabilities than Matrix is." (Hilgar, Tr. 1354, 1382-83; JX 25 at ¶ 14 (Hilgar Dec.)).

Response to Finding No. 522:

Respondents have no specific response.

523. Matrix sold its fabrication facility, known as Brown Steel, in late 2000. (Newmeister, Tr. 1589-90). By losing its fabrication capability, Matrix is required to subcontract the fabrication work for these tanks, and subcontracting could increase Matrix's costs. (Newmeister, Tr. 1569, 1570, 1602 (no company has been a viable LIN/LOX competitor while subcontracting out fabrication); Hilgar, Tr. 1381-1382 (Air Products would require Matrix to become re-qualified if they sold off their fabrication facility)). Therefore, as Mr. Newmeister testified, the sale of Brown Steel could have the effect of diminishing Matrix's competitive strength. (Newmeister, Tr. 1590-1591, 1595; see Harris, Tr. 7309 (Matrix's sale of Brown Steel competitively disadvantages Matrix in the LIN/LOX Market)).

Response to Finding No. 523:

Complaint Counsel incorrectly assumes that subcontracting will necessarily increase costs. Record evidence has demonstrated that subcontracting portions of a project does not necessarily increase the costs of a particular job. (Bryngelson, Tr. 6143). In some cases, subcontracting actually decreases costs because subcontractors with an expertise in a particular area are able to use a standardized approach in performing work. (Bryngelson, Tr. 6143-44). Similarly, subcontracting can reduce costs because specialized subcontractors may be better at certain job functions than a general contractor, which could improve the overall schedule. (Cutts, Tr. 2472; FOF 3.543; 5.219). LIN/LOX customers have testified that the fabrication of a LIN/LOX tank can be easily subcontracted to an outside company and supervised by a field supervisor. (Hilgar, Tr. 1526-27; FOF 5.220).

Further, this finding is inaccurate and misleading to the extent it implies that Matrix does not have the ability to fabricate LIN/LOX tanks in-house. In fact, Mr. Newmeister testified that Matrix currently has the required fabrication capabilities in-house in Matrix's existing fabrication facility. (*See* Newmeister, Tr. 2197). As a result, the sale of Brown Steel will have very little effect on Matrix. (Harris, Tr. 7309; *see also* FOF 512, 517).

524. Matrix cannot replace PDM's presence in the TVC market. (Scully, Tr. 1115-16; Higgins, Tr. 1268-69). Although Chart Industries ("PSD") was planning to use Matrix to fabricate the shop-built chambers for the Raytheon TVC project (Higgins, Tr. 1268-69), Mr. Higgins, the President of the Process Systems Division of Chart Industries, would not partner with Matrix on a large TVC project because it does not have the capability to engineer and construct these large chambers. (Higgins, Tr. 1267-68).

Response to Finding No. 524:

Respondents have no specific response except to state that Matrix could become a competitor in the TVC market if CB&I's proposed remedy with respect to the TVC market is implemented. (*See* FOF 6.99-6.121).

525. Matrix has not expended any significant resources on developing its capability to engineer and design TVCs. (JX 37 at 89-90 (Newmeister, Dep.)).

Response to Finding No. 525:

Respondents are not aware of any exhibit entered into evidence with the designation JX 37. Otherwise, Respondents have no specific response to this finding.

9. *Morse Constructors Can Not Replace PDM*

526. Morse Constructors will not replace PDM. Morse is a "niche" player whose ability to compete is restricted to the Northwest. (CX 1485 at MCG-03741 (CB&I assessment of Morse); *see also* CX 1484 at MCG-03746 (CB&I due diligence report)).

Response to Finding No. 526:

This finding is misleading and irrelevant because Respondents have maintained that Morse is not a competitor in the LPG market. Instead, Morse demonstrates the ease of entry and lack of entry barriers in the LPG market. (*See* Opening Br. at 90-93).

527. Morse has never built an LNG or LIN/LOX tank or a TVC in the United States. CCFF 136, 146, 151, 164, 192.

Response to Finding No. 527:

Respondents do not dispute the truth of this finding. However, Respondents reassert their responses in RFOF 136, 146, 151, 164 and 192.

528. Morse built one LPG tank in Ferndale, Washington, in 1994, and Morse has not constructed any low-temperature tank since 1994. (Maw, Tr. 6546-7) Morse also has not bid on another LPG tank, or any other relevant product, in the United States since 1994. (Maw, Tr. 6589).

Response to Finding No. 528:

Respondents do not dispute the truth of this finding. (FOF 4.73).

529. On November 30, 2001, Morse was acquired by CB&I. (Maw, Tr. 6545). As a result, "Morse [will] not compete against another arm of CB&I for an LPG tank." (Maw, Tr. 6661-62).

Response to Finding No. 529:

Respondents do not dispute the truth of this finding to the extent that the testimony actually states: "Morse would not compete against another arm of CB&I for an LPG tank." (Maw, Tr. 6661-62).

10. *Skanska/Whessoe Cannot Replace PDM*

530. Skanska/Whessoe has significant competitive disadvantages that make it unlikely Skanska/Whessoe can replace PDM. Skanska/Whessoe has higher costs than PDM that hinder it from offering competitive prices on LNG projects. CCFF 135, 142, 442, 860, 870-880, 883, 903. Whessoe has a reputation for poor quality and reliability. CCFF 537-538, 542.

Response to Finding No. 530:

The proposed finding is factually misleading and incorrect. First, the proposed finding fails to cite any evidence to support the assertion that Skanska/Whessoe has "significant competitive disadvantages" that make it unlikely that it will "replace PDM." In fact, the evidence contradicts the proposed finding. Skanska/Whessoe has already entered the United

States LNG market and is currently competing for several domestic projects. (*See* FOF 3.268-3.273). For example, Dynegy recently selected Skanska/Whessoe as the EPC contractor for its Hackberry, Louisiana LNG import terminal. (Puckett, Tr. 4547; *see also* FOF 3.268). Dynegy choose Skanska/Whessoe over Kvaerner, Technip, CB&I, Kellogg Brown & Root, and Bechtel. (Puckett, Tr. 4546; *see also* 3.264). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (Jolly, Tr. 4691, 4760; *see also* FOF 3.268). Dynegy is "satisfied" with Skanska/Whessoe's pricing. (Puckett, Tr. 4587-88; *see also* FOF 3.309).

The proposed finding is also misleading in regards to Skanska/Whessoe's cost structure and reputation. First, Complaint Counsel failed to present any evidence regarding Skanska/Whessoe's internal cost structure. Thus, the proposed finding's assertion that Skanska/Whessoe has "higher costs" is not supported by the evidence. Second, United States customers and LNG participants have clearly accepted Skanska/Whessoe. (*See* FOF 3.74-86). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]** (Jolly, Tr. 4700-01; *see also* 3.93).

531. Skanska/Whessoe has never built an LNG, LIN/LOX or LPG tank or TVC in the United States. CCFF 136, 146, 151, 164, 172, 180, 190.

<u>Response to Finding No. 531:</u>

The proposed finding is irrelevant given the fact that **[xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4683; *see also* FOF 3.162). Since the Acquisition, foreign companies have entered the United States market and competed for American LNG projects. (*See generally* FOF 3.68-73, 3.109-22, 3.173-78, 3.200-03, 3.212-27). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Jolly, Tr. 4760; *see also* FOF 3.307). When completed, the Hackberry facility will be the largest LNG regasification facility in the United States. (Puckett, Tr. 4540; *see also* FOF 3.259).

532. The price quoted by Whessoe for the Memphis project in 1994 establishes that Whessoe's prices are substantially higher than Respondents LNG tank prices. CCFF 135, 953.

<u>Response to Finding No. 532:</u>

The proposed finding is misleading and factually incorrect because Whessoe's portion of Lotepro's 1994 Memphis bid was insignificant. Lotepro, not Whessoe, was the bidder, and Noell Whessoe (Whessoe was then owned by Germany's Noell) refused to provide Lotepro a bid for the entire LNG tank and in fact was reluctant to participate at all. (Kistenmacher, Tr. 895; *see also* FOF 3.676). Instead, Whessoe only agreed to provide engineering in support of Lotepro's LNG tank bid; Whessoe's portion accounted for only $1 million of Lotepro's $40 million total bid. (Kistenmacher, Tr. 900, 938-939; *see also* FOF 3.498). Lotepro found Titan Constructor to construct and erect the LNG tank; Titan Constructor's costs accounted for $14 million of Lotepro's total bid. (Kistenmacher, Tr. 900, 938; *see also* FOF 3.498). Whessoe had no involvement in the construction bid. (*See* Kistenmacher, Tr. 900, 938; *see also* FOF 3.498). Therefore, Whessoe's "price" for the 1994 Memphis project is not an accurate predictor of Skanska/Whessoe's current costs. Whessoe only reluctantly provided its $1 million engineering quote to Lotepro. (Kistenmacher, Tr. 939-940; *see also* FOF 3.498). Further, Skanska did not acquire Whessoe until 2000, well after Whessoe provided the engineering quote to Lotepro. (RX 770 at 33/49; *see also* FOF 3.57). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4760; *see also* FOF 3.307).

533. The prices quoted by Whessoe to [**xx**] in 1998 show that Whessoe's prices are substantially higher than Respondents' LNG tank prices. CCFF 870-878, 880, 883, 903.

Response to Finding No. 533:

The proposed finding is misleading and irrelevant. First, the document relied upon is from 1998, well before the Acquisition. Additionally, the document was created before Skanska acquired Whessoe in 2000. (RX 770 at 33/49; *see also* FOF 3.57). Further, testimony at trial contradicts the proposed finding. British Petroleum testified that it would include Whessoe on a potential bidder list for LNG projects in the United States. (Sawchuck, Tr. 6062; *see also* FOF 3.78). This issue is addressed further in RFOF 870-878, 880, 883 and 903.

534. Since CB&I acquired PDM, the price quoted by Whessoe to Dynegy show that Whessoe's prices are substantially higher than CB&I's LNG tank prices. CCFF 991, 1000-1001.

Response to Finding No. 534:

The proposed finding is misleading, incomplete and factually inaccurate because the record does not contain Whessoe's pricing to Dynegy. Complaint Counsel relies solely on Mr. Price's concerns about the prices submitted to Dynegy. (*See* CCFF 1000). However, the proposed finding fails to account for the following facts: Mr. Price is a head-to-head competitor of CB&I; Mr. Price did not see the Dynegy bids; and Mr. Price failed to express his concerns to his client, Dynegy. (Price, Tr. 610, 641, 667; *see also* FOF 3.659, 660, 664). Mr. Price's "concerns" are further undercut by the fact that Black & Veatch failed to solicit a budget price for the Dynegy project from CB&I. (Price, Tr. 603-04; *see also* FOF 3.661). If Mr. Price was so "concerned" with Whessoe's pricing, why wouldn't he obtain an alternate budget price from CB&I? Mr. Price testified that it was just "natural" to obtain a budget price from Whessoe. (Price, Tr. 603-04; *see also* FOF 3.661). The only relevant evidence regarding Whessoe's ultimate firm fixed bid pricing to Dynegy is Mr. Puckett's testimony that Dynegy was satisfied with the bids it received. (Puckett, Tr. 4587-88; *see also* FOF 3.309). **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Jolly, Tr. 4691, 4760; *see also* FOF 3.268).

535. Since CB&I acquired PDM, the price quoted by Skanska/Whessoe to CMS energy for an LNG tank was **[xxxxxxx]** than the price submitted by CB&I. (**[xxxxx]**, Tr. 6285, *in camera*).

<u>Response to Finding No. 535:</u>

The proposed finding is misleading, incomplete and factually inaccurate because it compares **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (J. Kelly, Tr. 6284; *see also* FOF 3.473). It is well established that budget pricing does not have any bearing on the ultimate competitiveness of firm fixed bids. (*See* FOF 7.1-7.38). Thus, Complaint Counsel is comparing apples to oranges from which it cannot draw meaningful conclusions. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (J. Kelly, Tr. 6292; *see also* 3.973). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx]** (J. Kelly, Tr. 6293) (*see* also FOF 3.974). The proposed finding fails to account for the fact that CMS Energy **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxx]** (J. Kelly, Tr. 6285; FOF 3.474).

536. Whessoe, the LNG tank building firm Skanska purchased, has a spotty record constructing LNG facilities. CB&I was chosen over Whessoe for an additional fourth tank on an LNG tank project managed by Enron in Dabhol, India due to concerns about Whessoe's ability to timely complete the original three tanks. (CX 301 at CB&I/PDM-H4002566).

<u>Response to Finding No. 536:</u>

The proposed finding is incomplete, misleading, factually inaccurate and lacks evidentiary support. Overwhelming evidence has established Whessoe's currently strong reputation. (*See* FOF 3.74-3.86, 3.93-3.98). As for the Dabhol project, a former Enron

executive testified that Enron thought Whessoe's work was "excellent"; Enron was pleased with Whessoe's performance on the project. (Carling, Tr. 4459-60, 4464-65; *see also* FOF 3.91). Mr. Izzo concurred with Mr. Carling's opinion and testified that Whessoe finished the Dabhol project successfully and completed the first LNG tank in 28 months, "probably a record for a tank of that size." (Izzo, Tr. 6487; *see also* FOF 3.92).

537. Dr. Simpson viewed Whessoe's experience building three LNG tanks in Dabhol, India as a negative for Whessoe. (Simpson, Tr. 5751). Dr. Simpson testified: "[J]ust because a project ends up turning out okay doesn't necessarily mean that a company's performance on it was good. The fact that Enron had to assign some of its own people to it and had to kind of sweat out the project for a while I think would be a negative for Whessoe." (Simpson, Tr. 5751).

Response to Finding No. 537:

Complaint Counsel is indeed correct that Dr. Simpson gave this testimony. However, Complaint Counsel failed to note the following: (i) Mr. Carling ultimately testified that he now believes Skanska/Whessoe has a good reputation; and (ii) Enron viewed the need to assign extra engineers as its own problem. Dr. Simpson has no foundation for his statement and it is contradicted by the record. First, Dr. Simpson cited to Mr. Carling's deposition testimony regarding Whessoe to suggest that Whessoe has a poor current reputation for building LNG tanks, even though Mr. Carling testified that the problem Enron had at the Dabhol, India project was related to Kvaerner, not Whessoe, and that Whessoe, under the ownership of Skanska, is a very professional organization. (Simpson, Tr. 3639-50; *see also* FOF 7.209). Nonetheless, Dr. Simpson did not tell the court that Mr. Carling actually views Whessoe has having a good reputation. (Simpson, Tr. 3648-49; *see also* FOF 7.209). Second, in regards to assigning more engineers to the Dabhol project, Mr. Carling testified that "that was more the fault of then Enron management to only put in two people to supervise the contractor." (Carling, Tr. 4507). Neither Dr. Simpson, when confronted with adverse facts during cross-examination, nor the proposed finding accounts for these very important facts.

The proposed finding also fails to account for the fact that Enron's Dabhol project occurred well before Skanska acquired Whessoe; Kvaerner/Whessoe was ultimately the contractor Enron used for the Dabhol project. (Izzo, Tr. 6486; *see also* FOF 3.89). Additionally, Skanska/Whessoe has a fine reputation among current United States LNG customers and market participants. ((*See* FOF 3.74-3.86). For example, Dynegy selected Skanska/Whessoe as its EPC contract based partially on Whessoe's experience on the Dabhol, India project. (Puckett, Tr. 4548-49; *see also* FOF 3.272). While investigating Skanska/Whessoe's background and experience, Dynegy learned that Whessoe performed the Dabhol, India project in a satisfactory manner. (Puckett, Tr. 4565; *see also* FOF 3.272).

538. On the Atlantic LNG project in Trinidad, Bechtel precluded Whessoe from bidding on the last of three LNG tanks, although Whessoe had built the first two tanks, citing Whessoe's poor performance during the construction of the first two tanks. (JX 32 at 57-58 (Rapp, Dep.)). "Whessoe did not perform at all well in Trinidad, and Bechtel had to provide substantial project management support." (CX 693 at **[xxx]** 01 028).

Response to Finding No. 538:

The proposed finding is misleading for several reasons. First, Mr. Rapp testified that Bechtel is satisfied that the tanks Whessoe built in Trinidad are "well-constructed" (Rapp, Tr. 1332-33; *see also* FOF 3.82). Mr. Rapp testified that he did not have personal knowledge about Whessoe's performance constructing the first two LNG tanks in Trinidad (Rapp, Tr. 1291). Mr. Rapp only heard about Whessoe's performance from second and third-hand sources. (Rapp, Tr. 1291). Second, Mr. Rapp testified that he believes Whessoe is able to competitively pursue LNG jobs in the United States. (Rapp, Tr. 1326-27; *see also* 3.82). Third, Skanska had not yet acquired Whessoe when Bechtel awarded Whessoe the Trinidad project. (CX 693 at **[xxx]** 01 028). Skanska's acquisition of Whessoe created a "formidable pair." (Scorsone, Tr. 4864; *see also* FOF 3.96).

539. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 135 at CB&I 009268-HOU, *in camera*).

Response to Finding No. 539:

The proposed finding is not remotely supported by the evidence because it erroneously quotes language that does not appear in the cited document. The quotations provided in the proposed finding do not appear in the cited document. (*See* CX 135). In fact, the record that is in evidence contradicts the proposed finding. Bechtel is satisfied that the LNG tanks Whessoe built in Trinidad are "well-constructed" (Rapp, Tr. 1332-33; *see also* FOF 3.82). Further, Bechtel believes that Whessoe is able to competitively pursue LNG jobs in the United States. (Rapp, Tr. 1326-27; *see also* 3.82). Other United States LNG customers and industry participants also have a favorable view of Skanska/Whessoe's reputation. (*See* FOF 3.74-3.86).

540. Only CB&I and PDM submitted bids for the third LNG tank for an expansion of the Atlantic LNG expansion in Trinidad. (JX 32 at 57-58 (Rapp Dep.)).

Response to Finding No. 540:

The proposed finding is not supported by the evidence. The evidence cited does not even allude to the "fact" provided in the proposed finding. (*See* Rapp, Tr. 1290-92). Therefore, Complaint Counsel has failed to cite any evidence supporting the proposition that CB&I and PDM were the only bidders for the third LNG tank in Trinidad.

541. PDM noted Whessoe's historically poor performance in communications with consultants. In August 1999, Luke Scorsone wrote that he expected a potential customer, Unocal, to look favorably upon PDM relative to Whessoe on a project, "given that Noell Whessoe has performed poorly at Trinidad and Dabhol." (CX 115 at PDM-HOU017554). Dr. Simpson testified: "The record indicates that one customer, Bechtel, is not willing to consider them (Skanska); indicates that they've had problems in the past. The competitors of Whessoe are knowledgeable about these problems, and these competitors have an incentive to share the information about Whessoe's poor record with customers, as is indicated by that e-mail from Sam Kumar." (Simpson, Tr. 3329).

<u>Response to Finding No. 541:</u>

The proposed finding is misleading and irrelevant because regardless of what PDM wrote in 1999 or what Dr. Simpson presently believes, current United States LNG customers and market participants consider Skanska/Whessoe's reputation excellent. (*See* FOF 3.74-3.86). Further, Dr. Simpson's opinion fails to account for the fact that Enron and Bechtel both considered Whessoe's performance to be very good during the Dabhol and Trinidad projects. (Carling, Tr. 4459-60, 4464-65; Rapp, Tr. 1332-33; *see also* FOF 3.82, FOF 3.91).

11. ***[xxxxxxxxxxxxxxxxx] Cannot Replace PDM***

542. The joint venture formed between **[xxxxxxxxxxxxx]** and **[xxxxxxxxxxxxxxxxxxxx]** to compete on LNG project is unlikely to replace PDM. **[xxxxxxxxxxxxx]** is not capable of competing against CB&I for the majority of CB&I's domestic LNG work: single-containment tanks. CCFF 547. **[xxxxxxxxxxxxxxxx]** also lacks the experience and the local knowledge that CB&I possesses and PDM possessed. CCFF 376. In fact, **[xxxxxxxxxxxxx]** avoids competing with CB&I for U.S. projects, and does not bid on projects in direct competition with CB&I. CCFF 554-555.

<u>Response to Finding No. 542:</u>

The proposed finding is misleading and factually incorrect because it ignores the current trend in the United States toward double and full containment construction. (*See* FOF 3.11-3.14). Most of the new LNG projects currently under consideration in the United States are requiring the use of double or full containment tanks. (Puckett, Tr. 4541-42; Scorsone, Tr. 4988; Eyermann, Tr. 6968; RX 185, at TWC000006; *see also* FOF 3.12). The proposed finding's broad conclusions are belied by the evidence. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx]** (*See* FOF 3.162, 3.163, 3.164). Technigaz/Zachry has already entered the U.S. LNG market and has been accepted by LNG customers. (*See* FOF 3.173-3.186). Moreover, the proposed finding incorrectly states that Technigaz-Zachry avoids competing with CB&I. This is patently false. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. (*See* FOF 3.174-3.177).

543. **[xxxxxxxx]** has never built an LNG, LPG or LIN/LOX tank or a TVC in the United States. CCFF 136, 146, 172, 180, 192.

<u>Response to Finding No. 543:</u>

CB&I has no specific response.

544. The press release announcing the Technigaz/Zachry partnership states only that the partnership will pursue LNG projects and makes no mention of the other relevant products. (RX 35).

<u>Response to Finding No. 544:</u>

CB&I has no specific response.

545. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxx]**, Tr. 3290-1 (citing *in camera* documents). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (*Id.*)

<u>Response to Finding No. 545:</u>

The proposed finding is irrelevant and misleading. Dr. Simpson's opinions about Technigaz/Zachry's ability to compete in the United States are contradicted by evidence from current LNG customers and market participants. (*See* FOF 3.179-3.194). **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx] (**Fahel, Tr. 1684-85; *see also* FOF 3.173). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Jolly, Tr. 4764-65; *see also* FOF 3.178). Dr. Simpson was unable to account for any of these significant facts.

546. **[xxxxxxxx]** admits it is not capable of competing against CB&I for single containment tanks. (**[xxxxxx]**, Tr. 4725, *in camera*). **[xxxxxx]**, Vice President of Marketing of **[xxxxxxxxxxxxxxxxxxx]**, testified it is likely that CB&I would have a large advantage over **[xxxxxxx]** for single-containment LNG tanks. (**[xxxx]**], Tr. 4711, *in camera*).

Response to Finding No. 546:

The proposed finding is misleading, incomplete and irrelevant because it fails to account for the fact that the United States LNG market is trending toward double and full containment tanks. (*See* FOF 3.11-3.14). Most of the new LNG projects currently under consideration in the United States are requiring the use of double or full containment tanks. (Puckett, Tr. 4541-42; Scorsone, Tr. 4988; Eyermann, Tr. 6968; RX 185, at TWC000006; *see also* FOF 3.12). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4693-94; *see also* FOF 3.163). Thus, Technigaz/Zachry's ability to compete for single containment tanks is irrelevant because owners are requiring double and full containment tanks. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4693-94; *see also* FOF 3.163).

547. **[xxxxxx]**'s expertise is in concrete construction. (**[xxxxx]**, Tr. 1645-46; **[xxx]**, Tr. 4707, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxx]**, Tr. 1645-6, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]**. (**[xxx]**, Tr. 4724-25, *in camera*).

Response to Finding No. 547:

The proposed finding is incomplete and inaccurate. **[xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx]** (*See* CCFF 547 (emphasis added); Jolly, Tr. 4724-25). **[xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4724-25). The proposed finding is also inaccurate in that **[xxxxxxxx]** never stated that **[xxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

548. **[xxxxxxxx]** does not have a sense of the cost of building LNG tanks in the U.S. (**[xxx]**, Tr. 4755-56, *in camera*).

Response to Finding No. 548:

The proposed finding is misleading and inaccurate because it fails to account for **[xxxxxxxxxxx]** vast worldwide LNG experience. **[xxxxxxx]** currently has eight full containment LNG tanks under construction around the world. (**[xxxxxxxxxx]**; *see also* FOF 3.150). Contrary to the proposed finding, **[xxxxxxxxxxxx]** has a sense of the costs of building an LNG tank. **[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* CCFF 548; Jolly, Tr. 4755-56). This testimony cannot be accurately extrapolated into Complaint Counsel's proposed finding that **[Technigaz]** "does not have a sense of the cost of building LNG tanks in the U.S."

549. **[xxxxxxx]** added that CB&I would have an advantage in fabrication and erection of inner 9% nickels tank for even a full containment tank. (**[xxxxxxx]**, Tr. 4721, *in camera*). **[xxxxxx]** employees do not have experience in welding nine percent nickel steel. (**[xxxxx]**, Tr. 1629, *in camera*).

Response to Finding No. 549:

The proposed finding misrepresents **[xxxxxxxxxx]** testimony. **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, 4721-22; *see also* FOF 3.564). Additionally, it has been well established that fabrication and field erection are not barriers to entry. (*See* FOF 3.550-3.564). **[xxxxxxxx]** lack of specific nine percent nickel steel welding experience is also irrelevant as nine percent nickel steel welders use the exact same processes and techniques that carbon steel welders use. (Rano, Tr. 5872-73; *see also* FOF 3.532. Welding skills are not a barrier to entry. (*See* FOF 3.528-3.540).

550. To compete for LNG projects, **[xxxx]** would need to acquire specialized equipment relating to welding, cranes, testing and installation equipment for insulation, all at a significant cost. (**[xxxx]**, Tr. 1640-41, *in camera*).

<u>Response to Finding No. 550:</u>

The proposed finding is inaccurate because CB&I also rents some of the necessary LNG erection equipment. (Scorsone, Tr. 4897; *see also* FOF 3.38). **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4721).

551. **[xxxxxx]** of **[xxxxxx]** testified that **[xxxxxxxxxxxxxxxx]** would have to depend on less experienced field crews than those to which CB&I has access in the United States. (**[xxxxx]**, Tr. 4713, *in camera*).

<u>Response to Finding No. 551:</u>

The proposed finding is misleading and factually inaccurate. The cited evidence does not support the proposed finding. **[xxxxxxxxxx]** did not testify that **[xxxxxxxxxxxxxx]** would have to depend on less experienced field crews than CB&I. (*See* CCFF 551; **[xxxxx**], Tr. 4713). Contrary to the proposed finding, field crews are migratory, hired on a job-by-job basis and able to work for any company that needs them. (Glenn, Tr. 4119-20; Rano, Tr. 5917-18, 5952-53; *see also* FOF 3.550). Therefore, the lack of experienced local labor/workforce is not a barrier to entry. (*See* FOF 3.550-3.559).

552. **[xxxxxxxx]**, who had been closely involved in establishing the partnership between **[xxxxxxx]** and **[xxxxxxxx]**, testified that **[xxxxxxxxxxxx]** plans to pursue LNG projects selectively, with the first criteria being who will be competing against **[xxxxxxxxx]** (**[xxxxxx]**, Tr. 1672-73, *in camera*; *see also* **[xxx]**, Tr. 4750, *in camera*).

<u>Response to Finding No. 552:</u>

The proposed finding is misleading and factually incorrect because **[xxxxxxxxx]** did not testify that **[xxxxxxxxxxxxxx]** "first criteria" in pursing an LNG project was the competition. (*See* CCFF 552; **[xxxxx],** Tr. 1672-73). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** **[xxxxx]**, Tr. 1672-73). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. (*See* FOF 3.174-3.177).

553. **[xxxxxxxxx]** has chosen not to bid on recent projects where CB&I is also a bidder. **[xxxxxxxxxxxxxxx]** chose not to bid against CB&I for an LNG project in **[xxxxxxxx xxxx]** because "the **[xxxxxx]** part' of the joint venture believed that "CB&I would know more about how to construct that project than we could and that CB&I may be more equipped to perform that project than we would." (**[xxx]**, Tr. 1653-54, *in camera*). **[xxxxxxxxxxxxxxx]** bowed out of the bidding process, citing that labor and construction issues would make the work "very difficult to perform." (**[xxx]**, Tr. 1652-53, *in camera*).

<u>Response to Finding No. 553:</u>

The proposed finding is incomplete and misleading. For example, **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Fahel, Tr. 1653). **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* FOF 3.334, 3.335). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4698; *see also* 3.335). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* FOF 3.174-3.177).

554. **[xxxxxxxxxxxxxxx]** also chose not to bid against CB&I on either **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx]**. (*See* **[xxxxxx]** Tr. 1659, *in camera*; **[xxxxx]**, Tr. 4749, *in camera*).

<u>Response to Finding No. 554:</u>

The proposed finding is incomplete and misleading. The proposed finding is incorrect regarding the factors behind **[xxxxxxxxxxxxxxxxxx]** decision not to bid on Enron's Bahamas and Elba Island projects and El Paso's Rosarito project. **[xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Fahel, Tr. 1659). **[xxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Fahel, Tr. 1659; Jolly, Tr. 4749). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4749-50).

555. In **[xxxxxxxxxxxxx]**, **[xxxxxxxxxxxxxxx]** submitting a price for LNG tanks to **[xxxxxx]** but was eliminated from the field because its price was substantially higher than Whessoe and TKK. (**[xxx]**, Tr. 4690-91 (**[xxx]** told us to "sharpen our pencil to be more competitive next time"). CCFF 1003. This means that on the **[xxxxxxxxxxxxxxxxxxxxxx]** project, **[xxxxxxxxxxxxxxxx]** was less competitive on price than Whessoe and TKK, and would have been even less competitive than CB&I **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**.

<u>Response to Finding No. 555:</u>

The proposed finding is factually inaccurate because **[xxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx]** (Jolly, Tr. 4691). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4691). Further, the proposition that **[xxxxxxxxxxxxxxxxx]** "would have been even less competitive than CB&I" is absolute speculation that is wholly unsupported by the record. Complaint Counsel cannot possibly know the numbers associated with a bid that CB&I did not make; Complaint Counsel failed to present any evidence about **[xxxxxxxxxxxxxxxx]** bid price to Dynegy.

556. **[xxxxxxxxx]** testified that **[xxxxxxxx]** will stop competing for LNG projects in the United States if it is not successful after 3-5 bids. (**[xxxxxx]**, Tr. 4752-53 (*in camera*)).

<u>Response to Finding No. 556:</u>

The proposed finding is incomplete and misleading because **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly Tr., 4685, 4690; *see also* FOF 3.166; 3.173).

Thus, a decade or more could pass before **[xxxxxxxxxxxxxxx]** submits three to five bids on U.S. projects.

12. ***TKK Cannot Replace PDM***

557. TKK, a Japanese LNG tank builder, has teamed with AT&V to supply LNG tanks in the United States. (Cutts, Tr. 2437-38). Pursuant to this partnership, AT&V will supply the field labor for the erection of the LNG tank and share some of the responsibility for estimating the costs of the project. (Cutts, Tr. 2327-8).

Response to Finding No. 557:

CB&I has no specific response.

558. TKK will "carry the lead responsibility" for engineering and design of the LNG tank. (Cutts, Tr. 2327). TKK will train AT&V employees on how to construct LNG tanks, including the use of TKK's welding equipment. (Cutts, Tr. 2379). Mr. Cutts anticipates that the newly trained AT&V employees will need several years of experience constructing LNG tanks before they work as efficiently as experienced CB&I employees. (Cutts Tr., 2379-80).

Response to Finding No. 558:

The proposed finding mischaracterizes Mr. Cutts' testimony as he testified that AT&V employees will need only a "few" years (not "several") of experience before becoming as experienced as CB&I. (Cutts, Tr. 2379-80).

559. Although it has bid on LNG projects, TKK has never built an LNG, LPG, LIN/LOX tank or TVC in the United States. CCFF 136, 146, 172, 180, 192.

Response to Finding No. 559:

Respondents have no specific response.

560. Based on the prices submitted for the Memphis LNG project, CB&I and PDM have as much as a 59% cost advantage over TKK for U.S. LNG projects. CCFF 952.

Response to Finding No. 560:

The proposed finding is inaccurate, misleading, irrelevant, and is not supported by the evidence. Complaint Counsel fails to cite a single piece of evidence in its proposed finding, or CCFF 952, showing that CB&I and PDM had a 59% cost advantage over TKK. Further, the

pricing submitted for the Memphis project is irrelevant because the bid process occurred in 1994, almost nine years ago. (Scorsone, Tr. 5013-14) (FOF 3.507). Black & Veatch submitted a tank price for the Memphis project, using TKK's tank design. (RX 888) (FOF 3.502). TKK's design, however, accounted for less than 25% of Black & Veatch's tank price. (RX 888) (FOF 3.502). The remaining costs of Black & Veatch's quoted tank price were attributed to Graver Tank. (RX 888) (FOF 3.502). Thus, it is misleading, and inaccurate for Complaint Counsel to compare CB&I's and PDM prices to a tank price Black & Veatch sumbitted that incorporated TKK's design. TKK's correct pricing abilities are shown by its Dynegy bid, which the customer was satisfied with, and its bid in Trinidad which is a natural experiment simulating TKK's ability to price in the U.S. (Puckett, Tr. 4559-60; Harris, Tr. 7351) (FOF 3.304, 7.103).

561. On the Dynegy project, CB&I's price for LNG tanks (had it submitted such pricing information) would have been substantially below TKK's prices. CCFF 996-997.

Response to Finding No. 561:

The proposed finding is misleading, speculative, and unsupported by the evidence. While CB&I never submitted a tank price for the Dynegy project, TKK submitted a bid that met Dynegy's technical expectations and fell within Dynegy's expected price range. (Puckett, Tr. 4556-57) (FOF 3.287-3.288). Obviously, Dynegy does not agree with this finding or it would have let CB&I bid. (Puckett, Tr. 4559-60; Glenn, Tr. 4137) (FOF 3.304, 3.305). Complaint Counsel's proposed finding is purely speculative, as there is no evidence suggesting that CB&I's price would have been higher than TKK's bid.

562. TKK considers the United States to be "one of the most difficult if not the most difficult" countries in which to operate. (Cutts, Tr. 2340). TKK views forming a corporation, complying with tax laws, OSHA regulations and environmental regulations as overly burdensome and a barrier to entry into the U.S. market. (Cutts, Tr. 2339-40). TKK is "cautious" about supplying LNG tanks in the United States because it "does not find the atmosphere in America to be a user-friendly atmosphere." (Cutts, Tr. 2329-30).

Response to Finding No. 562:

The proposed finding is misleading. TKK has entered the U.S. LNG market despite any of the alleged difficulties operating in the U.S. (FOF 3.109-3.122). Further, TKK has partnered with AT&V to help it overcome its unfamiliarity with the U.S. (FOF 3.105).

563. The success of the joint venture between TKK and AT&V will depend to a significant extent on the capabilities of AT&V, the local contractor. (Carling, Tr. 4521). "[T]he number one barrier to entry" in the LNG market is the customer's "attitude or appreciation for what you've built in the past and/or what you build in the future." (Cutts, Tr. 2344).

Response to Finding No. 563:

Respondents have no specific response.

564. AT&V has experienced construction problems and delays on recent projects for other customers that have damaged its reputation. CCFF 473-475; 480-481.

Response to Finding No. 564:

The proposed finding is misleading and mischaracterizes the evidence. (RFOF 473-475; RFOF 480-481). Current LNG customers including Dynegy, Calpine, and Freeport LNG, agree that AT&V has the reputation necessary to build LNG tanks in the U.S. (Puckett, Tr. 4557-58, 4584-85; Izzo, Tr. 6499, 6536; Eyermann, Tr. 7001-02) (FOF 3.123-3.130).

565. Linde believes the TKK/ATV partnership creates an unacceptable level of risk for TKK as AT&V's partner for LNG projects. (Kistenmacher, Tr. 905). (*See* Carling, Tr. 4522-3) (to assess capabilities of AT&V, would examine its track record on similar projects).

Response to Finding No. 565:

The proposed finding is inaccurate and grossly misleading. Mr. Kistenmacher never testified that AT&V creates a risk for TKK. BOC, which now owns Linde, has awarded two LIN/LOX tank projects to AT&V since the acquisition. (Kistenmacher, Tr. 921-22 ; V. Kelley, Tr. 4599, 5291-92; Scorsone, Tr. 5024; RX 273; RX 813) (FOF 5.87, 5.116, 5.181). BOC "was quite satisfied [with AT&V] in all aspects." (V. Kelley, Tr. 5287) (FOF 5.108).

566. Dr. Simpson believes that the TKK/ATV partnership is not sufficient to restore the pre-acquisition level of competition. (Simpson, Tr. 3288-9). According to Dr. Simpson, the results of the bidding for an LNG tank project for Memphis Light, Gas & Water indicate that a partnership of TKK and Graver Tank was not competitive. (Simpson, Tr. 3290). Dr. Simpson noted that ATV has less experience than Graver did. (Simpson, Tr. 3290).

Response to Finding No. 566:

The proposed finding is not supported by the evidence. There is no record evidence which supports Dr. Simpson's speculation that AT&V has less experience than Graver. In fact, AT&V employs many ex-CB&I workers, and several employees of AT&V have experience building LNG tanks in the U.S.. (Carling, Tr. 4489; Cutts, Tr. 2463) (FOF 3.108, 3.127). There is no evidence that TKK and Graver formed a partnership for the Memphis project; rather "TKK clearly came in on a one-shot deal in 1994 to work with" Black & Veatch on the project. (Price, Tr. 650) (FOF 3.508). Mr. Carling testified that TKK's prices for LNG tanks in the U.S. will be competitive to the level of PDM's prices. (Carling, Tr. 4519). (FOF 3.127).

13. *XL Technologies Cannot Replace PDM*

567. XL Technology Systems ("XL Technologies") was created in 1995 by Ronald Scully to produce thermal vacuum systems for satellites (Scully, Tr. 1113). CB&I bought the company in 1999 and changed its name to XL Technology Systems, Inc. (Scully, Tr. 1113). CB&I sold the company back to Mr. Scully in 2002. (Scully, Tr. 1113).

Response to Finding No. 567:

Respondents have no specific response to this finding, except that XL does not produce thermal vacuum systems for *satellites*. Rather, XL builds thermal vacuum systems for *TVC's.* (*See generally* RFOF 6.1-6.10).

568. XL Technologies has never built an LNG, LIN/LOX or LPG tank in the United States. CCFF 136, 146, 172, 180, 192.

Response to Finding No. 568:

Respondents have no specific response.

569. XL Technologies admits that it is not capable of supplying a TVC without partnering with an experienced chamber supplier such as CB&I. (Scully, Tr. 1118, 1134, 1252; *see* CX 262 at CB&I-H004037).

Response to Finding No. 569:

Respondents have no specific response.

570. On February 28, 2002, CB&I sold its XL Technologies subsidiary to Mr. Scully. (Scully, Tr. 1130). CB&I did not transfer to XL Technologies the assets, engineering know-how, equipment or personnel necessary to the field-erection of large TVCs. (Scully, Tr. 1133).

Response to Finding No. 570:

Respondents have no specific response.

L. CB&I's Market Power Extends to All Types of LNG Tanks

571. Respondents argue that a "trend" towards full-containment tanks will enable foreign firms, skilled in building concrete structures, and will erode CB&I's market share and market power. This argument is specious for at least two reasons. First, there is no evidence from FERC – the regulatory agency that decides why types of LNG tanks must be built – that it has mandated a "trend" towards full-containment tanks. CCFF 574. Second, Respondents have as much experience in constructing full-containment tanks as any other firm, and has localized competitive advantages against these firms in the United States. CCFF 358, 377-378 . The recent record of CB&I success in negotiations for full-containment tanks in the United States underscores these competitive advantages. CCFF 578, 585, 586.

Response to Finding No. 571:

The proposed finding is argumentative, unsupported by the evidence and not an appropriate "finding of fact." While FERC has not yet mandated the use of double or full containment LNG tanks, it is apparent from customer testimony and recent project announcements that owners are trending toward these tank designs. (*See* FOF 3.12). Dynegy, Williams Energy and Freeport LNG, and most of the other new LNG projects currently under consideration in the United States are requiring the use of double or full containment tanks. (Puckett, Tr. 4541-42; Scorsone, Tr. 4988; Eyermann, Tr. 6968; RX 185, at TWC000006; *see also* FOF 3.12). Further, CB&I has far less experience constructing double and full containment LNG tanks than its competitors. For example, Technigaz, is currently constructing eight full

containment LNG tanks worldwide, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4689; *see also* FOF 3.151). **[xxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4700-01; *see also* FOF 3.93).

572. Full-containment tanks are more likely to be used "[i]f you are closer to population in more of an urban setting or close to an urban setting, full-containment typically is used just for the extra bit of safety it has." (Bryngelson, Tr. 6133).

<u>Response to Finding No. 572:</u>

The proposed finding is incomplete because LNG customers have also indicated that the "enhanced value" of double containment may be greater than the additional cost. (Cutts, Tr. 2501; *see also* FOF 3.12). Customers also view full and double containment tanks as safer than single-containment tanks. (Glenn, Tr. 4112-13; Hall, Tr. 1842-43; *see also* FOF 3.12). Further, an owner can site a double and full containment LNG tank on a smaller piece of property than it could for a single containment tank in order to comply with federal laws relating to vapor dispersion and thermal radiation in the event of a spill. (Scorsone, Tr. 4922; *see also* FOF 3.11).

573. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxx]**. (RX 157 at BP 02 004; CX 124 at PDM-HOU2011156; CX 1075 at CB&I-001240-PLA; CX 1161 at CB&I/PDM-H4008131-133, *in camera*; JX 23a at 89 **[xxxxxxxxxx]**, *in camera*; **[xxxxx]**, Tr. 4724-25, *in camera*).

<u>Response to Finding No. 573:</u>

Respondents have no specific response.

574. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx]**, Tr. 697-98, 727-28, *in camera*; Bryngelson, Tr. 6133). Respondents presented no evidence from FERC that there is a "trend" toward full-containment LNG tanks in the United States.

Response to Finding No. 574:

The proposed finding is irrelevant because it ignores the fact that most of the new LNG projects currently under consideration in the United States are requiring the use of double or full containment tanks. (Puckett, Tr. 4541-42; Scorsone, Tr. 4988; Eyermann, Tr. 6968; RX 185, at TWC000006; *see also* FOF 3.12). While FERC has not yet mandated the use of double or full containment LNG tanks, it is apparent from customer testimony and recent project announcements that owners are trending toward these tank designs. (*See* FOF 3.12). Owners are choosing double and full containment LNG tanks because they are safer, which is particularly important given recent terrorist concerns, and because owners are able to construct these tank types on smaller parcels of land. (*See* FOF 3.11, 3.12, 3.13). It is difficult for an owner to find a large enough site to accommodate a single containment LNG tank. (Eyermann, Tr. 7054-55; *see also* FOF 3.387).

575. Given a choice, customers will seek the lowest-cost LNG tank to build. (Izzo, Tr. 6523; Kelly, Tr. 6260, 6274-75).

Response to Finding No. 575:

The proposed finding is misleading and incomplete because it ignores the fact that owners also consider safety and siting concerns when selecting an LNG tank type. (*See* FOF 3.10, 3.12).

576. CMS Energy, which may shortly begin construction of an LNG tank facility in Louisiana, has received approval for a single-containment tank. (J. Kelly, Tr. 6260, 6271). CB&I will construct the LNG tank for CMS Energy. (Kelly, Tr. 6260).

Response to Finding No. 576:

The proposed finding is misleading, incomplete and factually inaccurate. CMS Energy is an exception to the recent trend because it is a one tank expansion of an existing facility. (Eyermann, Tr. 7054; *see also* FOF 3.14). Unlike a new facility, the CMS expansion

project will construct an LNG tank on a site that already contains numerous single containment LNG tanks. (Eyermann, Tr. 7054; *see also* FOF 3.14). Thus, CMS is allowed to build an additional single containment tank because the new construction is "grandfathered". (Eyermann, Tr. 7054; *see also* FOF 3.14). An owner constructing a new LNG facility would have a difficult time finding a large enough site to accommodate a single containment tank. (Eyermann, Tr. 7054-55; *see also* FOF 3.387).

577. The Dynegy project will consist of a full-containment tank. (Puckett, Tr. 4541). CB&I repeatedly refused to quote a price unless it was awarded the project on a turnkey basis, and ultimately Dynegy did not accept CB&I's price quote because it was submitted too late in the bidding process. CCFF 996.

Response to Finding No. 577:

The proposed finding is misleading and factually inaccurate. First, Dynegy's Hackberry LNG import terminal will include three full containment tanks, not one full containment tank. (Puckett, Tr. 4539-40; *see also* FOF 3.256). Second, the proposed finding oversimplifies and misstates the facts surrounding CB&I's initial decision not to bid on the tank portion of the Dynegy project. The fact that CB&I initially chose not to bid on the project based on its concerns about submitting its pricing and designs to Black & Veatch, a competitor and partner of one of the bidders, is uncontroverted. (*See* FOF 3.297-3.306). Ultimately, CB&I decided to submit a bid and Dynegy refused to accept it. (*See* FOF 3.303, 3.304). The proposed finding ignores the fact that one of the reasons Dynegy would not accept CB&I's bid was because it was satisfied with the bids it received from Skanska/Whessoe, TKK/AT&V and Technigaz/Zachry. (*See* FOF 3.304, 3.305).

578. **[xxx]** is likely to purchase a full-containment tank for an upcoming project. (JX 31 at 74 (**[xxxxxxx]** Dep.)). **[xx]** has decided to negotiate for sole-source agreements with CB&I for this and two other pending LNG projects in the United States. (Glenn, Tr. 4180).

Response to Finding No. 578:

The proposed finding is factually inaccurate and misleading because it fails to cite evidence supporting its contention that **[xxxx]** decided to negotiate sole-source agreements with CB&I for three LNG projects. To the contrary, CB&I does not have a contract or a notice to proceed for any **[xxxx]** LNG project in the United States. (Glenn, Tr. 4180). **[xx]** has, however, decided to work with CB&I on the front end development of these projects. (Glenn, Tr. 4180). If BP is satisfied with CB&I's pricing, schedule and terms and if the projects move forward, **[xx]** has indicated that CB&I will be awarded those jobs. (Glenn, Tr. 47180). If **[xxx]** can not reach an agreement with CB&I, it is prepared to explore other options with other contractors. (Scorsone, Tr. 4995; *see also* FOF 3.413). It is not accurate to portray this procedure as agreeing "to negotiate for sole-source agreements." (*See* CCFF 578).

579. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 758 at CB&I-PL031543-59, *in camera*; CX 145 at PDM-S 001430-431).

Response to Finding No. 579:

The proposed finding is incomplete and misleading to the extent that it implies that CB&I is more qualified to build double and full containment tanks than other competitors. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx]** (Jolly, Tr. 4732; *see also* FOF 3.150). **[xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4689; *see also* FOF 3.151). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4700-01; *see also* FOF 3.93). For a double or full containment tank, CB&I would subcontract the foundation work to a company with an expertise in concrete work because concrete work is not a "core competency" of CB&I. (Rano, Tr. 5920-21; *see also* FOF 3.43). Further, in regards to double and full containment

tanks, CB&I has never self-performed the construction of concrete walls for field-erected LNG tanks. (Rano, Tr. 5923; *see also* FOF 3.45).

580. Dr. Simpson testified that he believes that an independent PDM would be a strong competitor for full-containment LNG tanks in the U.S. Dr. Simpson based this on the fact that PDM had built full-containment LNG tanks overseas. (CX 145 at PDM-S 001430-001431). According to Dr. Simpson, if PDM could compete on an equal footing in other parts of the world, they should have an advantage in the U.S. where they know the regulatory environment, the subcontractors, and the work force. Dr. Simpson also noted that PDM had built a double-containment LNG tank in Puerto Rico. (Simpson, Tr. 3350).

Response to Finding No. 580:

The proposed finding is misleading, speculative and lacking evidentiary support. Despite Dr. Simpson's beliefs, the truth is PDM had problems constructing the double containment LNG tank in Puerto Rico. (Scorsone, Tr. 4827-28; *see also* FOF 8.92, 8.93). These problems occurred in 2000 right up to the eve and even post-Acquisition by CB&I. (Scorsone, Tr. 4831; *see also* FOF 8.95).

M. CB&I's Post-Merger LNG Project Wins Show that Other Firms Cannot Replace PDM

581. Respondents contend that entry by foreign and domestic firms will erode CB&I's market share and market power. The evidence of post-merger negotiations for LNG projects in the United States that may be built in the future indicates the opposite conclusion: CB&I is likely to maintain or increase its dominant position in the United States LNG tank market.

Response to Finding No. 581:

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." The fact that current LNG customers and market participants are not concerned about the Acquisition because of the presence of foreign competition contradicts the proposed finding. (*See* FOF 3.247-3.255).

582. There are at least 11 new LNG projects in the United States today that are in various stages of development. Depending on business conditions, some or all may never be built. Of these 11 projects, CB&I has won or has the inside track on winning at least six projects (CMS, [**xx**] (three projects), El Paso, Poten & Partners), a chance of winning in four other

projects (Yankee Gas, Freeport LNG, Calpine and Williams/Dominion Resources), and has refused to submit pricing in a timely manner in the 11th project (Dynegy).

Response to Finding No. 582:

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." Further, the proposed finding is misleading, factually inaccurate and incomplete. Foreign competitors are competing, or planning to compete, for the projected U.S. LNG projects. (*See* FOF 3.68-3.73, 3.109-3.122, 3.173-3.178, 3.200-3.203, 3.212-3.227). Further, owners of the proposed domestic LNG projects are currently considering, or would in the future consider, foreign LNG tank suppliers. (*See generally,* FOF 3.256-3.459). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** ((Jolly, Tr. 4760; *see also* FOF 3.307). Contrary to the proposed findings assertion, CB&I attempted to submit a tank-only bid for the Dynegy project but was rejected because Dynegy was satisfied with the bids it had received. (*See* FOF 3.303, 3.304; *see also* RFOF 577).

583. CMS Energy intends to build an LNG import terminal in Louisiana. CMS Energy has awarded the tank portion of the contract to CB&I. (Glenn, Tr. 4399).

Response to Finding No. 583:

The proposed finding is misleading and factually inaccurate. CMS Energy is planning to build a one tank expansion to its existing Lake Charles facility. (J. Kelly, Tr. 6260; *see also* FOF 3.468, 3.469). It does not intend to build "an LNG import terminal in Louisiana." (*See* CCFF 583).

584. **[xxx]** is evaluating the possibility of constructing three new LNG import terminal facilities in the United States. CCFF 832. [**xx**] has decided to negotiate for sole-source agreements with CB&I for the three projects. (Glenn, Tr. 4180).

Response to Finding No. 584:

The proposed finding is factually inaccurate and misleading. The evidence cited does not support the proposition that **[xxx]** has decided to negotiate sole-source agreements with CB&I. To the contrary, CB&I does not have a contract or a notice to proceed for any **[xxx]** LNG project in the United States. (Glenn, Tr. 4180). **[xxx]** has, however, decided to work with CB&I on the front end development of these projects. (Glenn, Tr. 4180). If **[xxx]** is satisfied with CB&I's pricing, schedule and terms and if the projects move forward, **[xxx]** has indicated that CB&I will be awarded those jobs. (Glenn, Tr. 47180). However, **[xxx]** is prepared to explore other options with other contractors if it cannot reach an agreement with CB&I. (Scorsone, Tr. 4995; *see also* FOF 3.413).

585. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]**. (Glenn, Tr. 4177, 4234; CX 1478 at CB&I 010191-HOU, *in camera*).

Response to Finding No. 585:

Respondents have no specific response.

586. CB&I is negotiating a sole-source contract to construct an LNG import terminal for Poten & Partners in the Northeastern United States. (Glenn, Tr. 4399).

Response to Finding No. 586:

Respondents have no specific response.

587. Yankee Gas is considering entering into a turnkey arrangement with CB&I or CHI. CCFF 1008.

Response to Finding No. 587:

The proposed finding is misleading, incomplete and factually inaccurate. Yankee Gas is considering entering into a turnkey arrangement with an EPC contractor or taking bids on the component parts of the project. (Andrukiewicz, Tr. 6466-67). However, Yankee Gas hired SEA Consultants as its engineering consultant. (Andrukiewicz, Tr. 6444-45; *see also* FOF

3.352). SEA Consultants is currently developing project specifications that would allow Yankee Gas to solicit proposals. (Andrukiewicz, Tr. 6450; *see also* FOF 3.353). In addition to developing specifications, SEA is also charged with sending the specifications to, and soliciting information from, appropriate companies, reviewing responses, and assisting Yankee Gas in analyzing the final proposals. (Andrukiewicz, Tr. 6453; *see also* FOF 3.353). Yankee Gas would consider qualifying Skanska/Whessoe, Technigaz, CB&I and CHI for the Waterbury project. (Andrukiewicz, Tr. 6453-54; *see also* FOF 3.357).

588. In addition to the projects that are being negotiated as, or may become, sole-source arrangements, four other projects are under consideration, but the nature of the bidding process – open competitive bidding or sole-source arrangement – has yet to be decided. The three pending LNG projects are for Freeport LNG, Calpine and Williams. (Glenn, Tr. 4140-2, 4145-8).[4]

Response to Finding No. 588:

The first sentence of the proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." The proposed finding also fails to account for the fact that although they are not completely certain the owners are reasonably certain that their projects will be completed. (Izzo, Tr. 6521-22; Eyermann, Tr. 7043-44). For example, Calpine plans to make a public announcement at the end of the first quarter of 2003 and Freeport LNG plans on filing its FERC application in February 2003. (Izzo, Tr. 6490; Eyermann, Tr. 6977; *see also* FOF 3.406, 3.388). CX 1607 does not support the contention that there is any uncertainty surrounding the Williams Energy/Dominion Resource LNG expansion project. (*See* CX 1607).

589. Because the LNG tank owner has not decided how to structure the bidding process for the LNG tanks, it is unclear who will win the projects.

[4] It is uncertain whether these three projects will ever be completed. (Izzo, Tr. 6521; Eyermann, Tr. 7043-7044; CX 1607 at 1).

Response to Finding No. 589:

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact."

590. CB&I has at least a 50% chance of winning each project. (Glenn, Tr. 4267; CX 1729 at 9). Mr. Glenn will not allow CB&I to spend "any time or money in projects where we don't think we have a really good chance of winning. I mean, if there are three bidders, it's a 33 percent chance, we'd probably pass on that one. If there are three bidders and we've got a 40 or 50 or 60 percent chance of winning it, we'll go after it." (CX 1729 at 10). CB&I's current "capture rate" is markedly higher than PDM EC's 34% capture rate in 1999, and higher still than PDM EC's 2000 capture rate goal (37%). (CX 94 at PDM-HOU017585).

Response to Finding No. 590:

This finding is vague, as it does not refer to a specific product market. Further, this finding is not supported by credible evidence to the extent it relies on CB&I's internal predictions regarding its chances of winning any particular project. The only entity that knows CB&I's true chances of winning a particular job is the owner of the project; Complaint Counsel has not cited any evidence to support its claim that owners agree with these statistics. To the contrary, current customers for LNG tanks believe that there is sufficient competition in the markets, and that CB&I must keep its prices competitive in order to avoid losing work to other companies. (*See* Opening Br. at 64-80).

591. CB&I declined to submit a price quote for the Dynegy project unless Dynegy structured the project as a turnkey project. (Glenn, Tr. 4245, 4247-8). CCFF 984.

Response to Finding No. 591:

The proposed finding is misleading and factually incorrect: the evidence cited by the proposed finding does not support it. During the EPC contractor search, CB&I submitted a turnkey proposal and the owner, Dynegy rejected CB&I's approach and disqualified it as a bidder. (Puckett, Tr. 4558; Glenn, Tr. 4128-29, 4410; *see also* FOF 3.270). The fact is that CB&I initially chose not to bid on the project based on its concerns about submitting its pricing

and designs to Black & Veatch, a competitor and partner of one of the bidders. (*See* 3.297-3.306). Ultimately, CB&I changed its mind and decided to submit a bid only after Dynegy agreed to analyze the bids itself. (Glenn, Tr. 4411; *see also* FOF 3.301). Dynegy refused to accept CB&I's bid because it was satisfied with the bids it received from Skanska/Whessoe, TKK/AT&V and Technigaz/Zachry. (*See* FOF 3.304, 3.305).

N. Respondents' Critical Loss Analysis Is Flawed and Underestimates the Profitability to CB&I of a Price Increase in the Relevant Markets

592. Dr. Harris uses a critical loss analysis to assess whether new entrants collectively can prevent CB&I from exercising market power. (Harris, Tr. 7255-58)

Response to Finding No. 592:

Respondents have no specific response.

593. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxxxxxxx]**, Tr. 3817, *in camera*). A critical loss analysis can be used to determine whether a hypothetical monopolist can profitably increase price by 5 percent. (James Langenfeld and Wenqing Li, "Critical Loss Analysis in Evaluating Mergers," *Antitrust Bull*. (2001), at 299-337; Barry C. Harris & Joseph J. Simons, "Focusing Market Definition: How Much Substitution is Enough?," 12 Research in L. & Econ., at 207 (1989); Simpson, Tr. 2993-94).

Response to Finding No. 593:

Complaint Counsel's finding number 593 is irrelevant because Dr. Simpson botched his critical loss analysis in several key ways. First, Dr. Simpson lacked the underlying information necessary to properly conduct a critical loss analysis. Although he relied almost entirely on a single PDM document for all his assumptions regarding fixed and variable costs, he admittedly did not know whether CB&I and PDM had differences in the way they calculated fixed versus variable costs. (Simpson, Tr. 3875-76) (FOF 7.196). In addition, Dr. Simpson relies on documents and testimony he admittedly knows nothing about. (FOF 7.197-7.205). Dr. Simpson classified entire categories of costs as variable, despite evidence that they are fixed in

whole or in part; thus he severely underestimated the critical loss. Moreover, this proposed finding is irrelevant because even if Dr. Simpson's critical loss analysis were to be accepted, CB&I has already lost more business than the "critical loss" estimated by Dr. Simpson. Thus, CB&I could not keep enough business at higher prices to make a price increase profitable. (Harris, Tr. 7263-64).

594. Dr. Simpson testified: "...[A]s the hypothetical monopolist increases price, it earns a higher profit on those units that it continues to sell....[I]t also loses profit because it's not selling as many units as it had before....For the hypothetical monopolist, the price increase is profitable if the additional profit that it gets from getting a higher price on the units that it continues to sell exceeds the profit that it loses because it's selling fewer units." (Simpson, Tr. 2994; CX 1639).

Response to Finding No. 594:

Respondents have no specific response.

595. When the hypothetical monopolist increases price, the profit that it loses on the units that it no longer sells is the difference between the price that it had obtained for those units and its variable costs of producing those units. (Simpson, Tr. 2995). The difference between price and variable cost is sometimes called the contribution margin. (Simpson, Tr. 3017).

Response to Finding No. 595:

Respondents have no specific response.

596. The size of the contribution margin determines the critical loss, which is the amount of sales that a firm could lose before a given price increase becomes unprofitable. (Simpson, Tr. 2998). A critical loss analysis then compares this critical loss with information about the hypothetical monopolist's likely loss of sales if it were to increase price to determine whether a price increase would be profitable. (Harris, Tr. 7259; Simpson, Tr. 2998-99, 3530).

Response to Finding No. 596:

Respondents have no specific response.

597. A critical loss analysis could also be used as a tool to measure competitive effects if one is careful and recognizes several important caveats. (Simpson, Tr. 3525-6; Langenfeld, "Critical Loss Analysis," at 299, 313).

Response to Finding No. 597:

Respondents have no specific response. (Harris, Tr. 7156).

598. Dr. Harris, in performing his critical loss analysis to assess whether new entrants can collectively prevent CB&I from exercising market power, makes at least four major errors. He underestimates the critical loss, which is the sales loss that would make a price increase unprofitable for CB&I. (Simpson, Tr. 3527-30; CX 1669). He overestimates the amount of sales that CB&I would actually lose as a result of a price increase. (Simpson, Tr. 3536). He ignores differences between using a critical analysis to define a market and using a critical loss analysis to measure market power within a market. And, he fails to check whether his conclusions are consistent with other evidence. (Simpson, Tr. 3537).

Response to Finding No. 598:

Complaint Counsel's finding number 598 is utterly false. Dr. Harris properly estimates the critical loss in this case, properly estimates the amount of sales that CB&I would actually lose as a result of a price increase, understands the difference between using critical loss to measure market power and to define a market (Dr. Harris did, after all, invent critical loss analysis (Harris, Tr. 7156)), and Dr. Harris' conclusions are fully consistent with record evidence. Dr. Harris relied on actual CB&I evidence indicating how CB&I calculates fixed and variable costs, whereas Dr. Simpson did his calculation based on faulty assumptions made on documents he knows nothing about and misunderstands. (Harris, Tr. 7341-45) (FOF 7.59-7.81).

599. Dr. Harris testified that an important step in performing a critical loss analysis involves estimating the contribution margin. (Harris, Tr. 7259). Since the contribution margin is the difference between price and variable cost, estimating the contribution margin requires that one identify a firm's variable costs. (Harris, Tr. 7259; Simpson, Tr. 3004).

Response to Finding No. 599:

Respondents have no specific response to Complaint Counsel's proposed finding number 599, except to note that whether a particular cost is variable depends on the amount of sales lost and on a firm's overall business practices. Thus, a cost that might be varied if 50% of sales are lost and may not be variable if only 25% of sales are lost. (FOF 7.247).

600. The concept of variable cost, for the purpose of computing a critical loss, is an economic concept rather than an accounting concept. (Simpson, Tr. 3876). Variable costs are those costs that vary with output. (Carlton & Perloff, at 29; Simpson, Tr. 2995). A cost does not need to vary with every minor increment of output to be a variable cost. (Simpson, Tr. 2997).

Response to Finding No. 600:

Complaint Counsel's finding number 600 is misleading because, as Dr. Simpson admits, the important issue regarding whether a cost is variable or fixed depends on how a company actually runs its business. (Simpson, Tr. 3872-74) (FOF 7.246).

601. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxx]**, Tr. 5774, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxxx]**, Tr. 5774, *in camera*). **[xxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 5774, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (**[xxxxxxx]**, Tr. 5774, *in camera*).

Response to Finding No. 601:

Complaint Counsel's finding number 601 is irrelevant because whether a company "can" vary its workforce or assets does mean that CB&I will reduce its workforce if it loses any of its business in the relevant product markets. Further, Dr. Simpson ignores whether there are cost benefits to making frequent hire/fire decisions. In fact, the evidence indicates that CB&I would not vary its workforce in response to a decrease in projects in the relevant product markets. (*E.g.* Scorsone, Tr. 4904-4919) (FOF 7.70-7.75).

602. Dr. Simpson performed a critical loss analysis for product market definition. (Simpson, Tr. 2993, 3416-7). Dr. Simpson identified CB&I's variable costs by applying economic theory to information from CB&I executives and from CB&I and PDM documents. (Simpson, Tr. 2999). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx]**. (Simpson, Tr. 3017; CX 1641, *in camera*).

Response to Finding No. 602:

Complaint Counsel's finding number 602, while it is true that Dr. Simpson gave this testimony, is false insofar as he did not "apply economic theory." He made assumptions that were not supported by the evidence. (FOF 7.196-7.205).

603. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]** (Harris, Tr. 7342, 7900-02; CX 1641, *in camera*). Dr. Harris estimated that variable costs accounted for only **[xxx]** percent of the pre-acquisition price of LNG tanks and only **[xxx]** percent of the pre-acquisition price of LPG tanks, LIN/LOX tanks, and TVCs. (Harris, Tr. 7900-04; CX 1641, *in camera*).

<u>Response to Finding No. 603:</u>

Complaint Counsel's finding number 603 is misleading because, since as Dr. Simpson admits, the important question in calculating contribution margin is how a company actually runs its business. (Simpson, Tr. 3872-74) (FOF 7.246). Dr. Simpson never talked to a single CB&I witness to find out how CB&I runs its business, and instead relied on his own interpretation of documents about which he knew very little. (FOF 7.196-7.205). Nor is it true that Dr. Harris solely relied on interviews with CB&I witnesses. Dr. Harris relied on all the record evidence and considered and rejected the support Dr. Simpson claimed for his view of the contribution margin. (FOF 7.68).

604. Dr. Simpson testified that the differences in their critical loss estimates means that he and Dr. Harris then reach different estimates of what loss of sales would make a given price increase unprofitable. (Simpson, Tr. 3528; CX 1668 (demonstrative)). For instance, Dr. Simpson explained that if variable cost is 85 percent of price, then the initial contribution margin is 15 percent, and a firm could lose 25 percent of its sales before a 5-percent price increase became unprofitable, but, with an initial contribution margin of 33 percent, a firm could lose only 13 percent of its sales before a 5-percent price increase became unprofitable. (Simpson, Tr. 3529).

<u>Response to Finding No. 604:</u>

Complaint Counsel's proposed finding is true -- but the result is that Dr. Simpson's critical loss analysis must be rejected.

605. Materials, sublet, freight, and transportation constitute roughly **[xxxxxx]** of the cost of an LNG tank. (CX 539, *in camera*; CX 1641, *in camera*). **[xxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Simpson, Tr. 3004-5; CX 1641; Harris, Tr. 7902, *in camera*). Sublet is the cost of any subcontracts, freight is the cost of shipping the materials to the job site, and transportation is the cost of moving workers to the job site. (Simpson, Tr. 3004).

Response to Finding No. 605:

Respondents have no specific response.

606. Field erection costs constitute about **[xxxxxxxx]** of the cost of an LNG tank. (CX 539, *in camera*; CX 1641, *in camera*). Field erection costs are variable. (Simpson, Tr. 3005). CB&I and PDM EC hired construction workers for individual jobs. Gerald Glenn, CB&I's CEO stated: "[P]eople in the field operations are -- they come and go as the work comes and goes. So if you need a welder for six weeks, you hire him for six weeks and you terminate him and he's hired again at the next job. So they go from project to project." (CX 431 at 72 (Glenn, Dep.))

Response to Finding No. 606:

Complaint Counsel's finding number 606 is false because not *all* field erection costs are variable. While much of the field labor is hourly, there are also salaried field personnel and project managers who are salaried. (Scorsone, Tr. 4896; Glenn, Tr. 4120). Dr. Simpson assumed that because there are hourly field workers all field erection costs are variable, a fact which is simply not true.

607. CB&I and PDM EC documents indicate that employment of construction supervisors depends on the overall level of work at the company (Simpson, Tr. 3005-6; CX 1563).

Response to Finding No. 607:

Complaint Counsel's proposed finding number 607 is wrong for several reasons. First, the document relied upon by Dr. Simpson does not indicate that employment depends on the overall level of work at the company. The document he relies upon was intended to provide management with an idea of how employees were performing and the suggestions to fire people were not implemented. (CX 1563; Scorsone, Tr. 4913). CX 1563 does not suggest that CB&I employs construction supervisors on the basis of overall work levels. Importantly, Dr. Simpson admitted that he did not know if the people listed in CX 1563 were ever laid off, a fact he admittedly would need to know. (Simpson, Tr. 3905-09) (FOF 7.199). Further, Dr. Simpson's critical loss analysis depends on the notion that CB&I would make reductions based on decreases

of business *in the relevant product markets*, otherwise the calculation would say nothing about whether CB&I could increase prices in the relevant markets. Business in the relevant product markets is a small share of CB&I's total business. Thus, whether reductions would be made if there were an overall loss of business is irrelevant.

608. Prior to the acquisition, project management accounted for about **[xxxxxxxxx]** of the total price of an LNG tank. (CX 539, *in camera*; CX 1641, *in camera*). Although CB&I and PDM documents indicate that employment of project managers depends on the overall level of work at the company (CX1563; CX 1033, Simpson, Tr. 3007-10), **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Harris, Tr. 7902; CX 1641, *in camera*).

Response to Finding No. 608:

Complaint Counsel's finding number 608 contains clear falsehoods. CX 1563 is, on its face, related to employee performance. (*See* Scorsone, Tr. 4913). CX 1033, a 10-K filing, does not indicate *anywhere* that CB&I's project manager force depends on the level of work. Dr. Simpson admitted that he made an assumption based on VROs offered by CB&I, despite knowing nothing about what a VRO is or under what conditions one may be offered. (Simpson, Tr. 3880-81) (FOF 7.197). Dr. Harris' reliance on CB&I employees for information about how it runs its business is the appropriate manner in which to calculate variable and fixed costs. (Harris, Tr. 7342).

609. Prior to the acquisition, fabrication accounted for about **[xxxxxxxxx]** of the total price of an LNG tank. (CX 539, *in camera*; CX 1641, *in camera*). The cost of fabrication represents a variable cost. CB&I and PDM sometimes purchased fabricated steel. (Scorsone, Tr. 4894-5). Where CB&I uses subcontractors for fabrication, the fabrication is "clearly a variable cost," since it "is an expense that they would not have to bear if they did not get the project." (Simpson, Tr. 3011). Using an outside fabricator indicates that in-house fabrication is also a variable cost, since if the company did not do a certain project, that would free up capacity to avoid the expense of subcontracting for fabrication for another project. (Simpson, Tr. 3011). Finally, CB&I changes its fabrication work force in response to changes in workload. (Simpson, Tr. 3012).

Response to Finding No. 609:

Complaint Counsel's finding number 609, which basically states that fabrication is an entirely variable costs, is false. Dr. Simpson's assumption that the use of prefabricated steel indicates that in-house fabrication is also a variable cost is fatally flawed. Dr. Simpson has presented no evidence whatsoever regarding the capacity or capacity utilization of CB&I's fabrication facilities or whether they are at full capacity, even with imported pre-fabricated nine percent nickel steel. Most critically, Dr. Simpson *admits that he does not know the capacity of CB&I's fabrication facilities.* (Simpson, Tr. 3888-89). How Dr. Simpson can assume that the in-house facilities are "freed up" is beyond comprehension, especially considering the fact that Dr. Simpson has done no analysis of the extent to which in-house fabrication facilities are used to fabricate materials for other products, like flat-bottom or water storage tanks. Further, CB&I has testified that it would not reduce its staff at its fabrication facilities or shut down fabrication facilities as a result of a decrease in business in the relevant markets. (Scorsone, Tr. 4908-09). Finally, at best, fabrication is variable in the LNG market only, as the only evidence of importing pre-fabricated steel is in that tank market.

610. While respondents' expert, Dr. Harris, acknowledges that the fabrication costs shown in CX 1641 which reflect costs for the **[xxxxxxx]** LNG tank are variable, he contends that fabrication is a fixed cost for LPG tanks, LIN/LOX tanks, and TVCs. (Harris, Tr. 7343-44; 7902-03; 7940-41). Such a contention is illogical. If CB&I could fabricate tanks at zero variable cost, they would never subcontract their fabrication. (Simpson, Tr. 3012). Therefore, Harris' conclusion that fabrication is a totally fixed cost is not consistent with CB&I's behavior. (Simpson, Tr. 3012).

Response to Finding No. 610:

Complaint Counsel's proposed finding number 610 focuses on what CB&I *could* do, not what it does do, which is the proper inquiry. (Simpson, Tr. 3872-74) (FOF 7.246). Further, the finding is based on the erroneous assumption that CB&I even *could* import *all* its materials pre-fabricated or inexpensively subcontract its fabrication. Complaint Counsel has

presented no such evidence. CB&I's decision whether or not to fabricate steel is based on which choice produces the overall lowest cost or fabricated steel delivered to the job site, including transportation, fabrication, and materials costs. Fabrication costs are only one factor in this decision. Typically it will fabricate steel other than nine percent nickel steel, which it buys from foreign sources, itself. (*See* Scorsone, Tr. 4892-95). Dr. Simpson's assumption that all fabrication costs are variable is totally without basis and contradicts record evidence suggesting otherwise.

611. Prior to the acquisition, engineering and drafting accounted for about **[xxx]** percent of the total price of an LNG tank. (CX 539, *in camera*; CX 1641, *in camera*). The cost of engineering and drafting represents a variable cost. Mr. Leventry, CB&I's vice-president of technology services, said that CB&I would definitely let go of some engineers if there were a reduction in workload (CX 497 at 63 (Leventry, Dep.); *see also* CX 497 at 38 (Leventry. Dep.) ("people get terminated all the time"). Mr. Scorsone also testified if CB&I lost half of its business across all of its product lines it would make reductions in its engineering department. (Scorsone, Tr. 4910-11). Also, CB&I included engineers in a voluntary retirement offer designed to adjust the size of its workforce to its workload (CX 1033, Simpson, Tr. 3015 (citing CX-497)). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]**. (Harris, Tr. 7902, CX 1641, *in camera*).

<u>Response to Finding No. 611:</u>

Complaint Counsel's proposed finding number 611 is wrong and very confused. While certainly CB&I might make reductions if it lost half its overall business, the evidence is unequivocal that CB&I would not fire any engineers as a result of a decrease in work in the relevant product markets, which account for 1.5% of its revenues. (Scorsone, Tr. 4906-07). Further, the cited Mr. Leventry testimony is responding to questions about what Mr. Leventry would do if he instantly lost half of his entire engineering projects at once -- hardly facts relevant to whether CB&I would vary engineers based on a critical loss of 12% or 25% in just the relevant markets. (CX 497 at 63). Dr. Simpson *admits* that he had no idea whether Mr. Leventry was talking about firing people based on performance or a downturn in work. (Simpson, Tr.

7.198). This proposed finding is ludicrous. A critical loss calculation, if aimed at calculating how much CB&I can afford to lose in the relevant product markets, requires a look at the contribution margin *in the relevant product markets*. Next, the VRO referred to clearly does *not* even *suggest* that the VRO was designed to adjust the size of its workforce to its workload. (CX 1033).

612. Prior to the acquisition, selling, general, and administrative costs accounted for about **[xxxxxxxx]** of the total price of an LNG tank. (CX 539, *in camera*; CX 1641, *in camera*). Some of this cost would be fixed and some of this cost would be variable (Simpson, Tr. 3016). Dr. Simpson explained: "For instance, there would be some administrative costs associated with administering a particular project, and if a company does not win that project, they would not have to bear that administrative cost." (Simpson, Tr. 3016-17).

Response to Finding No. 612:

Complaint Counsel's proposed finding 612 is false and totally unsupported by the evidence. The only "evidence" cited for the proposition that SG&A is partially variable is Dr. Simpson. Dr. Simpson gave the above referenced testimony based wholly on conjecture and cited no evidence whatsoever to support his conclusion. (Simpson, Tr. 3016-17). Dr. Simpson's total guess as to how CB&I's administrative costs are administered is insufficient to support Dr. Simpson's critical loss calculation, especially given the inaccuracy of his other guesses related to variability.

613. Because Dr. Harris relies almost exclusively on Mr. Scorsone to identify variable costs, Dr. Harris incorrectly labels some variable costs as fixed costs. In fact, in at least one instance, Dr. Harris concedes that his reliance on Mr. Scorsone led him to incorrectly label a variable cost as fixed. Relying on his interview with Mr. Scorsone, Dr. Harris initially treated LNG tank fabrication costs as fixed. (Harris, Tr. 7344-45). However, Dr. Harris later acknowledged that, because CB&I purchases its fabricated steel from overseas for its LNG tanks, the fabrication cost for LNG tanks should be treated as variable. (Harris, Tr. 7344). Therefore, Dr. Harris conceded that Dr. Simpson was correct in treating all LNG tank fabrication cost as variable. (Harris, Tr. 7344).

<u>Response to Finding No. 613:</u>

Complaint Counsel’s finding number 613 underscores the care that Dr. Harris used in calculating critical loss as well as Dr. Harris’ reference to the complete record; this contrasts with Dr. Simpson’s calculation of critical loss which was based on conjecture and guessing, ignoring the record and CB&I’s business practices.

614. After learning that Mr. Scorsone had erroneously classified LNG tank fabrication costs as fixed, Dr. Harris adjusted his critical loss calculation to make it closer to Dr. Simpson's calculation. (Harris, Tr. 7902-04). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1641, *in camera*). Dr. Harris acknowledged that if Mr. Scorsone is wrong in classifying other costs as fixed, Dr. Harris's critical loss calculation would be incorrect. (Harris, Tr. 7904-05).

<u>Response to Finding No. 614:</u>

There is no evidence that any other category has been incorrectly classified as variable. It is Dr. Simpson’s stubborn adherence to his original critical loss calculations in the face of overwhelming contrary evidence that is suspect and has application to Dr. Simpson’s credibility generally.

615. Additional evidence further indicates that Dr. Harris incorrectly identified some variable costs as fixed costs.

<u>Response to Finding No. 615:</u>

Complaint Counsel’s proposed finding 615, fails to cite any evidence and is inappropriate "finding of fact."

616. Dr. Harris testified that variable cost is a proxy for the actual cost saved as a result of a reduction in sales. (Harris, Tr. 7887). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 1641, *in camera*; Harris, Tr. 7902), even though Mr. Scorsone testified that PDM would have incurred *none* of the cost items of the Cove Point LNG tank if PDM did not build the tank. (CX 535 at 218 (Scorsone Dep.); Harris, Tr. 7905-07).

Response to Finding No. 616:

Complaint Counsel's proposed finding number 616 does not suggest that those costs are variable. As Mr. Scorsone noted, and as is noted repeatedly above, CB&I would not fire salaried employees based on reductions in projects in the relevant product markets. The costs would be incurred because PDM would have paid the welders whether they welded on that job or not. Complaint Counsel grossly distorts Mr. Scorsone's testimony. The next page of the Scorsone deposition shows that he meant something different from incurred as Complaint Counsel uses the word and that he consistently has testified that these cost categories include a lot of overhead. (CX 535 at 219).

617. Dr. Harris acknowledged that fixed costs do not increase as the size of the tank increases and that variable costs are affected by the size of the tank. (Harris, Tr. 7923-24). Dr. Harris further acknowledged that variable costs may vary with the complexity of a project. (Harris, Tr. 7924). Also, Dr. Harris acknowledged that while fixed costs generally do not increase if a job schedule is accelerated, variable costs may increase. (Harris, Tr. 7924).

Response to Finding No. 617:

Complaint Counsel's finding number 617 is an utter misstatement of Dr. Harris' testimony. Dr. Harris stated that "that's logically possible but not necessarily true." (Harris, Tr. 7924). Further, there is no evidence that additional costs would be avoided if CB&I loses one or more given projects. Complaint Counsel is trying to obscure the real issue, which is whether CB&I will continue to carry the cost should it lose business.

618. Dr. Harris treated all field erection supervision costs as fixed, even though Mr. Scorsone said the number of hours required for field erection supervision depends on the size, specifications and complexity of the project. (Harris, Tr. 7907).

Response to Finding No. 618:

Complaint Counsel's proposed finding number 618 is misleading and irrelevant because whether the number of man hours required for field erection varies is totally irrelevant since field erection supervisors are salaried. They are paid the same amount whether they work

on a particular job or not. (Scorsone, Tr. 4896). The appropriate focus is not on the size, specifications, and complexity of a project, but rather on whether or not CB&I is awarded a project.

619. Dr. Harris treated all project management costs as fixed even though the number of project management man-hours required for a job depend on the size and complexity of the project and the number of subcontractors that have to be managed. (Harris, Tr. 7946-47).

Response to Finding No. 619:

Complaint Counsel's proposed finding number 619 is misleading and irrelevant because whether the number of man hours required for field erection varies is totally irrelevant since project managers are salaried. They are paid the same whether they work on a particular job or not. (Scorsone, Tr. 4896; Glenn, Tr. 4120). (*See supra* RFOF 618).

620. Dr. Harris treated all engineering costs as fixed even though the number of engineering man-hours required for a project depends on the size, specifications and complexity of the project. (Harris, Tr. 7907, 7934 (Larger jobs have a higher engineering content), 7935 ("Q: ... you treat all engineering costs as fixed even though engineering costs for a large tank are greater than engineering costs for a small tank? A: Yes, that's correct.")).

Response to Finding No. 620:

Complaint Counsel's proposed finding number 620 is misleading and irrelevant because whether the number of man hours required for engineering a project varies is totally irrelevant since engineers are salaried. They are paid the same whether they work on a particular job or not. (Scorsone, Tr. 4903). (*See supra* RFOF 618).

621. Dr. Harris treated all drafting costs as fixed even though drafting man-hours are affected by the size and complexity of the tank. (Harris, Tr. 7936-38).

Response to Finding No. 621:

Complaint Counsel's proposed finding number 621 is superfluous since drafting and engineering are one and the same. (Scorsone, Tr. 4905). (*See supra* RFOF 618).

622. Dr. Harris treated all fabrication costs as fixed, for projects other than LNG tanks, even though Mr. Scorsone testified that the number of hours required for fabrication depends on

the size, specifications and complexity of the project. (Harris, Tr. 7907). CB&I uses a computer program to calculate the fabrication man-hours of a tank based on the diameter and height of the inner and outer tank. (Harris, Tr. 7938-39). CB&I's fabrication man-hours also vary with the shape and size of the roof and the design of the bottom plates of the tank. (Harris, Tr. 7940).

Response to Finding No. 622:

Complaint Counsel's proposed finding number 622 is irrelevant since CB&I would not vary its fabrication facilities based on reductions in business in the relevant product markets; it incurs the costs of maintaining and operating its fabrication facilities regardless of output. (Scorsone, Tr. 4908-09). (*See supra* RFOF 618).

623. Dr. Harris treated field-erection supervisors and foremen as fixed costs even though, in some circumstances, as a job gets larger, more field erection foremen and supervisors may be added to a job. (Harris, Tr. 7942-43).

Response to Finding No. 623:

Whether Complaint Counsel's finding number 623 is irrelevant since at the end of the day, as Dr. Harris explains, the costs are fixed to CB&I. They may add project managers to the job, but those project managers already work for and are paid by CB&I, regardless of whether they are added to the particular job. (Harris, Tr. 7944). (*See supra* RFOF 618).

624. Finally, Dr. Harris's critical loss analysis, as he has applied it in this case, understates the profitability of a price increase for any relevant project because of the way Dr. Harris has chosen to define fixed cost and contribution margin. Dr. Harris treats personnel and assets as a fixed cost in his critical loss analysis as long as they can be employed anywhere within the company, even though in the accounting sense, the personnel and assets are not fixed with respect to any project or any relevant product. (Harris, Tr. 7981). This ignores the opportunity cost of personnel and assets used to design, engineer, fabricate and construct the products in this case.

Response to Finding No. 624:

Complaint Counsel's finding number 624 makes no sense whatsoever. The important thing is that CB&I will not vary these costs based on critical losses of 12% or 25% of business in the relevant markets, regardless of how some accounting practice would apportion these costs to projects.

625. An opportunity cost is the forgone value of an asset in an alternative use. (Harris, Tr. 7888). Opportunity costs may be included in the actual cost of a product. (Harris, Tr. 7887). In order to justify use, in the production of a product, of an asset that has an alternative use, a profit maximizing firm will set a price for the product that takes into account the opportunity cost of the asset, *i.e.*, what the asset could have earned in the alternative use. D. Carlton & J. Perloff, *Modern Industrial Organization* (3d ed. 2000). at 33-34. (Crain, Tr. 2594; CX 624 (When CB&I had "Idle resources" to utilize, it would bid projects at "negative margins")). Thus, even some costs that appear to be fixed are in fact variable because the underlying asset can be redeployed to alternative uses. *Id.*

Response to Finding No. 625:

Complaint Counsel's finding number 625 is false and stands the variable cost analysis on its head. This is not theory -- we are measuring evidence based on CB&I's behavior to determine variability. The costs are fixed because CB&I pays for them regardless of whether it loses business up to the critical loss. The theory espoused in proposed finding 625 is gibberish. Additionally, Dr. Harris specifically states that Complaint Counsel's definition of an "opportunity cost" is "a rough, a very rough definition of 'opportunity cost.'" (Harris, Tr. 7888). This does not support Complaint Counsel's asserted definition. That underlying assets can be redeployed to alternative uses is irrelevant since Complaint Counsel has offered no evidence regarding CB&I's capacity and whether it is operating at full capacity in any department.

626. Dr. Simpson testified: "[I]f you think of a company as having a portfolio of projects that they might be working on, if they assign a worker to one project, that means that the worker cannot work on another project, so there 's what's termed an opportunity cost for having a worker on a particular project. If they were to lose a project and they could reassign that worker to another project and do that project instead, then that worker would be variable." (Simpson, Tr. 5774)

Response to Finding No. 626:

Complaint Counsel's proposed finding number 626 is irrelevant. As stated above, Complaint Counsel has offered no evidence whatsoever in support of this assertion. The welder, as an asset, may be flexible in terms of deployment, but as a salaried employee, his cost of employment remains the same whether he is assigned to one project or another.

627. Because CB&I can redeploy assets and personnel to other markets, it does not lose the contribution margin earned with these assets and personnel if CB&I increases price in any of the markets in this case and experiences a reduction in the volume of sales of the relevant product as a result of the price increase. When CB&I's total volume of work changes, CB&I adjusts its staffing accordingly. (CX 1033 at 32; Scorsone, Tr. 4910-11).

Response to Finding No. 627:

Complaint Counsel's proposed finding number 627 is misleading. Complaint Counsel has presented no evidence regarding CB&I's overall volume of work, and is relying on a wholly theoretical but factually unsupported contention. The question is one of threshold: at what volume of work gained or lost would staffing be adjusted. (Simpson, Tr. 3870-71) (FOF 7.247). The testimony is that, at the critical loss thresholds of 12% or 25% in these four relevant markets, staffing would not be varied. (FOF 7.70-7.81).

628. Dr. Harris could only identify a few costs that CB&I could not shift to other lines of business or to work outside the United States when its United States TVC business is slow. (Harris, Tr. 7926 ("Engineers move around. Fabrication somewhat but less so. Fabrication – project management can move around. ... Erection management can move around as well")) Dr. Harris could not identify any category of cost that CB&I would have to charge to its United States TVC business irrespective of its level of work in that market. except for some minor fabrication costs. (Harris, Tr. 7928-30). Further, Dr. Harris only identified some local costs relating to field erection and fabrication that CB&I would have to charge to its United States LNG tank business irrespective of its level of work in that market. (Harris, Tr. 7930-32). Dr. Harris made the same observations with respect to CB&I's United States LPG tank business and with respect to CB&I 's United States LIN/LOX tank business. (Harris, Tr. 7933).

Response to Finding No. 628:

Complaint Counsel's proposed finding number 628 is irrelevant because there is no evidence CB&I "charges" a particular cost to a "TVC business" or any other business. The point is that CB&I has an industrial tank business, and it deploys its employees where needed and pays them whether in full use or not.

629. Dr Harris acknowledged in his deposition that a lot of the costs that he characterized as fixed are actually variable when a company is considering large, strategic moves. (Harris, Tr. 7910-11). CB&I's acquisition of PDM and CB&I's decisions regarding how to maximize its profits following the acquisition are large, strategic moves.

Response to Finding No. 629:

Complaint Counsel's proposed finding number 629 is irrelevant because we are not talking about "large strategic moves." We are trying to measure whether CB&I would vary staffing, etc. in response to losses of 12% or 25% of the relevant product markets -- which are small markets.

630. Mr. Scorsone testified that losing a project would not cause CB&I to alter its staffing. (*See* Scorsone, Tr. 4906. However, this simply means that if nothing changes, *i.e.*, CB&I does not get a new project, its staffing requirements are unaffected. (Harris, Tr. 7912 ("if nothing changes, then I would agree.")) However, taking on new LNG projects would put pressure on CB&I to increase staffing and therefore incur additional costs. As explained by Gerald Glenn, "I don't know that there's enough resources – if all that gets going and LNG projects, I think we'd tax the skilled resources in our business to be able to do that." (CX 1731 at 34; Harris, Tr. 7915-16 (CB&I would probably have to hire some people in order to take on a new LNG project)).

Response to Finding No. 630:

Complaint Counsel's proposed finding number 630 is false and irrelevant. The question to be answered is what would CB&I do if it lost business up to 25% in these markets, not how CB&I would treat its costs if it gained business.

631. After calculating the contribution margin and thus the critical loss, the next step in a critical loss analysis involves estimating the amount of sales that the firm would lose if it increased price and then comparing this estimate to the critical loss. (Harris, Tr. 7258; Simpson, Tr. 3592–30). Dr. Harris made major mistakes in performing this step.

Response to Finding No. 631:

Complaint Counsel's proposed finding number 631 is false; Dr. Harris made no mistakes in performing this step.

632. Dr. Harris assumed that a price increase would not be profitable to CB&I based on his observation that CB&I has only been awarded "18% of the dollars at risk post merger" projects in the relevant markets since the acquisition. (Harris, Tr. 7342-43, 7358-59). However, Dr. Harris did not examine the volume of sales CB&I would gain if it lowered its price or the volume of sales CB&I would lose if it raised its price. When asked if CB&I would gain sales if it decreased price by 10 percent in the markets in this case, Dr. Harris responded: "It might. I'm not sure that I can answer that." (Harris, Tr. 7899-7900). Dr. Harris denied that CB&I would experience fewer losses of customers to competitors in the markets in this case if competitors

raise their price when CB&I raises its price following the acquisition. (Harris, Tr. 7895). However, Dr. Harris provided no explanation for his conclusion. Dr. Simpson testified that he believes that CB&I would lose few sales if it increased the price of LNG tanks, LPG tanks, LIN/LOX/LAR tanks, and large, field-erected TVCs by 5 to 10 percent. (Simpson, Tr. 3531).

Response to Finding No. 632:

Complaint Counsel's proposed finding number 632 is misleading. Dr. Harris' observation that CB&I has only been awarded 18% of the dollars available in the relevant product markets was made to show that even if Dr. Simpson's critical loss calculation were to be accepted, it would not matter because CB&I is losing so badly that it cannot, at this point, afford to raise prices. Thus, Dr. Harris pointed out that CB&I has already lost 82% of the available post-Acquisition revenue in these product markets. Complaint Counsel does not quarrel with these numbers. Further, if CB&I then decreased prices by 10% in the relevant product markets, CB&I would not be imposing price increases. This proposed finding makes no sense. Dr. Simpson's testimony that CB&I would lose few sales if it increased price is based on an improper critical loss calculation and conjecture. Further, this finding totally fails to account for the impact of entry in the relevant product markets on CB&I's current state of mind, which Dr. Harris considered in his conclusion regarding whether CB&I would attempt a price increase. (Harris, Tr. 7260-61)(FOF 7.79).

633. A profit maximizing firm will choose the price increase that produces the greatest increase in profits. (Harris, Tr. 7887). Even if a small price increase may not be profitable, a large price increase may nevertheless be profitable. (*Id.*) Dr. Simpson testified that a critical loss analysis, in determining which costs are variable, should consider various possible price increases across all of the markets in the FTC complaint. (Simpson, Tr. 5778-9).

Response to Finding No. 633:

Complaint Counsel's proposed finding number 633 makes no sense and is irrelevant. Complaint Counsel has presented no evidence indicating that a large price increase

would be profitable in any of the relevant markets. The evidence is to the contrary. (*See* FOF 7.59-7.81).

634. Dr. Harris testified that he and his staff prepared a list of LNG, LPG, LIN/LOX, and TVC projects awarded after the acquisition. (Harris, Tr. 7346-7) Dr. Harris then testified that CB&I had lost six of the ten projects on his list and had lost "something like 82 or 83 percent of the dollars available to be won here." (Harris, Tr. 7356-7). **[xxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 951, *in camera*) **[xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Harris, Tr. 7357). Based on his assessment of his list, Dr. Harris claimed that CB&I could not have a cost advantage over the competition. (Harris, Tr. 7356-7).

<u>Response to Finding No. 634:</u>

Complaint Counsel's proposed finding number 634 is correct and Dr. Harris was correct in his analysis.

635. Dr. Harris, however, based his claim on a highly inaccurate and highly distorted compilation of project awards. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (RX 951; Puckett, Tr. 4557 (Decision on tank supplier planned for October 2002)).

<u>Response to Finding No. 635:</u>

Complaint Counsel's proposed finding number 635 is false. The evidence is uncontroverted that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]** Further, the evidence is that Dynegy will proceed with its project. (Puckett, Tr. 4567) (FOF 3.257).

636. While including Dynegy's Hackberry project, on which CB&I did not bid, Dr. Harris failed to include five United States LNG tank projects for which CB&I is currently negotiating contract terms with the customer for a sole-source arrangement. (Glenn, Tr. 4234, 4399).

<u>Response to Finding No. 636:</u>

Complaint Counsel's proposed finding number 636 is false. CB&I attempted to bid on the Dynegy project and was rejected. Further, Complaint Counsel exaggerates the sole-sourcing of CB&I -- only two of these projects, CMS and Southern LNG, are actually in

negotiation. They have not been awarded and the customer may award them to someone other than CB&I. The rest are theoretical and down the road, and Complaint Counsel does not even identify the projects.

637. Dr. Harris included Atlantic's Trinidad LNG project as a loss by CB&I and a win by TKK/AT&V, although the project is an LNG export terminal (not a relevant market) outside of the United States (Glenn, Tr. 4238;), and there is no evidence that AT&V is even involved in the project. (JX 11 at 1).

Response to Finding No. 637:

Complaint Counsel's finding number 637 is irrelevant. CB&I bid on and lost a contract to build an additional LNG tank in Trinidad and LNG tanks are a relevant market. Further, whether AT&V was involved is irrelevant since TKK clearly won the project. Finally, CB&I views Trinidad as relevant to its U.S. pricing decisions, so it is properly included in measuring whether CB&I will attempt a price increase. (FOF 7.79, 3.451-3.459).

638. While including the Trinidad project, Dr. Harris excluded El Paso's projects in the Bahamas and at Altamira, Mexico, for which El Paso has selected CB&I as the sole-source supplier, and CB&I is currently negotiating contract terms with El Paso. (Glenn, Tr. 4234).

Response to Finding No. 638:

Complaint Counsel's proposed finding is false -- CB&I is trying to be awarded these projects but it has not been "selected" for these projects. Further, there is no comparative price information for the Mexico projects while there is for Trinidad.

639. Dr. Harris treated Air Liquide's Freeport, Texas LIN/LOX tank as a win for AT&V and a loss by CB&I although Air Liquide has found AT&V's performance unacceptable, Air Liquide has requested CB&I to complete the project, and CB&I has refused. (Scorsone, Tr. 5036-7).

Response to Finding No. 639:

Complaint Counsel's proposed finding number 639 is irrelevant; AT&V was indeed awarded the Freeport, Texas job and CB&I lowered its bud to a zero percent margin and still lost. (FOF 5.122-5.125).

640. Dr. Harris treated Raytheon's El Segundo, California TVC as a win by XL/Votaw and a loss by CB&I. Dr. Harris acknowledged that the project is not a large, field erected TVC, but Dr. Harris failed to disclose, in his direct testimony, that Raytheon picked XL for the project when XL was part of CB&I and the bid was accepted by Raytheon in part because CB&I was going to do the job. (Hart, Tr. 384-5, 402, 405; Harris, Tr. 7787-88). Mr. Hart testified that he picked XL because CB&I's technical capability was better than Howard's. (Hart, Tr. 384-5; Harris, Tr. 7788). Mr. Hart further testified that he was not informed that Votaw, rather than CB&I, would build the chamber until well after Raytheon had awarded the contract to CB&I' s subsidiary, XL. (Hart, Tr. 405; Harris, Tr. 7790).

<u>Response to Finding No. 640:</u>

Complaint Counsel's proposed finding is irrelevant because Mr. Hart kept the project with XL after CB&I sold it. Mr. Hart could have insisted that CB&I perform the contract; instead he accepted Votaw as the tank builder.

641. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (RX 951, *in camera*) **[xxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**. (RX 951, *in camera*; Harris, Tr. 7354-5).

<u>Response to Finding No. 641:</u>

The BOC job was awarded after the Acquisition was announced but just before it was formally consummated. It was not improper for Dr. Harris to include this job which has an impact on CB&I's state of mind as it relates to critical loss.

642. In using a critical loss analysis to analyze whether CB&I has market power, Dr. Harris ignored differences between using a critical loss analysis for market definition and using a critical loss analysis for assessing market power within a market. Dr. Harris underestimated the profitability of a price increase to CB&I because he failed to take into account the sales diversion between CB&I and PDM and because he failed to take into account price reactions of other firms to a price increase by CB&I following the acquisition.

<u>Response to Finding No. 642:</u>

Complaint Counsel's unsupported proposed finding number 642 is false; Dr. Harris, the inventor of the critical loss calculation, understands the differences between using critical loss for market definition and for assessing market power, and he used critical loss in an appropriate way to show CB&I could not raise price after the acquisition. Dr. Harris properly

calculated critical loss -- there is no cite to the contrary. Even if he did not, it is irrelevant since it is Complaint Counsel's burden to present additional compelling evidence that the effect of the Acquisition is to substantially reduce competition in the relevant markets.

643. James Langenfeld and Wenquing Li explain that "in a differentiated product market, there are two important adjustments in calculating the firm's critical loss and in estimating the firm's actual loss of sales in the competitive effects analysis, as compared to the critical loss analysis in market definition studies. The first adjustment is to take into account the sales diversion between the merging firms when calculating the critical loss. When the sales diversion between the merging firms is taken into account, the formula for calculating the critical loss must be modified, and more information than the firms' premerger profit margins is needed to calculate the break-even critical loss. The second adjustment is to take into account price reactions of other nonmerging firms in the market in estimating the actual sales loss." J. Langenfeld and Wenquing Li, Critical loss Analysis in Evaluating Mergers, The Antitrust Bulletin, Summer 2001 299, 313. (Harris, Tr. 7893-94).

Response to Finding No. 643:

Complaint Counsel's proposed finding number 643 is irrelevant. Dr. Harris unequivocally testified that Drs. Langenfeld and Li are wrong. (Harris, Tr. 7895). Further, this very theory was rejected by the Northern District of California in *California v. Sutter Health System*, 130 F. Supp. 2d 1009, 1121 (N.D. Cal. 2001). Further, this article is not evidence and is improperly including in this finding; reading it into the record and having the witness say it is wrong does not make it evidence.

644. Dr. Harris appeared to be confused regarding the distinctions between use of a critical loss analysis for market definition and use of critical loss in analyzing the effects of an acquisition. Dr. Harris stated that the "question makes no sense at all" when he was asked if it is correct that the terms of sale of all other products are held constant when a critical loss test is used for market definition purposes, even though he acknowledged that he himself had made the statement in an article he had written. (Harris, Tr. 7884-86).

Response to Finding No. 644:

Complaint Counsel's proposed finding is misleading because in fact Complaint Counsel's questions to Dr. Harris which made no sense at all. (Harris, Tr. 7884-86).

645. Dr. Harris did not recall that Langenfeld and Li instruct, in their article, that in using a critical loss analysis to analyze the competitive effects of a merger it is necessary to take

into account the sales diversion between the merging firms. (Harris, Tr. 7892-93). When shown the statement by Langenfeld and Li, Dr. Harris acknowledged that in certain contexts the sales diversion between the products of the merging firms would matter. (Harris, Tr. 7894). Dr. Harris denied, however, that sales diversion matters in this case. (*Id.*)

Response to Finding No. 645:

Complaint Counsel's proposed finding number 645 is irrelevant because the Langenfeld article is not evidence and Dr. Harris did not rely on it and stated that it was wrong. (*See* RFOF 643).

646. Dr. Harris then stated that he considered sales diversion between CB&I and PDM prior to the merger, but claimed that he could not take it into account after the merger. (Harris, Tr. 7897). This admission by Dr. Harris means that Dr. Harris failed to consider whether following the acquisition, CB&I could profitably increase the price of its tank specification, in any of the markets, and capture a significant portion of any lost sales by offering PDM's tank specification as an alternative. Likewise, Dr. Harris failed to consider whether following the acquisition, CB&I could profitably increase the price of PDM's tank specification and capture a significant portion of any lost sales by offering CB&I's tank specification as an alternative. Dr. Harris simply assumed that a price increase would not be profitable to CB&I without considering the profitability of either of these pricing strategies.

Response to Finding No. 646:

Complaint Counsel's finding number 646 is irrelevant because Dr. Harris was not required to undertake any of the analysis suggested by Complaint Counsel. Dr. Harris performed a critical loss analysis in response to Complaint Counsel's critical loss analysis; Dr. Simpson did not consider any of the above mentioned "pricing strategies" either, so it is wholly irrelevant.

647. CB&I conducts union work through its CB&I Services Inc. and non-union work through CB&I Industrial. (CX 1033 at 8). Following the acquisition, CB&I planned to inform at least one LNG tank customer that it could not choose to have its project performed by a non-union workforce and would have to accept, at higher cost, union workforce job. Previously the choice of union or non-union work had been left to the customer. (*Id.*) However, Dr. Harris could not comprehend that CB&I could increase the price of non-union jobs and pick up some of the loss in sales through its union work. (Harris, Tr. 7918 ("That makes no sense to me at all.")).

Response to Finding No. 647:

Complaint Counsel's proposed finding number 647 is a misstatement of Dr. Harris' testimony; he clearly told Complaint Counsel that *his question* made no sense. (Harris,

Tr. 7918). That Complaint Counsel's question made no sense to the witness does not mean that Dr. Harris could or could not comprehend something. Further, the remainder of this proposed finding is irrelevant. If Complaint Counsel had asked about this document, they would have learned that CB&I would not send non-union labor into the location specified in the document. It has nothing to do with the acquisition or market power.

648. Langenfeld and Li explain that if other firms in the market increase their price in response to the price increase by the merged firm, the merged firm will lose sales to the other firms in the market only to the extent of the relative increase in its price compared to the price of the other firms: "Accordingly, the merged firm will experience fewer losses of customers to competitors in the market than if all competitors kept their prices constant, and it is more likely that a price increase will be profitable. ... When the price responses of the nonmerging firms in the market are taken into account, the actual loss of sales for a given price increase by the merged firm will decrease." J. Langenfeld and Wenquing Li, Critical Loss Analysis in Evaluating Mergers, The Antitrust Bulletin, Summer 2001 at 319. (Harris, Tr. 7896).

Response to Finding No. 648:

Complaint Counsel's proposed finding number 648 is irrelevant because this article is not evidence and is flawed as set forth in RFOF 643. It is improper for Complaint Counsel to include it in its findings of fact. The Court explicitly stated in his Order that only evidence should be cited. Further, the article discusses *when* price increases might be profitable, not whether price increases would be profitable in this case.

649. Economic theory predicts that other firms will increase their prices if CB&I increases its prices. (Simpson, Tr. 3526; see C. Davidson and R. Deneckere, Long-Run Competition in Capacity, Short-Run Competition in Price, and the Cournot Model, Rand Journal of Economics, 17, 1986, 404; Dalkir, Serdar, John Logan, and Robert Masson, "Mergers in Symmetric and Asymmetric Noncooperative Auction Markets: The Effects on Prices and Efficiency," 18 International Journal of Industrial Organization, at 395 (2000)).

Response to Finding No. 649:

Complaint Counsel's proposed finding number 649 is logically flawed in the context of this case where projects are won through a bidding process. If CB&I raises its prices, why would another firm also raise prices instead of seizing upon the opportunity to win the

project, particularly when there are so few jobs in the relevant markets? The articles cited are not evidence. Furthermore, these articles, like the proposed finding, generally ignore the possibility of entry. The suggestion is ludicrous in this context, and irrelevant to critical loss because CB&I will not try to increase price.

650. When asked if he agreed with Langenfeld and Li that the price reactions of other firms in the market should be taken into account in estimating the actual sales loss, Dr. Harris first claimed that Langenfeld and Li "got it wrong" factually but acknowledged that what they wrote is logically correct. (Harris, Tr. 7894-95). Dr. Harris then claimed that price responses of other firms "has absolutely nothing to do with this case" (Harris, Tr. 7896), but moments later claimed that he had taken into account the price reactions of other firms in conducting his critical loss analysis. (Harris, Tr. 7898 ("Yes, I considered that.")). Despite Dr. Harris's claim, he made no reference to the price reactions of other firms in his various assertions that CB&I cannot profitably increase price. (*See generally* Harris, Tr. 7152-8000).

Response to Finding No. 650:

Complaint Counsel's proposed finding number 650 is irrelevant because Dr. Harris did not suggest that Langenfeld and Li were correct in the application of their theory to this particular case. (Harris Tr. 7894-95). Furthermore, what Dr. Harris said "has absolutely nothing to do with this case" is a statement from Lagenfeld and Li. (Harris, Tr. 7896) The remainder of Complaint Counsel's proposed finding makes no sense and is irrelevant.

651. Dr. Harris failed to check whether the conclusion that he drew from his critical loss analysis, that CB&I does not currently have market power, is consistent with CB&I documents and CB&I's post-acquisition behavior. (*See generally* Harris, Tr. 7152-8000).

Response to Finding No. 651:

Complaint Counsel's proposed finding is simply untrue and unsupported.

652. Dr. Simpson testified that one could evaluate the competitive effects of an acquisition by examining whether price increased. (Simpson, Tr. 3541-2) According to Dr. Simpson: "[I]f there's a price increase, that would be one type of evidence that would indicate that the acquisition was anticompetitive." (Simpson, Tr. 3542) Dr. Simpson also testified that one could evaluate the competitive effects of an acquisition by examining the competitive strength of the two firms prior to the acquisition and using economic theory to assess how the combination of the two firms would affect pricing in the marketplace. (Simpson, Tr. 3542)

Response to Finding No. 652:

Complaint Counsel's proposed finding number 652 is irrelevant since there is no evidence that CB&I has increased prices or that the effects of the Acquisition are anticompetitive. Further, as is obvious from the proposed finding, Dr. Simpson ignored entry entirely when he gave his testimony.

653. Similarly, Dr. Harris testified: "[T]he right way to do critical loss ... is to go find out how the company itself behaves, ... how they behave in the real world and factor that into your critical loss analysis." (Harris, Tr. 7342). However, Dr. Harris failed to follow his own advice. Dr. Harris did not view the evidence of post-merger pricing as demonstrating price increases after the acquisition. (Harris, Tr. 8080 (Cove Point price increase); Harris, Tr. 8089 (Memphis Light, Gas & Water price increase).

Response to Finding No. 653:

Complaint Counsel's proposed finding number 653 is misleading. Because there is no evidence of post-merger price increases, this finding is predicated on a totally false assumption. Cove Point is not a price increase and Memphis is not a price increase. (FOF 3.168-3.641, 3.608-3.613).

654. Dr. Simpson testified that the Bureau of Economics policy for analyzing mergers is simply to apply economic theory and economic methods to the facts in the case. (Simpson, Tr. 5743).

Response to Finding No. 654:

Complaint Counsel's proposed finding number 654 is irrelevant since Dr. Simpson misapplied economic theories and ignored or distorted the facts in this case.

O. Dr. Simpson Established that the Merger Will Likely Lessen Competition

655. "Prior to the acquisition, CB&I's pricing was constrained by PDM EC, an equally strong company. When CB&I acquired PDM EC, ... CB&I could increase their price until other firms, such as Technigaz or Whessoe, began to constrain their pricing. But since these other firms were less good they cannot constrain the price as at low a level as PDM EC had." (Simpson, Tr. 3072-3).

Response to Finding No. 655:

Complaint Counsel's proposed finding number 655 is irrelevant because Dr. Simpson was wrong. First and foremost, the evidence is overwhelming that there has been both actual entry and that there is potential entry constraining CB&I's prices. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (See FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Second, there is no evidence what CB&I has in fact raised its prices and margins; Complaint Counsel's purported examples of price increases are based on inappropriate comparisons, conjecture, and fabrication. (*See* FOF 7.1-7.41, 3.597-3.641, 5.182-5.211, 7.164). Complaint Counsel has not and cannot provide a single instance where CB&I has raised prices on a firm fixed bid or where a customer has paid a higher price for a product than prior to the Acquisition. Complaint Counsel has presented no valid evidence indicating that CB&I has in fact raised prices. (FOF 3.597-3.641, 5.182-5.211, 7.164).

656. LNG tanks are sometimes sold through a sealed bidding process. (Simpson, Tr. 3073) "In a sealed bidding process what a bidder tries to do is identify who the other bidders will be, estimate what their costs will be, and then predict what their bidding behavior will be, and based upon having done this, then the bidder in a sealed bid submits the bid that would maximize their expected profit." (Simpson, Tr. 3073).

Response to Finding No. 656:

Complaint Counsel's finding number 656 contains an important admission made by Dr. Simpson: that bidders have to estimate their competitors' costs. Clearly, firms do not actually know their competitors' costs which makes it difficult for CB&I to raise prices. It cannot be assumed that it has lower costs, particularly when it is losing projects left and right. Finally, Dr. Simpson's description of sealed bidding is not evidence for the truth of the matter.

657. "[W]hen one strong bidder acquires the other strong bidder, the combined firm is much less concerned about losing, and as a result it may increase its price." (Simpson, Tr. 3073).

Response to Finding No. 657:

This proposed finding number 657 is irrelevant because CB&I is constrained by entry. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113). Dr. Simpson's "theory" is not supported by the evidence.

658. Dr. Simpson testified that economic theory predicts that if a merged firm increases its price, then other firms in the market will also increase their prices. (Simpson, Tr. 3074). Dr. Simpson cited CX 88 as evidence of this type of behavior in this market. (CX 88 at PDM-CH006397; Simpson, Tr. 3074-6).

Response to Finding No. 658:

Complaint Counsel's proposed finding number 658 is logically flawed in the context of this case where markets contain a few large projects awarded through bidding or negotiation. If CB&I raises its prices, other firms cannot be counted on to follow the increase. Instead they will win the project from CB&I. In some of the relevant markets, such as LPG or TVC markets, that may be the only project in several years. CX 88 does not support Dr. Simpson's assertion. (CX 88). Dr. Simpson simply does not assume a sealed bidding environment for this conclusion.

659. Dr. Simpson testified that in an environment where bidders submit sealed bids, a three-to-two merger or four-to-three merger can also harm competition. (Simpson, Tr. 3076-7) (citing Dalkir, Serdar, John Logan, and Robert Masson, 2000, "Mergers in Symmetric and Asymmetric Noncooperative Auction Markets: The Effects on Prices and Efficiency," International Journal of Industrial Organization, 18, 383-413, p. 395) Dr. Simpson noted that buyers believe they get better prices with more bidders. As evidence of this, Dr. Simpson cites Mr. Hall's testimony as an example of one customer who will go "to great lengths to increase the number of bidders from two bidders to four bidders." (Simpson, Tr. 3076-7; Hall, Tr. 1801-2).

Response to Finding No. 659:

Complaint Counsel's proposed finding number 659 is irrelevant. The articles relied on by Dr. Simpson does not support his conclusions. The article found that in a sealed

bidding environment, price increases considered by its model are "modest at best." (Simpson, Tr. 3832-33). Further, Dr. Simpson's use of theory is not supported by evidence. Dr. Simpson's reliance on Clay Hall's testimony is misplaced. Clay Hall says nothing to support the notion that customers "go to great lengths to increase the number of bidders from two bidders to four bidders." Further, whether a merger *can* harm competition does not address the issue of whether CB&I's Acquisition of PDM's EC division lessened competition or will lessen competition in the relevant product markets.

660. The Dalkir article supports two very general propositions. (Simpson, Tr. 5762). The first is that, in an environment where projects are sold in a sealed bidding process, a merger that combined two bidders would lead to less favorable pricing for the buyer. (Simpson, Tr. 5762-6). The second is that, in an environment where projects are sold in a sealed bidding process, when the merged firm increased its price, the other firms in the market would increase their prices. (Simpson, Tr. 5763). Dr. Simpson testified that the Dalkir, et al. article does not consider a scenario in which the two lowest cost producers merge. (Simpson, Tr. 5764).

Response to Finding No. 660:

Complaint Counsel's proposed finding number 660 is irrelevant; if the Dalkir, et al. article does not consider a scenario in which the two lowest cost producers merger, which is Complaint Counsel's theory in this case, what Dr. Simpson says about the propositions set forth in the article is irrelevant. This finding ignores the article's conclusion that its predicted price increase is modest at best. Moreover, the article's results are based on assumptions that entry would not prevent anticompetitive price increases. That assumption is inappropriate in the markets at issue here. Finally, CB&I's state of mind is relevant to the bid theory Dr. Simpson cites, and the model does not account for CB&I's state of mind which suggests it cannot increase prices. (*See* FOF 7.241, 7.243).

661. Dr. Simpson testified that buyers sometimes have information about the costs of other firms (Simpson, Tr. 3077-9, citing to CX 1175, CX 185). In a bidding contest where the various bidders know the costs of competing bidders, economic theory predicts that the lowest-cost bidder would undercut the second lowest-cost bidder by a slight amount and obtain the project at basically the second lowest-cost bid. (Simpson, Tr. 3077). In these cases, a merger of

the two lowest-cost competitors in the market means price is set by the third lowest bid rather than the second lowest bid. (Simpson, Tr. 3079).

Response to Finding No. 661:

Finding number 661 is irrelevant because Dr. Simpson's statement is irrelevant; buyers do not need to know the costs of firms -- they only care about who offers the lowest price. There is no support for the notion that bidders know each others' costs -- Dr. Simpson admits as much. (Simpson, Tr. 3073, 3771) (FOF 7.83). The evidence indicates that competitors do not know each others costs. (FOF 7.87, 7.88).

662. Instances where the second best bidder sets the price do not describe all sales of LNG tanks in the United States, because according to this theory, CB&I should always win if it is the lowest-cost bidder. (Simpson, Tr. 3086-8). According to Dr. Simpson, observations of CB&I losing a project post-acquisition are accounted for by a different type of analysis than oral-auction theory. (Simpson, Tr. 3088). Dr. Simpson testified that the bidding theory also incorporates the idea that a low-cost bidder could occasionally lose a bid. (Simpson, Tr. 3089).

Response to Finding No. 662:

Complaint Counsel's proposed finding 662 makes no sense. The first sentence, that "instances where the second best bidder sets the price do not describe all sales of LNG tanks, because according to this theory, CB&I should always win if it is the lowest-cost bidder" seems to be a true statement; CB&I does not always win and is not shown by Complaint Counsel to be the lowest-cost bidder. The next sentence, "according to Dr. Simpson, observations of CB&I losing a project post-acquisition are accounted for by a different type of analysis than oral-auction theory," is irrelevant. No theory can explain away the reality that Complaint Counsel's theory of its case is undermined by entry. The last sentence, that "bidding theory also incorporates the idea that a low-cost bidder could occasionally lose a bid" is irrelevant since CB&I has lost more than the occasional bid. CB&I has lost about 80% of the post-Acquisition dollars available.

663. Dr. Simpson testified that buyers in these markets may attempt to play the various bidders off against each other in order to obtain lower prices. In these cases, buyers look at bids obtained for a particular project and then give the various bidders feedback regarding where their bids rank with respect to one another. The bidders then respond by changing their bids. (Simpson, Tr. 3079-3080) (citing to CX 272, CX 192, CX 221, CX 147 as examples)).

Response to Finding No. 663:

Complaint Counsel's proposed finding 663 is incomplete and false because, as customers have testified, they "bluff" when they play competitors off each other. (Patterson, Tr. 364). This does not provide competitors with truthful information about each other.

664. Dr. Simpson testified that a bidding process where buyers play bidders off against each other can resemble an oral (open-outcry) auction (Simpson, Tr. 3086). In an oral (open-outcry) auction, the lowest-cost bidder wins the bid at a price slightly lower than the second lowest-cost bidder's cost. (Simpson, Tr. 3084-5). In this type of auction, a merger of the two lowest-cost bidders means that the second lowest bid no longer establishes the price. Rather, the third lowest bid establishes the price. (Simpson, Tr. 3085-6). (citing to the Merger Guideline and Tschantz, Steven, Philip Crooke, and Luke Froeb, 2000, "Mergers in Sealed versus Oral Auctions," International Journal of the Economics of Business, 7(2), 201-212.).

Response to Finding No. 664:

Complaint Counsel's proposed finding number 664 is inaccurate because Dr. Simpson does not account for the fact that customers frequently do not tell the truth when playing competitors against each other. (Patterson, Tr. 364). This means simply that rather than working like a normal blind auction, it is a blind auction where competitors are getting false information and having to make predictions and behave based on misinformation. Dr. Simpson admitted this complicates a bidder's decision to try to hold the line on price. (Simpson, Tr. 3770-71).

665. A PDM document (CX 921) states: **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 921 at CB&I 003613-HOU, *in camera*). Dr. Simpson testified that this suggests that CB&I "will increase price and earn a higher profit margin and have less sales" post-acquisition. (Simpson, Tr. 3098). Sales decline when prices increase, and, as Dr. Simpson testified, higher profit margins could not stem from efficiencies in this case because efficiencies would cause sales to either stay the same or increase. (Simpson, Tr. 3098).

Response to Finding No. 665:

Complaint Counsel's proposed finding number 665 is irrelevant because Dr. Simpson admitted that he knows absolutely nothing about CX 921. (Simpson, Tr. 4036-37). Further, he admitted that he did not know if CX 921 even pertained to the relevant product markets. (Simpson, Tr. 4037). It is totally disingenuous for Complaint Counsel to rely on this document, when Dr. Simpson admitted to knowing nothing about the document. Luke Scorsone testified that the higher profit margin would be the product of cost-savings. (Scorsone, Tr. 1571-73). The remainder of this proposed finding is irrelevant since there is no evidence that there will be price increases in the relevant product markets, and it fails to account for the entry that has and will constrain CB&I's prices.

666. Dr. Simpson testified that makers of liquefaction units, such as Black & Veatch and Lotepro, would be hurt by a reduction in competition for LNG tanks. (Simpson, Tr. 3125). According to Dr. Simpson: "The price for an LNG peak-shaving plant would have two components, the tank and the liquefaction unit and some of the other stuff. So when buyers are looking at purchasing one of these, they look at the overall price. To the extent that the tank component increases in price, that increases the overall price. To the extent that this higher price prompts buyers to purchase fewer of these peak-shaving plants, that would hurt the makers of the liquefaction units. So, ... the makers of the liquefaction units would be concerned about a price increase for LNG tanks." (Simpson, Tr. 3126).

Response to Finding No. 666:

Complaint Counsel's finding number 666 is irrelevant because Dr. Simpson is not a fact witness and is wrong. There is no factual record cite - only Dr. Simpson's unsupported speech. First, whether makers of liquefaction units would be affected by a reduction in competition for LNG tanks is irrelevant since there has been no reduction of competition for LNG tanks. Further, there is no support for the notion that makers of liquefaction units would be hurt by a reduction in competition for LNG tanks. For example, on cross-examination Mr. Price was forced to admit that even if his liquefaction unit had been bid with the lowest tank price, the

high cost of his liquefaction unit would have nonetheless resulted in being the last bidder. (Price, Tr. 649).

667. Dr. Simpson testified that he believes that CB&I's acquisition of PDM is likely to reduce competition in the LNG market and in each of the other markets alleged in the complaint. (Simpson, Tr. 2984, 3127).

Response to Finding No. 667:

Complaint Counsel's proposed finding number 667 is irrelevant because Dr. Simpson was wrong. His analysis was based on totally inappropriate analysis and assumptions. (Harris, Tr. 7338-7376). Further, Dr. Simpson's testimony is against the weight of the evidence which indicates that CB&I's pricing will be constrained and has been constrained by actual and potential entrants.

668. Dr. Simpson testified that the acquisition "already has led to higher prices." (Simpson, Tr. 2985). While evidence of actual anticompetitive effect is rare, finding such evidence confirms that the acquisition is likely substantially to lessen competition. (Simpson, Tr. 2989). Dr. Simpson testified that the evidence of anticompetitive harm in this case provides confirmation that CB&I's acquisition of PDM reduced competition. (Simpson, Tr. 3149).

Response to Finding No. 668:

Complaint Counsel's proposed finding is irrelevant because Dr. Simpson is wrong; there is no valid evidence of actual anticompetitive effects. FOF 3.597-3.641, 5.182-5.211, 7.164.

669. Because CB&I's business strategy is to sell its tanks in combination with other larger portions of a project, such as process units or import terminals, the likely reduction of competition in LNG tanks will, in turn, affect competition in LNG peak-shaving facilities and LNG import terminals. (Simpson, Tr. 3127, 3149, 3151 (citing to CX 186)). Dr. Simpson testified that the reduction in competition for LNG tanks would flow over into the other parts of LNG import terminals because CB&I has a preference for selling LNG tanks and the other parts of an LNG terminal together. (Simpson, Tr. 3354). Dr. Harris conceded "If CB&I had market power that would allow them to harm competition in those vertical integration markets ..." (Harris, Tr. 7349).

Response to Finding No. 669:

Complaint Counsel's proposed finding number 669 is incorrect; there is no evidence supporting a finding that there are vertical anticompetitive effects. (FOF 7.137, 7.138). The market for EPC (engineering, procurement, construction) contracts for import terminals or peak shaving plants is very competitive; CB&I is only one of many firms competing for such contracts. CB&I's business strategy of trying to sell tanks in conjunction with other parts of a project pre-dates the Acquisition. (FOF 7.137, 7.138). Moreover, the supposed anticompetitive effects in the vertical integration markets depend on there being anticompetitive effects in the LNG tank markets, and there are no anticompetitive effects in the LNG tank markets. This proposed finding is simply unsupported by evidence and contrary to the actual record evidence and is another example of Complaint Counsel attributing fact witness status to its economist.

P. Dr. Harris Overlooked Critical Evidence Inconsistent with His Conclusions

670. Dr. Harris' conclusions and analysis regarding the effects of the acquisition are unreliable because they lack support in the record and are contradicted by unrebutted evidence ignored or rejected by Dr. Harris. Dr. Harris made virtually no reference to CB&I' s and PDM's internal documents in his direct testimony and, on cross examination, showed little recollection of the companies' key documents. (*See generally* Harris, Tr. 7152-8000).

Response to Finding No. 670:

Complaint Counsel's proposed finding 670 is patently false. That Dr. Harris does not rely on irrelevant and outdated PDM and CB&I internal documents only supports a finding that Dr. Harris' reasoning was sound and supported by relevant evidence.

671. At trial, Dr. Harris could not identify any CB&I or PDM planning documents that he thought supported his testimony. (Harris, Tr. 7579-80 ("I just can't do it.")). Dr. Harris did not recall pointing to any internal planning documents to support his direct testimony regarding competition in the relevant markets following the acquisition. (Harris, Tr. 7578-79). He was unable to identify any such documents when asked to do so on cross examination. (Harris, Tr. 7578). Moreover, Dr. Harris was unable to identify any CB&I business plan that supports the testimony given by Dr. Harris, by Mr. Glenn or by Mr. Scorsone. (Harris, Tr. 7580-81). Dr. Harris did not ask Respondents to provide to him any of CB&I's post-acquisition planning documents that were not in the discovery record of this matter. (Harris, Tr. 7580).

Response to Finding No. 671:

Complaint Counsel's proposed finding is irrelevant; CB&I's planning documents do not prove whether the Acquisition will lessen competition in the relevant markets. Further the proposed finding is false. On direct examination, Dr. Harris cited to specific internal documents supporting his contention that competition will not be lessened. (Harris, Tr. 7321-24). Complaint Counsel apparently feels that a memory test rather than the strength of the economic evidence in the record determines which theory should be accepted by this Court. (*See* Harris, Tr. 7920-21 (indicating that he did not memorize record)).

672. Dr. Harris acknowledged that Respondents' documents showed that prior to the acquisition, competition between CB&I and PDM was intense (Harris, Tr. 7588) and that "they cared very much about competition with each other" (Harris, Tr. 7589). Dr, Harris acknowledged that competition in general put pressure on CB&I to lower its costs. (Harris, Tr. 7588).

Response to Finding No. 672:

Complaint Counsel's proposed finding number 672 is irrelevant since the important question is whether in the future prices will be constrained -- the evidence shows that it will. (*See* Harris, Tr. 7180-81).

673. Dr. Harris was unaware of a statement in PDM's 2000 strategic plan that claimed CB&I as its "only competitor" in cryogenic tanks in the United States. (Harris, Tr. 7554; CX 660). Dr. Harris was unaware of another statement in PDM's strategic plan that stated that prior to the acquisition PDM regarded CB&I as PDM's only competitor in LNG tanks in the United States. (Harris, Tr. 7554).

Response to Finding No. 673:

Complaint Counsel's proposed finding is irrelevant because the only important issue is whether competition will be lessened by the Acquisition. Further, that very strategic plan expressed concern that Skanska and other foreign players might enter the market.

674. Dr. Harris was unaware of a statement in PDM 's most recent strategic plan (2000) that stated that "CB&I is PDM EC's only competitor on domestic cryogenic, LNG, LPG, ammonia and thermal vacuum projects." (Harris, Tr. 7556 ("I was not specifically aware of this

sentence."); Harris, Tr. 7568 ("I was not specifically aware of this document. That' s not – this statement, this sentence."); *see* CX 660 at PDM-HOU 005016).

Response to Finding No. 674:

Complaint Counsel's proposed finding is irrelevant because the only important issue is whether competition will be lessened by the Acquisition.

675. Further, although Dr. Harris testified that he had conversations with Mr. Scorsone about the case, he stated that did not discuss PDM's 2000 strategic plan with Mr. Scorsone and that it did not occur to Dr. Harris to ask Mr. Scorsone about the document. (Harris, Tr. 7561). Indeed, Dr. Harris never asked anyone about the document. (Harris, Tr. 7564, 7566).

Response to Finding No. 675:

Complaint Counsel's proposed finding is irrelevant because the only important issue is whether competition will be lessened by the Acquisition. Dr. Harris did not ask Mr. Scorsone about the planning document because it is irrelevant.

676. In an attempt to reconcile inconsistencies between his conclusions and PDM's strategic planning documents, which recognized CB&I as PDM's only competitor in these markets, Dr. Harris speculated that the document was "just with blinders on" (*i.e.* with the narrow focus on who PDM competed with for current projects when the plan was developed). (Harris, Tr. 7558). However, Dr. Harris admitted , "I don't know why they focused on what they focused on." (Harris, Tr. 7578 ("I don't know why they did that, why they focused back then – I'm *ignorant* of that fact.") (emphasis supplied)). Dr. Harris acknowledged that he did not discuss with anyone from CB&I or PDM his unsupported notion that CB&I's and PDM's internal documents were written with a narrow view of competition. (Harris, Tr. 7566).

Response to Finding No. 676:

Complaint Counsel's proposed finding mischaracterizes Dr. Harris' testimony. Dr. Harris stated that this snapshot of pre-merger competition does not account for entry. (Harris, Tr. 7558). Dr. Harris was unequivocal that the only important evidence to consider is that which is predictive of future competition. (Harris, Tr. 7222). Complaint Counsel should not criticize Dr. Harris for not relying on irrelevant documents.

677. Dr. Harris acknowledged that Respondents' internal business plans were honest attempts to identify the significant competitive forces faced by Respondents. (Harris, Tr. 7582-83).

Response to Finding No. 677:

Complaint Counsel's finding number 677 is true but irrelevant since these internal business plans are old and thus irrelevant. However, Dr. Harris does not truly have foundation to express and opine as to whether the internal business plans were honest.

678. Dr. Harris failed to recall that, prior to the acquisition, Mr. Scorsone expected that a combination of CB&I and PDM would enable the combined firm to increase price and margins. (Harris, Tr. 7491 ("I don't specifically remember that.")).

Response to Finding No. 678:

Complaint Counsel's proposed finding is irrelevant since Complaint Counsel has not shown that Mr. Scorsone expected the combined firm to increase price and margins. Further, this is irrelevant since Dr. Harris did not rely on this "evidence" and post-Acquisition events have suggested that Mr. Scorsone's expectation was wrong.

679. Dr. Harris testified at length regarding his perception of the competitive environment faced by CB&I following the acquisition. (*See e.g.* Harris, Tr. 7356-7). However, when asked about CB&I deleting, following the acquisition, references to competition in the mandatory disclosure of risks in its S-1 SEC filings and prospectuses, Dr. Harris responded, "I don't remember precisely what they did in their filings." (Harris, Tr. 7497).

Response to Finding No. 679:

Complaint Counsel's proposed finding is misleading since there is no evidence that CB&I deleted references to competition in the mandatory disclosure of risks in its S-1 filings and prospectuses and it is a gross distortion to suggest otherwise. The very S-1 cited by Complaint Counsel contained a disclosure in a different part of the same indicating that CB&I has numerous competitors. (CX 1031 at 36).

680. Further, Dr. Harris acknowledged that he did not remember the details of CB&I's October 31, 2002 conference call with financial analysts in which CB&I executives recounted CB&I's competitive environment. (Harris, Tr. 7862-63; CX 1731 at 44). When confronted with the statements by Mr. Glenn regarding the competitive environment in which CB&I operates, Dr. Harris acknowledged that CB&I's statements to investors are "not consistent with [Dr. Harris's] view of the market." (Harris, Tr. 7867-68 ("that's not consistent with my understanding of the market."); CX 1731).

Response to Finding No. 680:

Complaint Counsel's finding number 680 is incorrect. Dr. Harris recalled the conference call but had not memorized the exact statements. Further, the conference call consists of conclusional statements made in the context of an attempt to make CB&I's stock more attractive to investment analysts and which generally apply to all of CB&I's business, not just the small share in the relevant markets. Dr. Harris relied on empirical record evidence concerning the actual ease of entry in the relevant market and the effects of the acquisition.

681. When asked about CB&I management's recent statement to CB&I's investors that CB&I is well-positioned to capitalize on a major share of the LNG tank market, Dr. Harris responded, "I don't recall the specifics." (Harris, Tr. 7852; CX 1731 at 12; CX 1729 at 9). When confronted with the public statement by Mr. Asherman, CB&I's executive vice president and chief marketing and sales officer, the Economist stated that he did not know what the term "capitalize on market share" meant and thus could not comment on whether he agreed with Mr. Asherman 's statement. Dr. Harris did not ask the CB&I executive what he meant by the statement. (Harris, Tr. 7853). Dr. Harris did not recall Mr. Asherman's further statement to investors, on July 17, 2002, that CB&I does not *see* any significant shifts in the marketplace in which it operates. (Harris, Tr. 7882-83; CX 1729 at 10). However, Dr. Harris acknowledged that the CB&I executive's statement is "not consistent with my understanding." (Harris, Tr. 7883).

Response to Finding No. 681:

Complaint Counsel's proposed finding is irrelevant because CB&I was clearly talking about the worldwide LNG tank market, which, in the context of market capitalization, says nothing specific about the U.S. LNG tank market. (CX 1729 at 12 ("we remain confident that supply and demand. . . will continue to drive new cap ex in LNG around the world. CB&I is well positioned to capitalize on that market." In addition, CB&I's business is to capitalize on the markets in which it participates -- this is not to say that it dominates or that there is no competition. Again, whether Dr. Harris memorized the record is irrelevant.

682. Dr. Harris had only a vague recollection of Mr. Glenn's statements to investors that "LNG tank projects are driving CB&I's backlog" and that the CB&I "prospect list and the projects CB&I is tracking look better to CB&I today than at any time [since CB&I became an independent company]." (Harris, Tr. 7853; CX 1731 at 24, 28).

Response to Finding No. 682:

Complaint Counsel's proposed finding is false and irrelevant. These statements were made by Mr. Glenn *and* Mr. Goodrich. That aside, these statements are not specific to the United States markets, which make them useless in examining the U.S. LNG market. Again, Dr. Harris' memorization skills are not at issue in this case.

683. Dr. Harris had only a vague recollection of PDM EC's determination in January 2000 to bid a very competitive price on the Cove Point LNG tank because PDM knew that it would be bidding against CB&I for the project. (Harris, Tr. 7843; CX 293 at CB&I/PDM-H 4008141). When asked about PDM increasing its proposed bid for the Cove Point LNG tank after signing the letter of intent with CB&I, Dr. Harris confessed: "I don't remember every little price, ... I don't remember the details." (Harris, Tr. 7498).

Response to Finding No. 683:

Complaint Counsel's proposed finding is irrelevant because CB&I has not improperly increased price on the Cove Point LNG tank and Dr. Harris does not rely on the Cove Point 2000 bid in his analysis.

684. When asked whether PDM had provided a firm, fixed price to Boeing prior to the acquisition, Dr. Harris responded, "They ***may*** have. I don't remember that clearly." (Harris, Tr. 7504). When asked whether, following the acquisition, CB&I increased by over 50% its margin on the Spectrum Astro TVC contract, Dr. Harris responded, "I remember general facts ... But I don't remember the numbers, so I can't answer your question with any specificity."(Harris, Tr. 7506).

Response to Finding No. 684:

Complaint Counsel's proposed finding is irrelevant since Dr. Harris did not memorize the entire record. Dr. Harris did, unlike Dr. Simpson, review the entire record, however. (Harris, Tr. 7172; Simpson, Tr. 3624-26) (FOF 7.48).

685. When asked whether, prior to the acquisition, PDM provided firm prices +/- 5% when requested by Linde BOC Process Plants LLC, Dr. Harris acknowledged: "I don't remember one way or the other." (Harris, Tr. 7508-9).

Response to Finding No. 685:

Complaint Counsel's proposed finding is irrelevant since Dr. Harris did not memorize the entire record. (Harris, Tr. 7920-21). Dr. Harris did, unlike Dr. Simpson, review the entire record, however. (Harris, Tr. 7172; Simpson, Tr. 3624-26) (FOF 7.48).

686. In presenting his analysis and opinions regarding the competitive effects of the acquisition, Dr. Harris overlooked significant testimony regarding non-competitive behavior by CB&I and PDM during the pendency of the acquisition. When asked about CB&I and PDM suspending fractious or unruly competition in TVCs after entering into the acquisition letter of intent, Dr. Harris stated: "I'm unaware of such an instance." (Harris, Tr. 7466).

Response to Finding No. 686:

The first half of Complaint Counsel's proposed finding number 686 is false. Dr. Harris did not "overlook" any testimony. Again, Dr. Harris did, unlike Dr. Simpson, review the entire record. (Harris, Tr. 7172; Simpson, Tr. 3624-26) (FOF 7.48). The second part of this proposed finding is irrelevant because there is no evidence to support the assertion that "CB&I and PDM suspended fractious or unruly competition in TVCs."

687. Dr. Harris bases his conclusions regarding entry and competitive effects in the LNG tank market primarily on his observations regarding Dynegy's Hackberry LNG project. His testimony reveals a misunderstanding on his part regarding what happened in the Dynegy project and serious flaws in his analysis of entry and competitive effects.

Response to Finding No. 687:

Complaint Counsel's proposed finding, unsupported and devoid of explanation, is false. Dr. Harris based his views on far more than Dynegy, and he does understand what happened in that project.

688. Explaining his conclusion that competitors in the United States LNG market have changed since 2001 (Harris, Tr. 7220-23), Dr, Harris noted that CB&I has "clearly lost the Dynegy job." (Harris, Tr. 7223). Dr. Harris testified at length about the significance of this "loss" in his analysis. Dr. Harris testified that the Dynegy project represents "a natural market experiment." (Harris, Tr. 7263).

Response to Finding No. 688:

Complaint Counsel's proposed finding is incomplete; Dr. Harris does not exclusively rely on the Dynegy job to support his conclusion that competitors in the United States LNG market have changed since 2001.

689. Dr. Harris bases his critical loss analysis on CB&I losing the Dynegy project. (Harris, Tr. 7263 ("I looked at critical loss and have determined that CB&I has lost more – way more business than they could have afforded to lose even if they had tried a price increase.... ")). He concluded from CB&I's "loss" of the Dynegy project that CB&I must not have lower costs than foreign firms. (Harris, Tr. 7264 ("If ... CB&I is the lowest-cost producer ... CB&I should have been able to win this job and be able to win it – well, just win the job.")).

Response to Finding No. 689:

Complaint Counsel's proposed finding is false. Dr. Harris does not base his critical loss analysis on CB&I losing the Dynegy project, he considers it as part of his analysis.

690. Dr. Harris infers that CB&I cannot have lower costs, in the United States, than foreign LNG suppliers, because, according to Dr. Harris, Dynegy would be taking a risk of losing multiple millions of dollars by not accepting CB&I's tank bid if the other bidders were not competitive. (Harris, Tr. 7349-50).

Response to Finding No. 690:

Complaint Counsel's proposed finding is irrelevant since it is Complaint Counsel's theory that CB&I is the lowest cost competitor and has failed to prove this fact or do any analysis whatsoever. Dr. Simpson admitted that he knows nothing about the costs of CB&I's competitors. (Simpson Tr. 3921-37) (FOF 7.150). Dr. Harris does not have to prove that CB&I is not the low cost competitor. Further, this finding mischaracterizes Dr. Harris' analysis. Dr. Harris states that if CB&I is the lowest cost producer and knows its competitors' costs, which is Complaint Counsel's contention, it would win every project but has not. It is certainly relevant evidence that Dynegy did not accept Dr. Simpson's assumptions.

691. None of the conclusions Dr. Harris draws from his Dynegy "natural market experiment" has any validity. CB&I did not lose the Dynegy project; CB&I declined to bid. Apparently recognizing that Dr. Harris had stretched the facts, Respondents asked Dr. Harris, at

the conclusion of his direct testimony, for clarification of his statement that CB&I "lost" the Dynegy project. (Harris, Tr. 7347-48). He acknowledged that the term "lost" may be inappropriate, but he failed to explain how the various conclusions he had testified to based on what he had perceived to be CB&I's "loss" of the Dynegy project, would withstand CB&I' s failure to bid on the project. (*Id.*).

Response to Finding No. 691:

Complaint Counsel's proposed finding is false. The fact that CB&I initially chose not to bid on the project based on its concerns about submitting its pricing and designs to Black & Veatch, a competitor and partner of one of the bidders, is uncontroverted. (*See* 3.297-3.306). Ultimately, CB&I decided to submit a bid and Dynegy refused to accept it. (*See* FOF 3.303, 3.304). That is a loss by CB&I. The proposed finding fails to account for the fact that one of the reasons Dynegy would not accept CB&I's bid was because it was satisfied with the bids it received from Skanska/Whessoe, TKK/AT&V and Technigaz/Zachry. (*See* FOF 3.304, 3.305).

692. When asked whether CB&I declined to bid separately for front-end engineering and design services for Dynegy's Hackberry LNG project, Dr. Harris responded, "I'm not sure. I get the FEED and the EPC issues confused." (Harris, Tr. 7511-2).

Response to Finding No. 692:

Complaint Counsel's proposed finding is irrelevant. This was clearly not important to Dr. Harris' analysis.

693. Dr. Harris concluded that the Hackberry project was an unacceptable loss to CB&I, but he failed to factor into his analysis of his natural experiment regarding the LNG jobs not taken by CB&I the statement by Mr. Glenn that CB&I would not object to some slowdown in the pace of new LNG projects. (Harris, Tr. 7862-63; CX 1731 at 37).

Response to Finding No. 693:

The proposed finding is irrelevant because CB&I lost the Dynegy job and in the process learned its competitors' prices were at levels satisfactory to the customer.

694. Based on his flawed observation that Dynegy was happy with the other bidders, Dr. Harris concluded that CB&I has no ability to exercise market power. (Harris, Tr. 7349). However, Dr. Harris acknowledged that Dynegy "on its own" does not itself have the expertise to analyze the bids on the Hackberry project and make an informed selection. (Harris, Tr. 7794-

7796). Accordingly, Dynegy hired Black & Veatch to evaluate the bids. (Price, Tr. 609-10; Harris, Tr. 7796). Dr. Harris did not remember that Mr. Price, Dynegy's engineering consultant from Black & Veatch, testified to his belief that competition between CB&I and PDM EC would have produced more favorable terms than those offered to Dynegy by other bidders. (Harris, Tr. 7796; Price, Tr. 622, 626-28, 630).

Response to Finding No. 694:

Complaint Counsel's proposed finding is false. First, Mr. Puckett of Dynegy indeed testified that Dynegy was happy with the bidders. (Puckett, Tr. 4540, 4587-88) (FOF 3.248). Second, Dr. Harris stated that he thought Mr. Puckett testified that it needed the assistance of a consultant to evaluate bids. (Harris, Tr. 7794-96). Dr. Harris was not making his own judgment to that effect. Brian Price's testimony is irrelevant since he never even saw the Dynegy bids. (Price, Tr. 610) (FOF 3.660). Black & Veatch made no effort to solicit CB&I for the Dynegy project. (Price, Tr. 619). If Mr. Price really believes that Dynegy was not getting good prices, it certainly never communicated that fact to its client. (*See* Price, Tr. 640-41).

695. Dynegy cannot ignore the rules it has established for competitive bidding of the Hackberry project, because doing so would discourage competitive bidding on future Dynegy projects. Dr. Simpson testified: "There are reasons why Dynegy would not be willing to accept a late bid even if Dynegy thought that the late bid might end up being lower, the reasons being that Dynegy would do business with vendors in the future, and if it looks as if Dynegy is willing to bend their rules in one case, that this could have adverse effects in their dealings with other firms." (Simpson, Tr. 3338). Dr. Simpson also testified: "Another reason why a buyer would be - might be reluctant to accept a late bid is that the late bidder hadn't complied with the way the buyer wanted things done initially, and to the extent that the buyer thought that might indicate that the person submitting the late bid would not follow the buyer's instructions in other areas, ... that would be a basis for why the buyer would be reluctant to purchase from that late bidder." (Simpson, Tr. 3341-2).

Response to Finding No. 695:

Complaint Counsel's suggestion that Dynegy would be willing to lose millions of dollars (if Complaint Counsel were correct that CB&I could offer the lowest price) to be "fair" and keep with purported "rules" is totally ludicrous, without support, and contrary to the testimony of Dynegy, who testified under oath that it was happy with the bids it received. (FOF

3.304, 3.305). That Complaint Counsel cites Dr. Simpson for this proposition instead of Mr. Puckett is telling. Dr. Simpson is not a fact witness, and his statement is not admitted for the truth of the matter asserted.

696. Further, Dr. Harris's conclusion that not accepting a delinquent bid from CB&I cost Dynegy at the risk of losing "multiple millions of dollars" if CB&I was the lowest cost producer is based on the unfounded assumption that CB&I would have bid its cost. (Harris, Tr. 7349-50). If CB&I had bid on the tanks, it would have maximized its profit by bidding at a price just below the cost of the other bidders. *Merger Guidelines* § 2.21 n.21; (Simpson Tr. 5762).

Response to Finding No. 696:

Complaint Counsel's proposed finding is irrelevant since CB&I could not have possibly known the cost of the other bidders. (*See* FOF 7.82-7.88). Complaint Counsel has not presented any evidence suggesting CB&I knows its competitors' costs, and has done no cost analysis indicating that CB&I is the low-cost producer. (FOF 7.150-7.156).

697. The other "natural market experiment" relied on by Dr. Harris to support his conclusions with respect to the U.S. LNG tank market is also based on a misinterpretation of the evidence by Dr. Harris. Dr. Harris misconstrued the results in Trinidad to speculate that prices have not changed in Trinidad and that foreign firms are able to "compete with a cost structure similar or better than CB&I." (Harris, Tr. 7351). Dr. Harris ignores CB&I 's price increases for materials and other cost escalations. (JX 11 at 1). ***After*** adjusting for changes in cost between the third and fourth tank, CB&I increased the price of the Trinidad LNG tank by 5-6 percent. (*Id.*, emphasis supplied).

Response to Finding No. 697:

Complaint Counsel's proposed finding number 697 ignores the fact that CB&I lost the contract for the fourth tank to be built at Trinidad. Thus, the price it offered will not be the price the customer pays. Furthermore, the proposed finding misapprehends Dr. Harris' testimony. Dr. Harris testified that CB&I's pricing was roughly 5 percent higher than their pricing had been on the earlier Trinidad project and the winning price was roughly 5 percent lower than the CB&I price; that suggests that the winning bid in Trinidad post-Acquisition was almost identical to the winning bid in Trinidad pre-Acquisition after materials cost escalation is

accounted for. (Harris, Tr. 7351) (FOF 7.62). Obviously, CB&I's increased price of 5 percent was considered by Dr. Harris -- this is important to the point he makes. Since CB&I's price was 5% higher than its previous price, and it lost by 5%, that means the winning price was the same as CB&I's earlier price. Complaint Counsel seems to suggest that CB&I's three year price old on tank three should be compared to its recent price on tank four, without accounting for raw materials escalation, which lead to an improper comparison.

698. CB&I is likely to have increased its margin on the fourth tank by more than 5-6 percent. CB&I's actual costs in performing the work would be reduced as compared to its costs for the third tank because its engineers, project manager, supervisors and foremen were familiar with conditions at the site and conditions in Trinidad, CB&I had a skilled LNG tank crew in place, and CB&I had already transported equipment to the site. (Harris, Tr. 7801-03). However, Dr. Harris did not examine CB&I's failure to pass through its cost savings on the fourth LNG tank in Trinidad (Harris, Tr. 7801-03 ("I didn't do that analysis.")), but acknowledged that CB&I would have been more likely to have won the project if it had chosen to pass through its cost savings. (Harris, Tr. 7808-09).

Response to Finding No. 698:

Complaint Counsel's proposed finding is unsupported and represents a complete mischaracterization of Dr. Harris' testimony. No one performed the analysis Complaint Counsel suggests because there is no evidence related to it one way or the other. Thus, this finding is unsupported "theory" and is neither fact nor evidence. First, Complaint Counsel's assertion that "CB&I is likely to have increased its margin on the fourth tank by more than 5-6 percent" is totally unsupported. Next, there is no support to Complaint Counsel's suggestion that CB&I did not include "cost savings" in its price. Moreover, Dr. Harris never agreed that CB&I even could achieve cost savings - he said they might but he didn't know. (Harris, Tr. 7802-03). Further, Complaint Counsel totally mischaracterizes Dr. Harris' testimony -- Dr. Harris never "acknowledged that CB&I would have been more likely to have won the project if it had chosen to pass through its cost savings." Dr. Harris stated that "the lower CB&I's bid is for any particular job, all else equal, the higher the likelihood they'll win. It doesn't mean they would

win, but all else equal, the higher the likelihood." (Harris, Tr. 7809). Obviously, the likelihood of winning a job will increase the lower a price is -- however there is no support whatsoever for Complaint Counsel's proposed finding.

699. Dr. Harris contradicted himself in his testimony regarding pricing of LNG tanks in Trinidad. In his direct testimony Dr. Harris claimed to compare the prices of the third and fourth LNG tanks in Trinidad and testified that the results are "strong evidence that prices ... have not changed in LNG." (Harris, Tr. 7351). However, on cross examination, when asked whether he was aware that CB&I had increased the price of the fourth tank in Trinidad by 15% over the price of the third tank, Dr. Harris disavowed his previous testimony, stating that "[i]t does not make sense" to compare prices on different LNG projects (Harris, Tr. 7798-99) and that if he had done so in his direct testimony he "should have been saying margins" (Harris, Tr. 7800; Harris, Tr. 7803 ("I meant to say 'margin,' but I may have said 'prices' inadvertently.")).

Response to Finding No. 699:

Complaint Counsel's proposed finding 699, that Dr. Harris contradicted himself, is false. Dr. Harris did not "disavow" his testimony. Dr. Harris obviously clarified his testimony, arguing that margins are the best basis for comparison. In fact, Complaint Counsel has devoted many proposed findings of fact to, ostensibly, making comparisons of pre and post-Acquisition margins. Complaint Counsel, however, only compares budget prices.

700. Despite his testimony, Dr. Harris examined neither CB&I's bids nor CB&I's estimates on the third and fourth tanks in Trinidad and did not even ask Respondents to show him its bids or estimates on the two projects. (Harris, Tr. 7807-08).

Response to Finding No. 700:

Complaint Counsel's proposed finding is irrelevant; the parties stipulated to the facts surrounding the Trinidad project. (JX 11).

701. Although Dr. Harris claimed that CB&I's loss of an LNG tank project in Trinidad is relevant to analysis of the effects of the acquisition in the United States, he failed to consider El Paso's selection of CB&I as the sole-source supplier for an LNG tank in the Bahamas and for an LNG tank in Altamira, Mexico. (Harris, Tr. 7676-77; Glenn, Tr. 4234).

Response to Finding No. 701:

Complaint Counsel's proposed finding number 701 is irrelevant because, while the contractor has been selected in Trinidad, that is not the case in the Bahamas or Mexico. Although El Paso is negotiating with CB&I, if El Paso feels that CB&I's offers are not good enough, it can pick another supplier. Thus, it is impossible to directly compare competitors as in a bidding situation. Further, El Paso held out the possibility of still bidding out those projects. (Bryngleson, Tr. 6179-80).

702. The "natural experiments" relied on by Dr. Harris are specious. The results observed by Dr. Harris are under CB&I' s control and influence, and Dr. Harris misinterpreted the facts in examining the results. Dr. Simpson testified that he did not view post-acquisition events in the markets named in the FTC's complaint as a natural experiment because CB&I could control the outcome of the "experiment." (Simpson, Tr. 5758).

Response to Finding No. 702:

Complaint Counsel's proposed finding 702 is false and totally unsupported. The results observed by Dr. Harris are *not* under CB&I's control and influence, and Complaint Counsel has presented, and cites, no evidence supporting this assertion. Further, Dr. Simpson provided no explanation or analysis whatsoever for his bald statement that "I believe that CB&I could control the outcome of the experiment." (Simpson, Tr. 5758). It is likely that Dr. Simpson did not explain how this is possible because it does not make any sense. CB&I cannot control its competitors or customers. CB&I lost many post-Acquisition projects with very low margins. If it increased its price, it would have lost even more.

703. Other experiments Dr. Harris could have conducted, but failed to examine, confirm the anticompetitive effects of the acquisition: Did competition between CB&I and PDM cause prices to fall prior to signing by CB&I and PDM of the acquisition letter of intent? (Harris, Tr. 7839, 7840). Would CB&I and PDM cease fractious competition after signing the acquisition letter of intent? (Harris, Tr. 7646). Would CB&I invite a competitor to coordinate on a bid following the acquisition? (Harris, Tr. 7647-48). Would PDM increase the price of the Cove Point LNG tank after signing the acquisition letter of intent? (Harris, Tr. 7648-51, 7839-40). Would CB&I increase the price of the Cove Point LNG tank following the acquisition?

(Harris, Tr. 7652-53, 7840). Would CB&I increase the price of large, field-erected TVCs following the acquisition? (Harris, Tr. 7654-55).

Response to Finding No. 703:

Complaint Counsel's proposed finding 703 comprises one unsupported statement after another. First, there is no evidence that "competition between CB&I and PDM cause[d] prices to fall prior to the signing by CB&I and PDM of the acquisition letter of intent," that CB&I and PDM cease[d] fractious competition after signing the acquisition letter of intent," that "CB&I invite[d] a competitor to coordinate on a bid following the acquisition," that "PDM increase[d] the price of the Cove Point LNG tank after signing the acquisition letter of intent," that CB&I increase[d] the price of the Cove Point LNG tank following the acquisition," or that CB&I increase[d] the price of large, field-erected TVCs following the acquisition." Since none of these assertions of Complaint Counsel are true, it makes sense that Dr. Harris did not use them as natural market experiments.

These statements are unsupported theories of Complaint Counsel which have been squarely rebutted in Respondents' Findings of Fact and in response to other responses to Complaint Counsel's proposed findings.

704. Dr. Harris did not recall that Mr. Glenn had recently acknowledged praise for the market discipline CB&I has demonstrated during the past two years. (Harris, Tr. 7857-58; CX 1731 at 42-43). Dr. Harris concluded that increased price discipline by CB&I following the acquisition is not relevant to this case. (Harris, Tr. 7860).

Response to Finding No. 704:

Complaint Counsel's proposed finding 704 is incomplete because Dr. Harris specifically stated that "I think there's evidence that they [CB&I] have lowered prices, so I guess the answer is no, I don't agree ['that CB&I holds the line on prices'.]" (Harris, Tr. 7857).

705. Despite his speculation that CB&I does not have lower costs than the firms with which it competes following the acquisition, Dr. Harris acknowledged that he did not have any basis to either agree or disagree with the recent statement by CB&I' s CEO that "because of our

concentration on lowering our costs and keeping our costs down, we can still be low bidder and make more money on it than most of our competitors, if not all of them." (Harris, Tr. 7862). Dr. Harris did not even recall Mr. Glenn's statement that "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." (Harris, Tr. 7865-66; CX 1731 at 44-45).

Response to Finding No. 705:

Complaint Counsel's proposed finding 705 is irrelevant because it is Complaint Counsel's assertion that CB&I has lower costs than its competitors, and this assertion is completely unsupported. (FOF 7.150-7.156). It is Complaint Counsel's burden to prove its case, which depends on its unsupported notion that CB&I is the low-cost provider. It is not Respondents' burden to disprove Complaint Counsel's *totally unsupported* arguments. Further, Dr. Harris' testimony that CB&I does not have lower costs than its competitors is actually supported by evidence. For example, the Trinidad project supports Dr. Harris' conclusion. (Harris, Tr. 7351) (FOF 7.103). CB&I's continued loss to AT&V in the LIN/LOX market is evidence that CB&I is not the low cost competitor Complaint Counsel asserts it is.

706. When pressed to state whether he agrees with CB&I's CEO that CB&I can win LNG projects every time unless someone offers a price below its cost of doing the work, Dr. Harris acknowledged that Mr. Glenn's statement is not consistent with Dr. Harris's assumption regarding costs. (Harris, Tr. 7867-68 ("That's not my understanding.")).

Response to Finding No. 706:

Complaint Counsel's proposed finding is flawed because Mr. Glenn never stated that "CB&I can win LNG projects every time. . . ." There is no mention of product or geographic location anywhere in Mr. Glenn's statement. (CX 1731 at 44-45).

707. Dr. Harris repeatedly avoided giving direct answers to questions. Dr. Harris equivocated when asked if he agreed with CB&I's CEO's statement that "for sophisticated projects like LNG projects and LNG tanks customers don't want to take a chance on a low price and a potential second-class job or shoddy welding or any of that kind of stuff." (Harris, Tr. 7868; CX 1731 at 44). Only when pressed by the Court to give a non-evasive answer did Dr. Harris acknowledge "[t]hat's consistent with my understanding." (Harris, Tr. 7869).

Response to Finding No. 707:

Complaint Counsel's proposed finding 707 ignores the fact that Dr. Harris could not understand most of the questions posed by Complaint Counsel. The remainder of this proposed finding is irrelevant.

708. Dr. Harris could not say whether he agreed or disagreed with Mr. Glenn, and claimed that he lacked sufficient context to make any sense of Mr. Glenn's August 1, 2000, statement to investors, that "in some of the larger projects we don't have as much competition and it utilizes more resources and with our cost structure we can still be very competitive and make up good returns, so we are not out buying projects, the margins in our work coming in, including the large projects, are as good or better than the margins that you're seeing now." (Harris, Tr. 7874-76; CX 1730 at 30). However, Dr. Harris did not ask Mr. Glenn what he had in mind when he said "we are not out buying projects." (Harris, Tr. 7876).

Response to Finding No. 708:

Complaint Counsel's proposed finding 708 is irrelevant -- what Mr. Glenn said on August 1, 2000 about competition is irrelevant today because of entry. Further, in his question, Complaint Counsel took Mr. Glenn's statement out of context -- of course Dr. Harris lacked sufficient context to agree or disagree.

709. Dr. Harris drew unsupported parallels between the facts of this case and facts in prior cases on which he had worked. In his direct testimony Dr. Harris represented: "The Baker Hughes case I think is very, very close in facts to this case." (Harris, Tr. 7166). However, when confronted on cross examination, with the stark and significant differences between the record in this case and the record in *Baker Hughes* (Harris, Tr. 7467-525), Dr. Harris acknowledged, "I've thought often over the years about the logic of that case, so I have thought a lot about it, but I have not thought about the facts – the detailed facts of that case probably in ten or fifteen years." (Harris, Tr. 7478-79). When confronted with one fundamental difference in the facts, the court's finding in *Baker Hughes* that the market in that case was mainly an import market, Dr. Harris simply acknowledged: "They may have. Most of the purchases were of imported rigs, but I don't remember one way or the other exactly what the court said." (Harris, Tr. 7479).

Response to Finding No. 709:

Complaint Counsel's proposed finding 709 is false. First, it is false that Dr. Harris was "confronted on cross examination with stark and significant differences" between this case and *Baker Hughes*. On cross-examination, Complaint Counsel read the *Baker Hughes*

decision to Dr. Harris, and asked questions like: “Is that what the district court opinion says?” to which Dr. Harris would respond: “I believe you read it correctly.” (Harris, Tr. 7472). That Dr. Harris had not memorized the decision is irrelevant to whether, as an economist, he found *Baker Hughes* to be factually similar to the case at hand.

Q. Industry Members Are Concerned that the Merger Will Likely Lead to Higher Prices and Poorer Quality

710. Based on his experience in soliciting bids for the construction of an LNG tank to store liquid methane, Mr. Eckhard Blaumueller predicts that CB&I's acquisition would lead to higher prices. (Blaumueller, Tr. 281-282, 323-324).

Response to Finding No. 710:

This proposed finding is irrelevant, as Complaint Counsel has not presented any evidence to suggest that Mr. Blaumueller has any foundation for his economic opinion. He has not been not been involved in the purchase or construction of an LNG facility since 1973. (Blaumueller, Tr. 286) (FOF 3.642). Further, Mr. Blaumueller has not been involved in or done research regarding the LNG industry since December of 2001. (Blaumueller, Tr. 279, 325, 329) (FOF 3.643). Mr. Blaumueller has no current knowledge regarding any foreign LNG tank suppliers or their efforts to enter the U.S. market. (Blaumueller, Tr. 321, 332-35) (FOF 3.644, 3.645). Further, this finding contradicts the weight of the evidence. Current customers do not believe that the Acquisition will lead to higher prices and poorer quality. (*See* Opening Br. at 64-80). Finally, contrary to Complaint Counsel's proposed finding, Mr. Blaumueller sought to purchase a methane tank, not an LNG to store liquid methane. (Blaumueller, Tr. 325-26). Methane tanks are not part of the relevant product markets.

711. Since the acquisition, **[xx]** has noticed that CB&I fails to "show signs of wishing to reduce costs or schedule through technical innovation." (CX 693 at **[xx]** 01 027). CB&I is reticent to consider "novel tank concepts that do not require welded steel plate." (CX 693 at **[xx]** 01 027)

Response to Finding No. 711:

This finding is unsupported by the evidence. It relies exclusively on a **[xxx]** document, and is wholly unsupported by testimony from **[xxxx]** corporate representative who testified in this case. There is no evidence that this document is accurate, or that the author's recitation of these views was accurate.

712. Robert Davis of Air Products stated that, if Air Products cannot partner with CB&I to compete on LNG projects, that "would make it more difficult for us to compete successfully with them... [W]e couldn't find another domestic tank builder with their experience and their market presence." (Davis, Tr. 3199-200). "To my knowledge, today, the LNG tank supply would be CB&I." (Davis, Tr. 3198).

Response to Finding No. 712:

This proposed finding is irrelevant, as Complaint Counsel has not presented any evidence to suggest that Mr. Davis has any foundation for his opinions. Mr. Davis acknowledged that the sole reference point for his testimony was the Memphis LNG peakshaving project. (Davis, Tr. 3204) (FOF 3.668). Further, Mr. Davis has no responsibility for LNG in his current position, has not had experience with the construction of an LNG tank since 1974, lacks current knowledge regarding companies that are constructing LNG tanks in the U.S. or worldwide, and is not familiar in any specific way with LNG import terminals. (Davis, Tr. 3177-79, 3187-88) (FOF 3.666, 3.668). Further, this finding contradicts the weight of the evidence. Current customers do not believe that the Acquisition has hindered their ability to purchase LNG tanks, as recent entry from foreign companies have created competition in this market. (*See* Opening Br. at 19-45).

713. Mr. Cleve Fontenot, VP of Air Liquide, testified that "The reason we felt that there would be a cost increase to Air Liquide is that less competitive situation on similar type of major equipment where we have seen constriction of markets in the past, we have seen some price increases, to us at least." (Fontenot, Tr. 2031).

Response to Finding No. 713:

Complaint Counsel's proposed finding 713 is irrelevant because Mr. Fontenot lacks foundation to testify about the competitive effects of the Acquisition; he left Air Liquide on July 1, 2001. (Fontenot, Tr. 2012). Mr. Fontenot has not kept up to date current or potential suppliers on LIN/LOX tanks in the United States. (Fontenot, Tr. 2032). Mr. Fontenot is not aware of current market conditions. (Fontenot, Tr. 2032). Mr. Fontenot has no knowledge of which companies Air Liquide has currently pre-qualified or permits to bid for the supply of field-erected LIN/LOX tanks. (Fontenot, Tr. 2033) (FOF 5.144). Further, Mr. Fontenot's unsupported prediction regarding cost increases is contradicted by the weight of the evidence. (*See* Opening Br. at 110-115).

714. John Gill of Howard Fabrication testified that the post-acquisition pricing for these chambers "can't be as good" as when two suppliers are competing for these projects. (Gill, Tr. 211). Mr. Gill further testified that "[w]ith the lack of a second competitor in the market, I'm sure [customers of TVCs] are not better off." (Gill, Tr. 249).

Response to Finding No. 714:

This finding is unsupported by the evidence. It is clear from Mr. Gill's testimony that he is speculating regarding the effect of the Acquisition. There is no evidence in the record to suggest that Mr. Gill has any economic training or that he has personal knowledge regarding the issue of price increases. Further, to the extent the testimony quoted by this finding has any relevance, it is limited to the TVC market.

715. Clay Hall testified that Memphis Light, Gas & Water is concerned that prices will rise "[b]ecause we don't see anyone out there with experience that could come into the market and compete with CB&I/PDM ... in the United States," and because Memphis does not know "where we're going to get competition for our bids in the next few years." (Hall Tr. 1830).

Response to Finding No. 715:

Complaint Counsel's proposed finding 715 is irrelevant because Mr. Hall lacks foundation to testify about the competitive effects of the Acquisition. Neither Mr. Hall nor

anyone else at MLGW has made any efforts to locate LNG tank builders. (Hall, Tr. 1843-45) (FOF 3.653). MLGW has not received firm bids on such a tank since 1994, nor does it plan to purchase another until at least 2006. (Hall, Tr. 1832-33) (FOF 3.650). Further, Mr. Hall is not familiar in any significant way with LNG import terminals, current competition for LNG tanks in the U.S. today, or pricing submitted by any foreign company for an LNG tank in the U.S. over the last five years. (Hall, Tr. 1854-57) (FOF 3.652, 3.653). Finally, Mr. Hall's concerns are not shared by the great majority of current customers who have engaged in efforts to learn about current market participants. (*See* Opening Br. at 19-45).

716. Even if a new company were to enter the market, Mr. Hall remains concerned because "[t]here's a long time between these projects, they're highly specialized, and even if additional firms come into this market, it would be our concern that they wouldn't be able to exhibit the depth of experience that these firms provide." (Hall, Tr. 1831).

Response to Finding No. 716:

This finding is irrelevant for the reasons stated in RFOF 715.

717. Joseph Hilgar of Air Products believes that the price of cryogenic storage tanks will increase as a result of the acquisition. "I would think that you remove a competitor ... from a marketplace that had three to four bidders in our business, it's my estimation the price could go up, yes." (Hilgar, Tr. 1353; *see also,* JX 25 at ¶ 14 (Hilgar Aff.) ("If CB&I purchases PDM, I believe that the price of field-erected cryogenic storage tanks will increase, because one of the low-cost, preferred bidders will be removed from the market.")).

Response to Finding No. 717:

Complaint Counsel's proposed finding 717 is an incomplete summation of Mr. Hilgar's view of the effects of the Acquisition. Air Products believes there are a sufficient number of competitors in the market to ensure that it will receive reasonable prices on its next project. (Hilgar, Tr. 1540-41). Air Products testified that although it obtained competitive pricing with only two bids, it believes it has more potential bidders for pre-qualification today than it has had in the past. (Hilgar, Tr. 1531-32, 1540). Air Products believes entry into the LIN/LOX market is easy because any company in the business of constructing industrial storage

tanks would require only minimal investment to have the capability to construct LIN/LOX/LAR storage tanks. (Hilgar, Tr. 1538-39). If market conditions change and a substantial demand for LIN/LOX/LAR tanks reemerges, existing tank construction companies could easily seek out opportunities to enter into the LIN/LOX field erected tank construction market. (Hilgar, Tr. 1543-44). (FOF 5.169-5.170).

718. David Kamrath, CEO of Air Liquide Process and Construction, testified that "The concerns were that with Graver/Iteq going out of business and CB&I acquiring PDM, there was only one viable tank supplier left in the industry." (Kamrath, Tr. 1991). Mr. Kamrath also described why that was a concern for Air Liquide: "When there's only one supplier, the concern will always be that there's no constraint on pricing, there's no competition, and the pricing will have a tendency to rise." (Kamrath, Tr. 1991; see Fontenot, Tr. 2025).

<u>Response to Finding No. 718:</u>

Complaint Counsel's proposed finding 718 is misleading to the extent it implies that Air Liquide does not have competition sufficient to ensure a reasonable price for LIN/LOX tanks. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx]** (Kamrath, Tr. 2260-61). (FOF 5.1) This finding is also misleading to the extent it implies that Air Liquide does not consider other suppliers to be viable. For example, Air Liquide sees Matrix as a viable competitor in the LIN/LOX market. (Kamrath, Tr. 2005-06).

719. Dr. Hans Kistenmacher, vice-president of Linde BOC Process Plants, testified that his company is concerned that "our choices of qualified vendors has been dramatically limited to one vendor, and relative to my experience in the industry, that means we have less competition, and less competition in my view always leads to higher prices." (Kistenmacher, Tr. 878)

Response to Finding No. 719:

Complaint Counsel's proposed finding 719 is irrelevant because Mr. Kistenmacher has no foundation to give such testimony. Mr. Kistenmacher does not personally get involved in reviewing the prices submitted for LIN/LOX tanks. (Kistenmacher, Tr. 926). Further, he has no personal knowledge of the prices that Linde has received for its proposed LIN/LOX project. (Kistenmacher, Tr. 927). Mr. Kistenmacher does not know if any of the companies that have purchased a LIN/LOX tanks since the Acquisition have paid higher prices than before the Acquisition. (Kistenmacher, Tr. 928-29). Mr. Kistenmacher testified that as a result of a merger, Linde is now a part of BOC. (Kistenmacher, Tr. 921-22; V. Kelley, Tr. 4649-50:7; 4650-51). However, Mr. Kistenmacher was unaware of the fact that BOC has awarded AT&V two LIN/LOX tanks projects in Midland, North Carolina and Hillsboro, Oregon. (Kistenmacher, Tr. 922) (FOF 5.180-5.181).

720. Patrick Neary of TRW testified that TRW estimates that, post-acquisition, "the growth [in price] would probably be a 50 percent increase in the future." (Neary, Tr. 1456-57).

Response to Finding No. 720:

This finding is misleading and speculative. CB&I has not and will not attempt to raise its prices post-Acquisition for field-erected TVC's. (FOF 6.122-6.125). In fact, CB&I has offered to supply field-erected TVC's on a cost plus four percent basis to customers in the future as part of Respondents' remedy offer. (FOF 6.100-6.101). Customers testified that if CB&I were to offer customers in this market a firm fixed bid price with a four percent profit margin on any project that arose for the next 7-10 years, customers would be receiving a good price. (Scully, Tr. 1231-32; Gill, Tr. 261; Neary, Tr. 1482) (FOF 6.110). Howard Fabrication, for example, normally attempts to bid out at a 7-10 percent profit margin, which is still a good value

for the customer. (Gill, Tr. 260-61) (FOF 6.110). Neary himself stated that CB&I is acting responsibly in offering the four percent deal. (Neary, Tr. 1482) (FOF 6.111).

721. Mr. John Newmeister, president of Matrix, testified that CB&I's acquisition of PDM is likely to increase prices of LPG tanks because "when a customer knows in the tank business that they have limited competition, they raise their price. They adjust to the market conditions to increase the maximum profitability." (Newmeister, Tr. 2203).

Response to Finding No. 721:

Complaint Counsel’s proposed finding is irrelevant because it is based on a general statement by Mr. Newmeister. It does not refer specifically to LPG tanks. Further, Mr. Newmeister lacks foundation for offering economic opinions regarding the LPG market, as there is no evidence that he has seen LPG tank prices of his competitors since the Acquisition. Finally, Mr. Newmeister's testimony should be given little weight, as he is a direct competitor of CB&I's in the LIN/LOX and LPG markets. Matrix recently entered both of these markets. (*See* Newmeister, Tr. 2180-84).

722. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxxxxxxx]**, Tr. 701, *in camera*). **[xxxxxxxxxx]** testified that the **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** was supplied by CB&I on a sole-source basis cost that was **[xxxxxxxxx]** more than comparable facilities, **[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 720-21, *in camera*).

Response to Finding No. 722:

This finding is irrelevant, as Ms. Outtrim lacks foundation for her views. **[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]** Further, the veracity of Ms. Outtrim's testimony is suspect, as she owns part of a

company called Cryocrete, which is in a position to compete with CB&I in the LNG markets. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Outtrim, Tr. 787) (FOF 3.690). Finally, and perhaps more importantly, actual customers in the LNG market disagree with Ms. Outtrim's opinions. Current customers respect new entrants in the U.S. LNG market and are willing to work with them on U.S. LNG projects. (Opening Br. at 19-45; FOF 3.683-3.696).

723. **[xxxxxxxxxxx]** also testified that LNG facility owners are "[concerned about being able to find other tank manufacturers and LNG facility constructors that can provide the same services in the U.S., and they're concerned about costs and customer service basically.]" (**[xxxxx]**, Tr. 725, *in camera*).

<u>Response to Finding No. 723:</u>

This finding is irrelevant for the reasons set forth in RFOF 722.

724. Michael Patterson, Director of Engineering at MG Industries, **[xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxx]**, Tr. 476, *in camera*).

<u>Response to Finding No. 724:</u>

This finding is irrelevant because Mr. Patterson does not have the necessary foundation to arrive at this conclusion.. It is also contradicted by Mr. Patterson's testimony. He **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]** and believes that he can get a competitive price for these tanks with three bidders. (Patterson, Tr. 348, 488) (FOF 5.147, 5.158). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]** (Patterson, Tr. 494) (FOF 5.160). **[xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Patterson, Tr. 494-95)

(FOF 5.159, 5.160). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Patterson, Tr. 495) (FOF 5.159, 5.160).

725. Brian Price of Black & Veatch testified that "the lack of a domestic supplier that we can go to bid with on a peak-shaving unit that includes a tank puts us at a disadvantage to compete on that project." (Price, Tr. 636).

<u>Response to Finding No. 725:</u>

This finding is irrelevant, as it is based on Mr. Price's unsupported speculation. Mr. Price's views are based primarily on the irrelevant 1994 Memphis project. (Price, Tr. 650-51, 661-62). Further, despite the fact that Mr. Price professes to be part of the Dynegy project team, the evidence on Dynegy contradicts his views. Mr. Puckett explained that Dynegy was satisfied with its choices of LNG contractors and prices provided by those contractors. (Puckett, Tr. 4540, 4587-88) (FOF 3.248). Mr. Price has no reason to dispute Mr. Puckett's conclusion, as he has never seen the pricing on the Dynegy bids. (Price, Tr. 610) (FOF 3.660). In addition, despite these concerns, Black & Veatch was touting itself as a partner of Skanska to Freeport LNG. (RX 935 (state of mind)) (FOF 3.662). Finally, Mr. Price's testimony is inherently biased. Mr. Price himself holds a patent on process technology that directly competes with CB&I. Further, his employer -- Black & Veatch -- is a "head to head" competitor of CB&I on peak-shaving facilities. (Price, Tr. 641) (FOF 3.659).

726. Ronald Scully, who was a CB&I employee at the time of the acquisition, testified that the acquisition may lead to higher pricing for TVCs. (Scully, Tr. 1181).

<u>Response to Finding No. 726:</u>

This finding is unsupported by the evidence, as it consists only of Mr. Scully's unsupported speculation on economic issues. Further, Respondents have set forth a remedy package that addresses the possibility of higher prices with a promise to sell field-erected TVC's on a cost plus four percent basis in the future. (FOF 6.100-6.101).

727. David Thompson of Spectrum Astro testified that the acquisition of PDM removed one of "two vicious competitors." (Thompson, Tr. 2099).

<u>Response to Finding No. 727:</u>

Respondents have no specific response to this finding.

728. The concerns of industry participants verifies Dr. Simpson's testimony that post-acquisition, prices of the relevant products are likely to increase because CB&I's pricing is "constrained by much weaker competitors and constrained at a higher price." (Simpson, Tr. 3406). If past competition between PDM and CB&I led to lower prices for the relevant products "then the elimination of that competition should enable the merged firm to set a higher price." (Simpson, Tr. 3406, 3501).

<u>Response to Finding No. 728:</u>

Complaint Counsel's proposed finding 728 is false because the referenced "industry participants" are, on the whole, not even current participants and overwhelmingly lack foundation to give the views given. *See* RFOF 710-728.

R. CB&I and PDM Recognized that the Merger Would <u>Reduce Competition and Lead to Higher Margins and Prices</u>

729. Respondents' merger planning documents and testimony at trial illustrate CB&I's own belief that PDM's demise created an opportunity for CB&I to raise prices and margins in the United States. CCFF 730-749.

<u>Response to Finding No. 729:</u>

Complaint Counsel's proposed finding 729 is irrelevant because Respondents' merger planning documents do not make the effects of the Acquisition more or less competitive. At the time of the Acquisition, Respondents could not predict the actual and potential post-Acquisition entry. Respondents, to the extent that they made any such predictions, were wrong.

730. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 213 at CB&I-PL033037, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]**. (CX 213 at CB&I-PL033084, *in camera*).

Response to Finding No. 730:

Complaint Counsel's proposed finding 730 is irrelevant because Respondents' merger planning documents do not make the effects of the Acquisition more or less competitive. At the time of the Acquisition, Respondents could not predict the actual and potential post-Acquisition entry. CB&I was wrong.

731. PDM also assessed the benefits of acquiring CB&I in 1999, and determined that acquiring CB&I would give PDM "Market dominance in Western Hemisphere." (CX 74 at PDM-C 1005941). Scorsone admitted that when he wrote the document he believed PDM could achieve "market dominance" by acquiring CB&I. (Scorsone, Tr. 5169).

Response to Finding No. 731:

Complaint Counsel's proposed finding 731 is irrelevant because Respondents' merger planning documents do not make the effects of the Acquisition more or less competitive. At the time of the Acquisition, Respondents could not predict the actual and potential post-Acquisition entry. Luke Scorsone's saying in 1999 that the Acquisition could give PDM market dominance does not make it so. Mr. Scorsone testified that this was made with the best information they had at that time. (Scorsone, Tr. 5264).

732. In August 2000, CB&I and PDM agreed to merge, thereby transforming aspirations of "market dominance" and creating a "competition void for 1-3 years" into reality. (CX 79 at PDM-C 1002684).

Response to Finding No. 732:

Complaint Counsel's proposed finding 732 is false -- CB&I does not have market dominance and there is no competition void.

733. Gerald Glenn saw the merger as a "once-in-a-lifetime opportunity." (CX 1627 at 133; Glenn, Tr. 4271-4272). Glenn added that the acquisition could provide "the next major step in our announced strategy to achieve significant growth in sustainable revenue, profitability and shareholder value." (CX 79 at PDM-C 1002684).

Response to Finding No. 733:

Respondents have no specific response to finding 733, except that the fact that Mr. Glenn called the Acquisition a "once-in-a-lifetime opportunity" supports the notion that the reasons were unrelated to the relevant product markets, which comprise a very small percentage of CB&I's business.

734. At PDM's offices, in August 2000, PDM began to analyze the benefits of the merger. In a document titled "Benefits of Combining PDM with CB&I," PDM listed the following benefits: (1) "Dominance of the cryogenic (LNG/LOX/LIN) markets;" and (2) "Allows CB&I to have a low cost USA tank producer." (CX 621 at PDM-HOU006702).

Response to Finding No. 734:

Complaint Counsel's proposed finding is false: "PDM" did no such thing; Dan Knight, a low-level PDM salesperson, created this document without foundation and without being asked to do so. FOF 5.224-5.234.

735. Dan Knight, PDM's then account manager and today CB&I's Business Development Manager, added that PDM had "been beating CB&I for years in this market, and as long as they recognize why that has happened ... this merger will benefit us all." (CX 621 at PDM-HOU006702).

Response to Finding No. 735:

Complaint Counsel's proposed finding 735 is a distortion of the record; Mr. Knight's comment makes no sense. Complaint Counsel's use of Mr. Knight's title does not change the fact that he is a low-level salesman who was incorrect. (FOF 5.224-5.234).

736. Numerous documents describe Respondents' internal assessment of where the merged firm stood in the competitive landscape.

Response to Finding No. 736:

This finding is wholly unsupported by the record evidence as it contains no date.

737. At CB&I, Glenn stated that CB&I/PDM had "unequaled capability in our chosen field." (CX 1720 at CB&I/PDM-H 4000784). Rich Goodrich, Executive Vice President and Chief Financial Officer, called CB&I/PDM the "900 pound gorilla." (CX 1681 at CB&I/PDM 4005289). Daniel Knight, the same person who anticipated that the combination of CB&I &

PDM would "create barriers to entry," stated, in a post-acquisition e-mail, that "We are by far the 'big-dog' of the industry and I think we need to better educate our customers of what they gain by buying from CB&I." (CX 459 at CB&I-E 007218; *see* CX 101 at PDM-HOU002359). CB&I boasted internally regarding the LNG market that "no other company in the world is more uniquely or strategically positioned to capitalize on that emerging market." (CX 823 at CB&I-E 009355).

Response to Finding No. 737:

Complaint Counsel's proposed finding 737 is irrelevant because it cites pre-Acquisition thoughts that do not take into account future entry. Further, the comments do not refer to the relevant products.

738. Mr. Glenn testified that CB&I "bought the company with the intention that the overall company's revenues and profitability would go up." (Glenn, Tr. 4259; see CX 1532 at 1; CX 1719 at 1 (CB&I tells its investors, "This acquisition is a major step in CB&I's strategy to achieve sustainable growth in revenues and profitability.")).

Response to Finding No. 738:

Complaint Counsel's proposed finding 738 is irrelevant; first the referenced documents talk about both the acquisition of PDM *and* Howe Baker, another unrelated company purchased at around the same time. (*See* Glenn, Tr. 4086). Second, whether the company's *overall* revenues and profitability goes up is irrelevant to whether the Acquisition will lessen competition in the relevant product markets.

739. At PDM, Scorsone thought CB&I/PDM will be a "powerhouse." (CX 72 at PDM-C 1004409). Scorsone later added that CB&I/PDM "will truly be the world leader in storage tanks." (CX 1686 at CB&I/PDM-H 4005550; Scorsone, Tr. 5203). At trial, Scorsone reiterated his belief that CB&I/PDM would be a "dominant force." (Scorsone, Tr. 5203, 5204).

Response to Finding No. 739:

Complaint Counsel's proposed finding is irrelevant and contains a misstatement; Mr. Scorsone only testified at trial that indeed he believed those statements to be true *at the time he made them.* (Scorsone, Tr. 5203-04). This is irrelevant because Mr. Scorsone was wrong.

All of these documents are contradicted by actual competitive events. (FOF 5.151-5.158, 5.123-5.125, 3.470-3.480, 3.485-3.486, 4.66-4.70, 3.140, 3.327-3.331).

740. Having agreed to merge, CB&I and PDM personnel began the business of integrating and implementing the objectives of the merger.

Response to Finding No. 740:

Respondents have no specific response to finding 740 except that the "objectives" of the Acquisition were to gain efficiencies and grow CB&I's worldwide LNG market. (Tr. 4080-81).

741. In October 2000, Scorsone and other executives held a "brainstorming" session. (Scorsone, Tr. 5204). The "brainstorming" team compiled a list of objectives entitled "PDM Merger Objectives Brainstorm Results." (CX 101 at PDM-HOU002359).

Response to Finding No. 741:

Complaint Counsel's finding 741 is misleading because there is no support in the record for the notion that the team together compiled a list of objective -- Mr. Scorsone did not testify to this fact. (Scorsone, Tr. 5204-08).

742. Among other things, the "PDM Merger Objectives Brainstorm Results" outlined the following objectives of the merger: (1) "Create barriers to entry as they can be built;" (2) "Defend an expanding market share;" (3) "Ensure that we do not allow smaller competitors to take share and pursue business in our attractive markets;" (4) "Put plans in place to command premiums for the services we provide;" and (5) "Improve pricing to achieve margin growth from 12.5% to 17%." (CX 101 at PDM-HOU002359-60).

Response to Finding No. 742:

Complaint Counsel's proposed finding is irrelevant because the document neither proves nor disproves Complaint Counsel's case. First, it is not product specific. Further, this is particularly irrelevant since PDM was the acquired firm and now has no market share; whether PDM had "objectives" is irrelevant since CB&I was the acquiring firm. Ultimately, CB&I has not been able to "create barriers to entry."

743. Scorsone circulated the "PDM Merger Objectives Brainstorm Results" document to key members of the integration team with the instruction that they read it to "introduce you to this process." (CX 1683 at CB&I/PDM-H 4005384; Scorsone, Tr. 5206).

Response to Finding No. 743:

Respondents have no specific response to finding 743, except Mr. Scorsone makes this statement on page 5207 of the trial transcript.

744. Shortly after the "brainstorming" session, Scorsone and other members of the integration team held an "Integration Kick-off Meeting." (CX 1544 at CB&I 057915; CX 1682 at CB&I/PDM-H 4005307).

Response to Finding No. 744:

Respondents have no specific response.

745. Consistent with the principles outlined in the "PDM Merger Objectives Brainstorm Results" document, the "kick-off meeting" agenda prioritized the objectives of the merger: (1) "Ensure we do not allow smaller companies to take share and pursue business in our attractive markets;" (2) "Defend an expanding market share;" (3) "Create barriers to entry;" and (4) "Use pricing advantage as necessary to not lose market share to competitors during the merger." (CX 1544 at CB&I 057941).

Response to Finding No. 745:

Complaint Counsel's proposed finding is irrelevant because the document neither proves nor disproves Complaint Counsel's case. First, it is not product specific. Further, this is particularly irrelevant since PDM was the acquired firm and now has no market share; whether PDM had "objectives" is irrelevant since CB&I was the acquiring firm. Ultimately, CB&I has not been able to "create barriers to entry."

746. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 921, *in camera*). **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]**. (CX 921 at CB&I 003613-HOU, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**. (CX 921 at CB&I 003609-HOU, *in camera*; Simpson, Tr. 3099-100).

<u>Response to Finding No. 746:</u>

Complaint Counsel’s proposed finding is irrelevant because **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx]** (Simpson, Tr. 4036-44) (FOF 7.171-7.175).

747. Dr. Simpson testified that instances where CB&I has increased price following its acquisition of PDM indicate that CB&I's management believes that they can profitably increase price. (Simpson, Tr. 5781)

<u>Response to Finding No. 747:</u>

Complaint Counsel’s finding 747 is predicated on the erroneous assertion that CB&I has increased price following the acquisition. Complaint Counsel has presented no valid evidence indicating that CB&I has in fact raised prices. (FOF 3.597-3.641, 5.182-5.211, 7.164). Further, there has been entry in the alleged product markets which has prevented CB&I from raising prices. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (See FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)).

748. As will be discussed below, the objectives developed during the "brainstorming session" and the "kick-off meeting" soon became reality.

<u>Response to Finding No. 748:</u>

Complaint Counsel’s proposed finding 748 is false.

VII.

THE MERGER HAS HAD ACTUAL ANTICOMPETITIVE EFFECTS

A. The Merger Has Resulted in Higher Prices and Margins in All Markets

749. Complaint Counsel has established that the merger will likely have anticompetitive effects through evidence of (1) Respondents' dominant position in highly concentrated markets, (2) the elimination of PDM as CB&I's closest competitor, and (3) the inability of foreign and domestic firms to replace PDM as a competitive constraint on CB&I.

Response to Finding No. 749:

Complaint Counsel's proposed finding 749 is patently false. First, there has been successful actual entry in the alleged product markets, and there is viable potential entry. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (See FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF 4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Complaint Counsel has presented no valid evidence indicating that CB&I has in fact raised prices. (FOF 3.597-3.641, 5.182-5.211, 7.164). Complaint Counsel has failed to prove its case.

750. Although not required to do so under Section 7 of the Clayton Act or Section 5 of the FTC Act, Complaint Counsel also presented evidence that in the two years since the merger, Respondents have in fact implemented anticompetitive price and margin increases.

Response to Finding No. 750:

Complaint Counsel's finding number 750 is entirely false, unsupported by evidence, and contrary to the weight of record evidence. First and foremost, the evidence is overwhelming that there has been both actual entry and that there is potential entry constraining CB&I's prices. (*See* Harris, Tr. 7209-13, 7239-47, 7286-87, 7308, 7315-17) (FOF 7.58, 7.92-7.101, 7.118, 7.113) (See FOF 3.68-3.227 (actual entry has occurred in the LNG market); FOF

4.16-4.54 (actual entry in the LPG market); FOF 5.22-5.71 (new competitors have entered the LIN/LOX market); 5.79-5.184 (LIN/LOX customers are satisfied with prices received and available competitive options)). Second, there is no evidence what CB&I has in fact raised its prices and margins; Complaint Counsel's purported examples of price increases are based on inappropriate comparisons, conjecture, and fabrication. (*See* FOF 7.1-7.41, 3.597-3.641, 5.182-5.211, 7.164). Complaint Counsel has not and cannot provide a single instance where CB&I has raised prices on a firm fixed bid or where a customer has paid a higher price for a product than prior to the Acquisition.

751. Examples of anticompetitive effects include, among others, an LNG project in Cove Point, Maryland CCFF 778-831; LNG projects for **[xx]** CCFF 832-833; an LNG project in Memphis, Tennessee CCFF 848, 930-955; an LNG project in Fairbanks, Alaska CCFF 956-978; an LNG project for Dynegy CCFF 979-1007; an LNG project for Yankee Gas CCFF 1008-1027; LIN/LOX projects for Linde and Praxair in New Mexico CCFF 1059-1087 and for MG Industries 1088-1108; and TVC projects for Spectrum Astro CCFF 1109-1165; **[xxx]** CCFF 1182-1221 and TRW CCFF 1166-1181.

Response to Finding No. 751:

Complaint Counsel's finding 751 is false. Complaint Counsel's purported examples of price increases are based on inappropriate comparisons, conjecture, and fabrication *See* FOF 7.1-7.41, 3.597-3.641, 5.182-5.211, 7.164. *See* RFOF 778-833, 848, 930-955, 956-978, 979-1007, 1008-1165, 1182-1221, 1166-1181.

752. The evidence of actual anticompetitive effects further belies Respondents' argument that entry by foreign and domestic firms will deter or counteract any anticompetitive harm that may flow from the merger.

Response to Finding No. 752:

Complaint Counsel's proposed finding 752 is false. There are no actual anticompetitive effects. That CB&I is losing the majority of post-Acquisition projects in the relevant markets belies Complaint Counsel's assertion that entry will not deter or counteract any anticompetitive harm that may flow from the merger.

1. *CB&I Publicly Acknowledges that Competition Has Been Substantially Lessened*

753. Beginning in 1997, CB&I filed a series of "S-1" forms with the Securities and Exchange Commission in connection with a public stock offering. The S-1s contain statements of "Risk Factors" that investors should be aware of before purchasing CB&I's stock. (CX 1633 at 13; CX 1635 at 11; CX 1714 at 14; CX 1715 at 14; CX 1716 at 10).

Response to Finding No. 753:

Respondents have no specific response.

754. One of the "Risk Factors" that CB&I warned about before the acquisition was the impact that competition from firms such as PDM had on CB&I's profitability.

> In recent years, **competition has resulted in substantial pressure on pricing and operating margins**. The Company expects overcapacity and other competitive pressures in the industry to continue for the foreseeable future... The Company's competitors, either alone or together with competitors having sufficient resources, could engage in a variety of actions, including **aggressive price competition**, increased commitment of resources to compete, offering a higher level of customer service and efforts to recruit the Company's customers, which may have the effect of delaying or preventing the implementation of the Company's business strategy or **adversely affecting the Company's ability to compete profitably**...."

(CX 1633 at 18 (emphasis supplied); *see also* CX 1635 at 18; CX 1714 at 18; CX 1715 at 19-20; CX 1716 at 15).

Response to Finding No. 754:

Respondents have no specific response.

755. CB&I's statements in its S-1 filings about the competitive pressures exerted by PDM are consistent with Respondents' contemporaneous business records and testimony in this case about the vigorous head-to-head competition between CB&I and PDM before the merger. CCFF 203-290.

Response to Finding No. 755:

Complaint Counsel's proposed finding 755 is misleading because the S-1 did not mention "the competitive pressure created by PDM." These filings do not provide useful

information regarding competition six years later, when the competitive landscape is changed completely.

756. Today, CB&I does not face the same competitive pressure from PDM or any other domestic or foreign firm. In November of 2001 (nine months after completing the acquisition of PDM) and in July 2002 (four months before the start of the FTC's trial), CB&I filed prospectuses with the SEC in connection with two separate stock offerings, the first for 1.3 million shares and the second for 2.7 million shares. (CX 1718 at 1 of 15 (filed as of November 9, 2001); CX 1021 (dated July 2, 2002)).

Response to Finding No. 756:

Complaint Counsel's proposed finding 756 is false; CB&I faces competitive pressure from other domestic and foreign firms. The remainder of the proposed finding is irrelevant.

757. Unlike the S-1s filed before acquiring PDM, the post-merger prospectuses contain discussions about "Risk Factors" but say nothing about competition having a negative impact on prices and margins or forcing CB&I to bid at less than attractive rates. Indeed, the "Risk Factors" section ignores competitors entirely. (CX 1021 at 7-13; CX 1718 at 3 of 15 - 9 of 15).

Response to Finding No. 757:

Complaint Counsel's proposed finding 757 is misleading because, indeed, the prospectus states that "[t]here are numerous regional, national and international competitors that offer products and services similar to ours." (CX 1021 at 36). Further, the S-1 is not talking about the relevant products which, representing 1.5% of the company's revenues, would not be material enough to mention.

758. The 2002 prospectus contains a separate section about "Competition," but CB&I's discussion only highlights its market leading position: "We believe that we are a leading competitor in most of the products and services that we sell. Price, quality, reputation, safety record and timeliness of completion are the principal competitive factors within the industry. There are numerous regional, national and international competitors that offer products and services similar to ours." (CX 1021 at 36).

Response to Finding No. 758:

Complaint Counsel's finding 758 is irrelevant; whether CB&I is a "leader" is irrelevant to whether CB&I will raise prices or will be able to raise prices. This is particularly true since CB&I acknowledges that it is not the only the competitor. (CX 1021 at 36). Further, this document is not product specific. *See supra* RFOF 757.

759. By its own admission, CB&I no longer encounters (1) "substantial pressure on pricing and operating margins," (2) "aggressive price competition," (3) conditions "adversely affecting the Company's ability to compete profitably," or (4) the need to "bid [its] services out for hire at less than attractive rates." (CX 1633 at 15).

Response to Finding No. 759:

Complaint Counsel's proposed finding 759 is a distortion of the facts. First, as Dr. Harris testified, securities filings are prepared for different purposes and by different people than regular company business documents. As Dr. Harris testified, these filings are "designed to be for purposes of presenting things in the best light." (Haris, Tr. 7584). Further, none of these S-1s are talking about the relevant products. Finally, Complaint Counsel's effort to stitch together these documents is wholly inconsistent with the post-Acquisition record of intense competition that is, unlike the S-1s, specific to the relevant products.

760. As CEO of CB&I, Mr. Glenn's responsibility is to ensure that its SEC filings are "accurate, truthful, and complete." (Glenn, Tr. 4376). To omit pertinent information or present false information in an SEC filing would be characterized as fraud, and would have punitive consequences. (Glenn, Tr. 4377).

Response to Finding No. 760:

Respondents have no specific response.

761. In the third and fourth quarters of 2001, CB&I's "Investor Fact Sheet," displayed on CB&I's web site, described the acquisition of PDM as a "major step in CB&I's strategy to achieve sustainable growth in revenues and profitability." (CX 1532; CX 1719). The "Investor Fact Sheet" states that CB&I's "competitive advantages" include "global execution capabilities unmatched by competitors." (CX 1532) CB&I underscored LNG as a product market with continuing opportunities: "Key Growth Strategies: Capture a major share of the worldwide market for Liquefied Natural Gas (LNG)." (*Id.*)

Response to Finding No. 761:

Complaint Counsel's proposed finding 761 is irrelevant and misleading; as the quoted portion of CX 1532 states, CB&I was referring to the "worldwide market" for LNG and "global execution capabilities." In any case that CB&I hopes to be a successful business is irrelevant.

762. In its July 2002 "Investor Presentation," CB&I emphasizes its "Multi-tiered Growth Strategy." Among other objectives, CB&I lists "Gain Share in High Growth Markets," "Market Expanded Capabilities," and "Growth through Strategic Acquisitions" as ways to grow its business. (CX 1628 at 14).

Response to Finding No. 762:

Complaint Counsel's proposed finding 762 is irrelevant; growing its business is not an anticompetitive act and does not have anticompetitive results. This is particularly true considering the majority of CB&I's business is in non-relevant product markets. Further, this explicitly include the Acquisition of Howe-Baker -- this document does not provide information relevant to the issues in this case. (CX 1628 at 14).

763. The same growth strategy was repeated on CB&I's web site for the third quarter of 2002. (CX 1527 at 2). CB&I reports to investors that it anticipates "margin improvement and accelerating earnings growth" going forward.

Response to Finding No. 763:

Complaint Counsel's proposed finding 763 contains error: CX 1527 says nothing about margin improvements; it is a 2000 document entitled "Strategic Business Plan" and discusses reducing procurement costs. (CX 1527).

764. Unrestrained by competition, CB&I's financial picture has improved since the merger. CB&I's July 2002 "Investor Presentation" reports that since the "transformational acquisitions" in 2000, which includes the PDM acquisition, CB&I's gross margins increased from 11.3% in 2000 to 12.6% in 2001 and 13.0% in 2002. (CX 1628 at 23). Revenues jumped from $612 million in 2000 to around $1.1 billion in 2001 and 2002. (*Id.*). Respondents made no mention of any threat from competition, much less of entry by foreign competitors.

Response to Finding No. 764:

Complaint Counsel's proposed finding 764 contains the inaccurate representation that CB&I is "unrestrained by competition." Further, that CB&I's overall business has improved is totally irrelevant. Further, Mr. Glenn testified that this document was referring to the Howe-Baker Acquisition which has been responsible for the gains reflected in CCFF 764. (Glenn, Tr. 4403-04).

765. CB&I added that it was "well positioned for revenue growth and margin improvement." (CX 1628 at 22; *see also* CX 1629 at 26 (CB&I revenue will be $1.2 billion in 2002); CX 1532; CX 1719 (On CB&I's web site, investors are told that CB&I's "Performance Goals" are to achieve revenues of $1.5 billion per year by 2005)).

Response to Finding No. 765:

Complaint Counsel's proposed finding 765 is irrelevant; that CB&I is well positioned for revenue growth says nothing about whether the effects of the Acquisition of PDM's EC Division is likely to lessen competition in the relevant U.S. product markets. Further, Gerald Glenn testified that this document was referring to the Howe-Baker Acquisition, which has been responsible for the gains reflected in CCFF 765. (Glenn, Tr. 4403-04).

766. On October 31, 2002, CB&I reported third-quarter results that exceeded the expectations set forth in July of 2002. CB&I 's recorded gross profit for the first nine months of 2002 were 13.6% of revenues, compared with 12.2% of revenues in the comparable 2001 period and 13.0% as projected in the July 2002 "Investor Presentation." (CX 1576 at 1; compare to CX 1628 at 23).

Response to Finding No. 766:

Complaint Counsel's proposed finding 766 is irrelevant; that CB&I's revenues say nothing about whether the effects of the Acquisition of PDM's EC Division is likely to lessen competition in the relevant U.S. product markets. Further, Mr. Glenn testified that this the Howe-Baker Acquisition has been responsible for the gains reflected in CCFF 766. (Glenn, Tr. 4403-04).

767. On October 31, 2002, CB&I held a conference call with the investment community to discuss its third-quarter financial results. Financial analysts asked questions and CB&I executives, including Glenn, addressed issues pertinent to the FTC's action.

Response to Finding No. 767:

Complaint Counsel's proposed finding 767 is false; the questions asked were not pertinent to the FTC's action.

768. An analyst asked how the competitive environment had changed: "[W]hat is the competitive environment for the services that you provide that has changed over the last five to ten years? I mean, are there fewer, better qualified contractors to be able to take advantage of this?" (CX 1731 at 44).

Response to Finding No. 768:

Complaint Counsel's proposed finding is irrelevant since the question was not product or market specific.

769. Glenn's answer touts CB&I's new-found market leadership position – unfettered by foreign and domestic competition:

> Well, I don't know that there are fewer. There are some that have run on hard times. There are those that have stubbed their toe. You know, you're only as good as your last job. And we're really proud of the fact that, you know, *a lot of owners out there, if they go to build a sophisticated project, like an LNG project or an LNG tank, they don't want to take a chance on a low price and a potential second class job or shoddy welding or any of that kind of stuff*. The kind of work that we do is very specialized, very sophisticated. We have an excellent track record.
>
> 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.

(CX 1731 at 44-45) (emphasis supplied).

Response to Finding No. 769:

Complaint Counsel's proposed finding is irrelevant because, first, this is not U.S. specific and is contradicted by factual evidence. Further, Mr. Glenn's statement that CB&I

thinks it can win the work every time technically does not suggest that CB&I will raise prices. Mr. Glenn has no foundation for his assertion that competitors must "take the work for less than they can execute it." CB&I does not know its competitors' costs, but knows that CB&I is losing projects to foreign competitors and cannot raise prices.

770. Another analyst asked about CB&I's higher margins: "Lastly, the gross margin keeps like coming up quite a bit. What do you think would be a reasonable margin of going forward like with your focus on more like a higher margin, Howe-Baker work? What's a reasonable margin run rate you think?" (CX 1731 at 41).

Response to Finding No. 770:

Complaint Counsel's proposed finding is irrelevant since the question addresses the Acquisition of Howe Baker.

771. Glenn's answer confirms CB&I's "high" margins, and ability to achieve higher margins than competitors:

> **The margin levels are high.** It's all got to do with the mix of the work and the timing of the revenues and ... [p]roject execution... So, I don't want to point to something other than just to say that, as I said before, we're trying to focus more of our energy, more of our efforts, more of our resources on the higher margin work... And that 's work that we – you know, we have to compete in some manner with others and because of our concentration on lowering our costs and keeping our costs down, **we can still be low bidder and make more money on it than most of our competitors, if not all of them**.

(CX 1731 at 41-42) (emphasis supplied).

Response to Finding No. 771:

Complaint Counsel's proposed finding is misleading since, as is evidenced by the question asked, this relates to Howe Baker. Further, this is irrelevant -- Mr. Glenn is talking about overall profit margins.

772. Another analyst asked about CB&I's prospects going forward: "If we look at the business opportunities that you *see* for CB&I, going over the next 12 months, and you go back to, you know, either December 31st or a year ago, either way you want to do it, can you give us an order of magnitude, does the business look the same, does it look better, and just give us some

way – you know, your target list projects pursued, you know, some way to quantify?" (CX 1731 at 27).

Response to Finding No. 772:

Complaint Counsel's proposed finding is irrelevant since the question was not product or market specific.

773. Glenn responded that CB&I's prospects look "30%" better today than in the past:

> With this report, CB&I has exceeded many of our previous records in areas like new business taken, backlog and several others. We're extremely pleased with the efforts and performance of our entire team. The results speak for themselves, so I will only comment that **our markets and prospects appear more attractive to us today than at any time in our recent past**.
>
> I would give you a general comment that **our prospect list and the projects that we're attracting looks better to us today than at any time since the IPO** [initial public offering of stock in 1997]. If you had to pick a number, I don't know, **maybe it's 30 percent or something, but it's a big number**.

(CX 1731 at 4, 28 (emphasis supplied); *see also* CX 1735 at CB&I 004168-HOU (new business taken has risen dramatically since 2001); **[xxx]**, Tr. 5302, *in camera*).

Response to Finding No. 773:

Complaint Counsel's proposed finding is irrelevant since the answer was not product or market specific. Further, that CB&I is doing well overall is irrelevant to whether CB&I is doing well in the alleged product markets, and is irrelevant to whether the results of the Acquisition is to lessen competition.

774. None of CB&I's post-merger communications mention anything about foreign firms, domestic firms or joint ventures threatening CB&I's ability to win projects and raise prices and margins.

Response to Finding No. 774:

Complaint Counsel's proposed finding is irrelevant; while competition will prevent CB&I from raising prices in the relevant product markets, this does not does not have

significance to CB&I's overall business such that it needs to be communicated to investors, since CB&I's business in the relevant product markets is so small.

775. On December 16, 2002, six-weeks after the conference call with investors, Glenn gave the Tribunal a less sanguine assessment of CB&I's prospects. **[xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxxxxxx]**, Tr. 4223-4224, *in camera*). This testimony is not credible considering Mr. Glenn's public statements as well as CB&I's higher prices and profit margins.

<u>Response to Finding No. 775:</u>

Complaint Counsel's proposed finding contains the false statement that Mr. Glenn's testimony is "not credible considering Mr. Glenn's public statements as well as CB&I's higher prices and profit margins. "There is no evidence that CB&I's prices are higher, and there is no evidence that CB&I's margins on projects in the relevant projects are higher. Nothing Mr. Glenn has said publicly contradicts Mr. Glenn's testimony.

776. Respondents' argument to the Tribunal – that ["vicious"] competition from foreign and domestic firms restrains CB&I – is a claim that CB&I has chosen to share with the Tribunal but not with the SEC or the investment community.

<u>Response to Finding No. 776:</u>

Complaint Counsel's proposed finding 776, which is pure argument and unsupported, is irrelevant.

B. <u>The Merger Has Had Actual Anticompetitive Effects in the LNG Market</u>

1. *The Cove Point, Maryland Project*

777. The LNG project at Cove Point, Maryland ("Cove Point") illustrates two important themes of this case. (1) Prior the merger, CB&I and PDM competed vigorously to win this project, and Cove Point benefitted in the form of lower prices. (2) Since the merger, the elimination of PDM as CB&I's closest competitor and the inability of other firms to replace PDM as a price constraint has permitted Respondents to raise prices and margins markedly. On at least four occasions, Respondents implemented price increases that raised the current price of the Cove Point tank by more than 60% from pre-merger levels, with a nearly five-fold increase in the dollar margins that the combined entity expects to earn.

Response to Finding No. 777:

For the reasons set forth in RFOF 779-830, the proposed finding is factually incorrect, misleading, conclusory, incomplete, and is not supported by the evidence.

778. The Cove Point story involves three phases. Phase 1 is the January 2000 period when CB&I and PDM were in head-to-head competition to win a 750,000 barrel LNG tank project with Columbia LNG, and its successor, Williams Gas Company. CCFF 779-788. Phase 2 is the September 2000-February 2001 period when Respondents had agreed to merge but had not yet finalized the acquisition. In Phase 2, Williams Gas Company obtained price quotes from PDM for the 750,000 barrel tank and alternatively for a 850,000 barrel tank, and accepted PDM's final bid for the 850,000 barrel tank. CCFF 789-811. Phase 3 is the period after February 2001 when Respondents had merged to create one entity. CCFF 812-825.

Response to Finding No. 778:

For the reasons set forth in RFOF 779-830, the proposed finding is factually incorrect, misleading, conclusory, incomplete, and is not supported by the evidence.

2. *Cove Point Phase 1 – CB&I - PDM Competition Brings Prices Down*

779. During Phase 1, CB&I and PDM competed aggressively to win a 750,000 barrel LNG tank for Columbia LNG to be built at Cove Point. (CX 293 at CB&I/PDM-H 4008141).

Response to Finding No. 779:

The proposed finding is misleading and mischaracterizes the evidence. CX 293 is an internal PDM document, and there is nothing in the cited page suggesting that CB&I "competed agressively" for the Cove Point project.

780. In January 2000, PDM's Mike Miles, the lead sales representative on Cove Point, announced to PDM staff working on the Cove Point bid, as well as his boss, Jeff Steimer, that (a) "PDM is bidding against CB&I on this one;" and (b) PDM needed a "very competitive price to be successful." (CX 293 at CB&I/PDM-H 4008141).

Response to Finding No. 780:

The proposed finding is misleading and is unsupported by the evidence. There is no record evidence suggesting either that (1) Mr. Miles was the lead sales representative on Cove Point, and (2) that Jeff Steimer was Mr. Miles' boss.

781. PDM initially quoted a price of approximately **[xxx]** million. (CX 226 at CB&I-PL044978, *in camera*). PDM subsequently bid **[xxxxxx]** million. (CX 1058 at PDM-HOU 017465).

<u>Response to Finding No. 781:</u>

The proposed finding is incomplete, misleading, and is unsupported by the evidence. First, Complaint Counsel failed to ask any witness at trial about CX 226, and thus, its interpretation of this document is suspect. Second, CX 226 is a CB&I document. CB&I was speculating as to what PDM's pricing was for the Cove Point project based on CB&I's discussions with Cove Point. (CX 226 at CB&I-PL44978). Third, as CX 226 indicates, PDM initial pricing to Cove Point was a budget price, which cannot be fairly compared to a firm, fixed price bid. (FOF 7.1-7.38). [**xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Rather than asking any witnesses at trial about CX 1058, Complaint Counsel instead attempts to speculate as to the meaning of certain undefined numbers contained in this document.

782. CB&I initially bid **[xxx]**. (RX 127 at CB&I-H008204).

<u>Response to Finding No. 782:</u>

The proposed finding is misleading and unsupported by the evidence. First, Complaint Counsel failed to question a single witness at trial regarding RX 127. As such, Complaint Counsel is merely speculating as to what the pricing numbers contained in this document represent. Second, RX 127 contains comments made a bid review meeting, and states: "To Be Completed Prior to Final Proposal Submittal". (RX 127 at CB&I-HO08200). Thus, while RX 127 contains proposed pricing for the Cove Point project, there is no record evidence suggesting that this pricing was actually submitted or used as a bid for the project.

783. CB&I's March 2000 bid review report shows that CB&I's bid consisted of a "profit" of **[xxxxxx]**, amounting to **[xxxxxx]** of the price, and a "Technical Services Fee," CB&I's equivalent of additional margin for sales, general and administration ("SGA"), of

[xxxxx], amounting to **[xxxxxx]**, for a total "margin" of **[xxxxxxxxxx]**, or **[xxxxxx]** of the price. (RX 127 at CB&I-H008204).

<u>Response to Finding No. 783:</u>

The proposed finding is misleading, incomplete, unsupported by the record evidence, and mischaracterizes the cited document. First, for the reasons set forth in RFOF 782, there is no evidence suggesting that the pricing information contained in RX 127 was actually submitted, or used in a bid for the Cove Point project. Second, Complaint Counsel fails to provide any record citation supporting its theory that "Technical Service Fee" is the "equivalent of additional margin for sales, general and administration". Instead, Complaint Counsel speculates on how CB&I calculates its margins, and ignores other line items such as "Admin" which contributed to its pre-acquisition margins. (RX 127 at CB&I-HO08204).

784. A CB&I report summarizing conversations with the customer shows that by March of 2000, competition from CB&I forced PDM to lower its initial bid by approximately **[xxx]**. (CX 226 at CB&I-PL044978, *in camera*).

<u>Response to Finding No. 784:</u>

The proposed finding is unsupported by the evidence and mischaracterizes the evidence, as there is nothing in **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Again, Complaint Counsel failed to question a single trial witness about this document.

785. On March 29, Gary Marine of CB&I relayed minutes of a meeting that he had with **[xxxxxxxxx]**, a representative from Columbia. (CX 226, *in camera*). Marine wrote: **[xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx]**. (CX 226 at CB&I-PL044978, *in camera*).

<u>Response to Finding No. 785:</u>

Respondents have no specific response.

786. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]**. (CX 226 at CB&I-PL044978, *in camera*).

Response to Finding No. 786:

The proposed finding is patently false, and grossly mischaracterizes CX 226. There is nothing contained in CX 226 suggesting that Columbia believed CB&I and PDM coordinated on their bids. Complaint Counsel bases this unfounded, speculative conclusion on the following innocuous sentence: "Wally confirmed that when he said the proposals were very similar ('as thought we were looking over each other's shoulder'), it was based on our base offer." Complaint Counsel failed to question a single witness about this document, and instead relies on innuendo to make an unwarranted accusation.

787. After Marine's March memo, the threat of losing Cove Point to PDM prompted CB&I to lower its price even further. (CX 1388 at CB&I/PDM-H 4015263). Marine advised that CB&I should reduce its price to **[xxxxx]** million, a reduction of **[xxxxx]** from its initial **[xxxxxxxxx]** bid, and offer a further discount tied to how quickly the customer places its order. (CX 226 at CB&I-PL044979, *in camera*; RX 127 at CB&I-H008204).

Response to Finding No. 787:

The proposed is factually incorrect, based on gross speculation, and is not supported by the evidence. Nothing in CX 1388 suggests that CB&I lowered its bid due to the threat of losing the Cove Point project to PDM. To the contrary, CX 1388 is a PDM document containing budget pricing information. Further, as stated in RFOF 782 and 783, there is no evidence suggesting that the pricing contained in RX 127 was submitted to the customer, and therefore, any proposed finding based on that assumption is erroneous.

788. Columbia sold Cove Point to Williams in June of 2000. (*See* CX 863; Harris, Tr. 7724-25). After Williams acquired the Cove Point facility, PDM continued to look for ways to reduce costs for Cove Point. In June of 2000, PDM's Miles reminded the team that Cove Point was a "very competitive situation," and, "in accordance with Luke [Scorsone's] direction," emphasized the need to get to "the lowest price possible" and to "save every dollar we can." (CX 863 at CB&I/PDM-H 4018410).

Response to Finding No. 788:

Respondents have no specific response.

3. *Cove Point Phase 2 – The First Price Increase*

789. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 863 at CB&I/PDM-H 4018410; Scorsone, Tr. 4964-4966; **[xxxx]**, Tr. 8061-8062, *in camera*).

<u>Response to Finding No. 789:</u>

Respondents have no specific response.

790. On August 29, 2000, CB&I and PDM agreed to merge, thereby diminishing each party's incentive to compete against the other.

<u>Response to Finding No. 790:</u>

The proposed finding mischaracterizes the evidence, as there is nothing in the record evidence suggesting that the proposed acquisition diminished CB&I's and PDM's incentive to compete against each other.

791. In contrast to its pre-merger eagerness to beat PDM, CB&I chose not to rebid on Cove Point. (Scorsone, Tr. 4965).

<u>Response to Finding No. 791:</u>

The proposed finding mischaracterizes the evidence, as there is no record evidence suggesting that CB&I "chose not to rebid". In fact, there is no evidence suggesting that CB&I was actually invited to submit another bid for the Cove Point project.

792. On September 8, 2000, PDM quoted Williams a budget price of **[xxxxx]** million for an 850,000 barrel tank and **[xxxxxxxxxx]** for a 750,000 barrel tank. (CX 1388 at CB&I/PDM-H 4015363). PDM's bid is significant for two reasons.

<u>Response to Finding No. 792:</u>

The proposed finding is misleading and mischaracterizes the evidence, as PDM's submitted budget price did not constitute a "bid", and there was nothing "significant" about this budget price.

793. First, just one week after agreeing to merge with its closest competitor, PDM raised its price by **[xxxxxxxx]** from pre-merger levels. PDM's September quote of **[xxxx**

xxxxxxx] for a 750,000 barrel tank is **[xxxx]** higher than PDM had bid for the same-size tank six months earlier when it was in head-to-head competition with CB&I, **[xxx]** higher than CB&I's March 2000 bid of **[xxxxx]** million and **[xxxxx]** higher than CB&I's proposed bid of **[xxxxx]** million. (CX 226 at CB&I-PL044978, *in camera*).

Response to Finding No. 793:

The proposed finding is misleading, mischaracterizes the evidence, and is unsupported by the evidence. First, there is no evidence suggesting what PDM's bid for the Cove Point project was prior to the date the letter of intent was signed. As stated in RFOF 781, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]** Rather than asking any witnesses at trial about CX 1058, Complaint Counsel instead attempts to speculate as to the meaning of certain undefined numbers contained in this document. Second, for the reasons stated in RFOF 782 through RFOF 787, Complaint Counsel has no evidence indicating what CB&I's previous firm, fixed price bids were for the Cove Point project. Third, even assuming that Complaint Counsel is accurately representing PDM's and CB&I's initial bids for this project, they cannot be compared to a budget price submitted by PDM in September 2000. (FOF 7.1-7.38). Additionally, Complaint Counsel fails to account for the inevitable scope changes of a typical LNG project that occur over the course of several months, which preclude any meaningful comparison of prices. Complaint Counsel has provided no evidence that the scope of the Cove Point LNG project when Columbia owned it was identical to when Williams owned it. Because Complaint Counsel failed to bring in a single expert witness or engineer to testify about these prices, any attempt to analyze the different prices is based on pure speculation.

794. Second, PDM's price schedule demonstrates that the price differential between a 750,000 barrel tank and a 850,000 barrel tank is **[xxxxxx]**, *i.e.*, **[xxxxxx]**. (CX 1388 at CB&I/PDM-H 4015363).

Response to Finding No. 794:

The proposed finding is misleading and mischaracterizes the evidence. CX 1388 demonstrates what PDM's budget prices were for a 750,000 barrel tank and a 850,000 barrel tank given the project scope and requirements at the time the budget prices were submitted in September 2000. However, the proposed finding is misleading and false to the extent Complaint Counsel suggests that there will always be a $2 million dollar, or 9%, differential between the two different sized tanks proposed for the Cove Point project. Because Complaint Counsel failed to bring in a single expert witness or engineer to testify about these prices, any attempt to analyze the different prices is based on pure speculation.

795. Scorsone claimed at trial that he believed CB&I was competing against PDM at the time, but nevertheless decided to increase PDM's prices without fear of losing. (Scorsone, Tr. 4965, 4974-4979; *see* Scorsone, Tr. 4983).

Response to Finding No. 795:

The proposed finding mischaracterizes Mr. Scorsone's testimony. While Mr. Scorsone believed PDM was competing against CB&I, PDM needed to change its price for the Cove Point project because Williams modified the project's specifications, increasing the tanks size from 750,000 barrels to 850,000 barrels. (Scorsone, Tr. 4964) (FOF 3.619). As a result, PDM needed to re-design, and re-price the tank to account for the specification change. (Scorsone, Tr. 4964) (FOF 3.619).

4. *Cove Point Phase 2 – The Second & Third Price Increases*

796. In October of 2000, PDM and CB&I began integration discussions in which they exchanged bidding and estimating methodologies. (Scorsone, Tr. 5194-5197).

Response to Finding No. 796:

The proposed finding mischaracterizes Mr. Scorsone's testimony. Any information that was shared between PDM and CB&I during October 2000 were for "non-

competition sensitive projects already sold and were entirely appropriate" "in the context of due diligence." (Scorsone, Tr. 5195). In fact, CB&I and PDM created a "clean team" to avoid the exchange of ongoing bids. (Scorsone, Tr. 5246).

797. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 863; CX 1160 at CB&I/PDM-H 4007484-7487, *in camera*; Scorsone, Tr. 4967).

<u>Response to Finding No. 797:</u>

The proposed finding is misleading, argumentative, and mischaracterizes the evidence. At the bid review meeting, PDM examined whether costs had been accurately projected by analyzing "on a line-by-line basis" each of the components, risks, and scope of the bid. (Scorsone, Tr. 4966-67) (FOF 3.622). There is no evidence suggesting that the purpose of PDM's Cove Point team meeting was "to identify costs that could be added to PDM's estimate." **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 1160 at CB&I/PDM-H 4007485).

798. On November 1, PDM reviewed the September quote of **[xxxxxxxxxx]** for the 850,000 barrel tank and increased the price to **[xxxxxxxxxxx]**. (CX 1160 at CB&I/PDM-H 4007485). This was an increase of **[xxxxxxxx]** over the September quote. (CX 1388 at CB&I/PDM-H 4015363, CX 226 at CB&I-PL044978, *in camera*; CX 1160 at CB&I/PDM-H 4007485, *in camera*).

<u>Response to Finding No. 798:</u>

The proposed finding is false, misleading, incomplete, and grossly mischaracterizes the evidence. First, there is no evidence that PDM reviewed the *budget price* it submitted in September on November 1 and increased the price to **[xxxxxxxxxxxx]** Second, Williams modified the project's specifications, increasing the tank size from 750,000 barrels to 850,000 barrels. (Scorsone, Tr. 4964) (FOF 3.619-FOF 3.623). As a result, PDM needed to re-design, and re-price the tank to account for the specification change. (Scorsone, Tr. 4964) (FOF

3.619). The re-design took approximately 200 hours, and the follow-up estimating for the project took between 100 and 200 hours. (Scorsone, Tr. 4964) (FOF 3.619). PDM then prepared a "brand-new estimate" for the 850,000 barrel tank because the "tank geometry changed". (Scorsone, Tr. 4966) (FOF 3.621). Finally, it is inappropriate for Complaint Counsel to compare a budget price that was submitted in September to a firm price that was developed in November, after the owner provided these specification changes. (FOF 7.1-7.38). Because Complaint Counsel failed to bring in a single expert witness or engineer to testify about these prices, any attempt to analyze the different prices is based on pure speculation.

799. Scorsone's November 1 proposal of **[xxxxxxxx]** for a 850,000 barrel tank is identical to the price Scorsone approved in March (pre-merger) as PDM's initial quote for a 750,000 barrel tank – **[xxxxxx]** – plus the **[xxxxxxxx]** to account for the larger-sized tank. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**.

Response to Finding No. 799:

The proposed finding is grossly inaccurate, misleading, incomplete, and is not supported by the evidence. First, for the reasons stated in RFOF 781, there is no credible evidence suggesting that PDM submitted a bid of **[xxxxxxxxxxxx]** in March. Second, there is no evidence supporting Complaint Counsel's claim that a meaningful comparison can be made between alleged pricing submitted in March 2000 for a 750,000 barrel tank and pricing developed in November for an 850,000 barrel tank, after a re-design and re-estimate was accomplished for this project. (Scorsone, Tr. 4964) (FOF 3.619). Because Complaint Counsel failed to bring in a single expert witness or engineer to testify about these prices, any attempt to analyze the different prices is based on pure speculation.

800. On November 2, PDM submitted a bid to Williams for the 850,000 barrel tank of approximately **[xxxx]** million, a further increase of **[xxxxx]** above the November 1 proposal, and **[xxxxx]** higher than PDM's September **[xxxxx]** million quote. (CX 1160 at CB&I/PDM-H 4007484-7485, *in camera*; CX 1388 at CB&I/PDM-H 4015363).

Response to Finding No. 800:

The proposed finding is misleading, inaccurate, incomplete, mischaracterizes the testimony, and is not supported by the evidence. First, for the same reasons stated in RFOF 798 and RFOF 799, it is inappropriate for Complaint Counsel to compare firm and detailed pricing estimates to budgetary pricing previously sent to the customer. (FOF 7.1-7.38). Second, Complaint Counsel fails to account for any specification and scope changes that occurred on the project during the time these different prices were submitted. For example, Mr. Scorsone testified that PDM prepared a "brand-new estimate" for the 850,000 barrel tank because the "tank geometry changed". (Scorsone, Tr. 4966) (FOF 3.621).

801. PDM's prices for the 850,000 barrel tank, as reviewed on November 1, and as submitted to Williams on November 2, are shown in the table below:

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

	[xxxxxxxxxxxxxxxxxxx]	**[xxxxxxxxxxxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxxxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxxxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxxxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxxxxxxxxxx]**
[xxxxxxxxxxx]	**[xxxxxxxxxxx]**	**[xxxxxxxxxxx]**

(CX 1160 at CB&I/PDM-H 4007485, *in camera*).

Response to Finding No. 801:

The proposed finding is incomplete. Mr. Scorsone testified that PDM's management team increased the cost estimates for the Cove Point project because there was "a very uncertain date for this project . . . ." (Scorsone, Tr. 4978) (FOF 3.630).

802. PDM's "Margin" of **[xxxxxxx]**, as calculated by Scorsone, is the sum of the "SGA" and the "Profit" line items. (CX 1160 at CB&I/PDM-H 4007485, *in camera*). **[xxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (*Id.*)

Response to Finding No. 802:

The proposed finding is misleading and incomplete, to the extent it is unclear whether Complaint Counsel is referring to profit margin or gross margin.

803. PDM's November 2 bid of [$28.6 million] anticipates a "margin" of **[xxxx xxxxxx]**, or **[xxxx]** on the sold price. (CX 1160 at CB&I/PDM-H 4007485, *in camera*). This margin is nearly three times the margin of **[xxxxxxxxxx]** and, measured as a percent of the price, more than double the total margin of **[xxxxx]** that CB&I anticipated for itself in March, before the merger. (RX 127 at CB&I-H008204; CCFF 784 (March 2000 bid shows total margin of **[xxxxx]**).

Response to Finding No. 803:

The proposed finding is misleading, factually incorrect, and mischaracterizes the evidence. First, the proposed finding is misleading and incomplete, to the extent it is unclear whether Complaint Counsel is referring to profit margin or gross margin. Second, it is inappropriate for Complaint Counsel to compare the firm pricing PDM submitted to Williams for a 850,000 barrel tank in November 2000 to pricing CB&I allegedly submitted to Columbia for a 750,000 barrel tank in March 2000. As discussed in RFOF 798, PDM encounterd various scope, design, and size changes of the LNG tank between March and November. (Scorsone, Tr. 4963-64) (FOF 3.619). Third, the proposed finding mischaracterizes, and incorrectly states, what margin CB&I anticipated in March. For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 127 at CB&I-H008204; Scorsone, Tr. 5335). Thus, even if CB&I submitted the pricing contained in RX 127 to Columbia (there is no evidence it did (RFOF 782)) Complaint Counsel is making an apples to oranges comparison of it to PDM's November pricing.

804. PDM's November 2 bid of **[xxxxxxxxxxxx]** anticipates a "profit" of **[xxxxxxxxxxx]**, or **[xxxxx]** on the sold price. (CX 1160 at CB&I/PDM-H 4007 485, *in camera*). This profit is more than triple the profit of **[xxxxxxxxxx]** and, measured as a percent of the price, more than

double the profit of **[xxxxx]** that CB&I anticipated for itself in March, before the merger. (RX 127 at CB&I-H008204).

<u>Response to Finding No. 804:</u>

The proposed finding is misleading, speculative, factually incorrect, and mischaracterizes the evidence for the reasons set forth in RFOF 803.

805. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1160 at CB&I/PDM-H 4007486-7487, *in camera*). Steimer believed the original estimate was **[xxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]**. (CX 1160 at CB&I/PDM-H 4007486-7487, *in camera*).

<u>Response to Finding No. 805:</u>

The proposed finding is misleading and incomplete. Steimer was one of several individuals who participated in PDM's bid review meeting for the Cove Point project, which also included an estimator, an engineer, and operational personnel. (Scorsone, Tr. 4968) (FOF 3.623). While Mr. Steimer did not agree with the revised pricing estimate, he was the lone dissenter; neither Mr. Scorsone nor the bid review group agreed with Mr. Steimer's comments. (Scorsone, Tr. 4973-82) (FOF 3.628-3.631). Mr. Steimer has never been involved in the engineering, fabrication, field erection, or materials estimating of an LNG tank, and does not have the basis of knowledge to hold a valid opinion on these subjects. (Scorsone, Tr. 4974, 4982) (FOF 3.628, 3.630). Mr. Steimer "was a salesperson on the project and it's not untypical for salespersons to have concerns when prices are increased." (Scorsone, Tr. 4973) (FOF 3.628). Overall, Mr. Scorsone considered the bid price submitted by PDM for the Cove Point expansion "to be reasonably lean considering the scope of this project . . . . " (Scorsone, Tr. 4980) (FOF 3.631).

806. Steimer emphasized that with respect to the profit figure, **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 1160 at CB&I/PDM-H 4007486-7487, *in camera*).

Response to Finding No. 806:

The proposed finding is misleading and incomplete for the reasons set forth in RFOF 805.

807. Overall, Steimer viewed the November 2 **[xxxxxxx]** bid for Cove Point as **[xx xxxx]**. (CX 1160 at CB&I/PDM-H 4007486, *in camera*).

Response to Finding No. 807:

The proposed finding is misleading and incomplete for the reasons set forth in RFOF 805.

808. Scorsone ignored Steimer's comments and instructed Steimer and the rest of the Cove Point team that "We are not however, to make any new price submittals to Williams as a result of your meeting." (CX 291).

Response to Finding No. 808:

Respondents have no specific response.

809. Williams accepted PDM's November 2 bid of **[xxxxxxxxxxxxx]**. (Scorsone, Tr. 4963).

Response to Finding No. 809:

The proposed finding is unsupported by the evidence and mischaracterizes the evidence. Mr. Scorsone never testified that Williams accepted PDM's November 2 bid. In fact, Mr. Scorsone stated that Williams entered into sole-source negotiations with PDM for the project after the bid. (Scorsone, Tr. 4963). Thus, the evidence does not support Complaint Counsel's speculation that Williams accepted PDM's November 2 bid without further negotiations.

810. Steimer's prediction that the margins realized on Cove Point would greatly exceed the November estimates proved correct.

Response to Finding No. 810:

The proposed finding is factually incorrect and unsupported by the evidence. Mr. Scorsone testified that CB&I is currently forecasting a profit margin, not including SG&A, of

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx] (Scorsone, Tr. 5335-36) (FOF 3.634-3.635). **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5336) (FOF 3.635).

811. In June 21, 2001, CB&I prepared a "Quarterly Review" that records the merged entity's projected margins on Cove Point. The "Quarterly Review" reports that the "projected GP" – projected gross profit – on Cove Point would be **[xxxxxxxxxxxxxxxx]** compared to the **[xxxxxxxxxx]** projected on November 2.[5] (RX 323 at CB&I 004066-HOU). The **[xxxxx]** gross profit represents a margin of **[xxxxxx]** of the sold price, and a **[xxxxxx]** increase since the November 2 bid. (RX 323 at CB&I 004066-HOU).

<u>Response to Finding No. 811:</u>

The proposed finding is incomplete. Complaint Counsel failed to question a single witness at trial regarding RX 323, and therefore, any statements made about this document are based on speculation.

5. *Cove Point Phase 3 – The Fourth Price Increases*

812. Since the November 2, 2000, bid, CB&I has **[xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5333, *in camera*).

<u>Response to Finding No. 812:</u>

The proposed finding is incomplete. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5334) (FOF 3.633). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5336). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

[5] **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx]**. (CX 1160 at CB&I/PDM-H 4007484-7485, *in camera*).

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Scorsone, Tr. 5337). **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5337-38).

813. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Scorsone, Tr. 5334, 5337-39, *in camera*).

<u>Response to Finding No. 813:</u>

The proposed finding is incomplete and mischaracterizes the evidence for the reasons set forth in RFOF 812. (Scorsone, Tr. 5334).

814. CB&I currently projects that it will earn a margin of approximately **[xxxxxxxxx]** on Cove Point, or **[xxxxx]** of the current price. (Scorsone, Tr. 5334, *in camera*). This dollar amount is a little less than five times the projected margin of **[xxxxxxxxx]** that CB&I was willing to accept in March of 2000 when it was trying to beat PDM on Cove Point, and a percentage margin that is nearly three times greater **[xxxxxxxxxx]**. (RX 127 at CB&I-H008204).

<u>Response to Finding No. 814:</u>

The proposed finding is misleading, factually incorrect, mischaracterizes the evidence, and is unsupported by the record. First, for the reasons stated in RFOF 812, CB&I projects it will earn a higher margin on the Cove Point project than it first anticipated because the project was significantly delayed; this allowed CB&I to spend several months to logistically preparing for the project. (RFOF 812).

For the reasons discussed in RFOF 803 and RFOF 812, it is inappropriate to compare CB&I current pricing information for the Cove Point project (involving a 850,000 gallon tank) to the pricing developed in March 2000 (involving a 750,000 gallon tank). (RFOF 803, 812). Any meaningful comparison between prices submitted for the Cove Point project over the course of many months would need to be conducted by an expert witness after hearing testimony about the documents upon which Complaint Counsel relies. No such expert testimony occurred in the present case; instead, Complaint Counsel is speculating about documents.

815. CB&I currently projects that it will earn a profit of about **[xxxxxxxxxxxx]** on Cove Point, or **[xxxxxxx]** of the current price. (Scorsone, Tr. 5314, *in camera*). This dollar amount is a little less than six times the projected profit of **[xxxxxx]** that CB&I was willing to accept in March of 2000 when it was trying to beat PDM on Cove Point, and a percentage profit that is over three times greater **[xxxxxxxxxxx]**. (RX 127 at CB&I-H008204).

Response to Finding No. 815:

The proposed finding is misleading, factually incorrect, mischaracterizes the evidence, and is unsupported by the record. First, CB&I is currently forecasting a profit margin of approximately 10 percent for the Cove Point project. (Scorsone, Tr. 5336) (FOF 3.634). Second, for the reasons discussed in RFOF 803 and RFOF 812, it is inappropriate to compare CB&I current pricing information for the Cove Point project (involving a 850,000 gallon tank) to the pricing developed in March 2000 (involving a 750,000 gallon tank). (RFOF 803, 812). Any meaningful comparison between prices submitted for the Cove Point project over the course of many months and various scope changes would need to be conducted by an expert witness after hearing testimony about the documents upon which Complaint Counsel relies. No such expert testimony occurred in the present case; instead, Complaint Counsel is speculating about documents.

6. ***Cove Point – What Could Have Been Absent the Merger***

816. A CB&I "Tank Estimate Summary Sheet," dated February 21, 2001, immediately following the CB&I/PDM merger, shows that CB&I, as an independent competitor, could have significantly undercut PDM's bids on Cove Point. The estimate may have been prepared before this date.

<u>Response to Finding No. 816:</u>

The proposed finding is factually incorrect, misleading, unsupported by the evidence, and mischaracterizes the evidence. First, there is no evidence that the "Tank Estimate Summary Sheet" Complaint Counsel refers to in the proposed finding "may have been prepared before" February 21, 2001. In fact, because Complaint Counsel failed to question any witness about this document, it is unclear, based on the four corners of the document, when this document was prepared. Second, as decribed in RFOF 818 through RFOF 824, there is no evidence supporting Complaint Counsel's speculation that CB&I could have undercut PDM's bid on the Cove Point project.

817. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 906 at CB&I 031076-HOU, *in camera*).

<u>Response to Finding No. 817:</u>

For the reasons stated in RFOF 818, the proposed finding is incomplete.

818. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]**. (CX 906 at CB&I 031076-HOU, *in camera*). The document shows a price of **[xxxxxxx]**. (CX 906 at CB&I 031076-HOU, *in camera*). This compares to PDM's quote to Williams for the same tank of **[xxxxxxxxxxx]** on September 8, 2000; PDM's bid of **[xxxxxxxx]** on November 2, 2000; and the current price of **[xxxxxxxx]**. CCFF 792, 800, 812.

<u>Response to Finding No. 818:</u>

The proposed finding is misleading, unsupported by the evidence, and grossly mischaracterizes the evidence. First, CX 906 does not calculate what CB&I would have bid for the Cove Point project. Rather, Mr. Scorsone testified that CB&I performed a re-estimate of the

price that PDM submitted for the 850,000 barrel tank "to make sure that the bid contained the sufficient budgets [for CB&I] to successfully execute the project and return the sold margin on the job." (Scorsone, Tr. 4984; CX 906) (FOF 3.636).

Second, CX 906 contains grossly inaccurate pricing information, as CB&I's estimator that prepared the document did not have any experience estimating PDM's tank designs. (Scorsone, Tr. 4987) (FOF 3.638). Only a "few hours" of work was put into this re-estimate. (Scorsone, Tr. 4985) (FOF 3.638). Further, there are various inaccuracies contained in the re-estimate: (1) the estimate did not properly account for the erection method that PDM used for the tank roof; (2) the estimator did not add in certain subcontractor costs; and (3) the estimator failed to add in man-hours associated with the work. (Scorsone, Tr. 4985-87) (FOF 3.638-3.640). If these errros were taken into account, the difference in price between the re-estimate (CX 906) and PDM's bid price would be approximately $500,000. (Scorsone, Tr. 4986) (FOF 3.640).

Third, it is inappropriate for Complaint Counsel to compare the price estimates contained in CX 906 to the budget pricing PDM submitted in September 2000 (FOF 7.1-7.38), PDM's bid in November 2000 (RFOF 800-804, 809), and the project's current price. (RFOF 814, 815).

819. The "Tank Estimate Summary Sheet" includes a "margin" of **[xxxx]** over cost and a "technology services fee" of **[xxxxx]**, which combined amounts to a total margin on the project of **[xxxxx]** or **[xxxxx]** million of the tank's price. (CX 906 at CB&I 031076-HOU, *in camera*). CB&I's estimated margin is almost identical to PDM's margin of **[xxxxx]** million included in PDM' s March 2000 bid to Columbia for the Cove Point tank, a coincidence that suggests that CB&I had access to PDM's March 2000 bid estimate during the companies' pre-acquisition exchange of information regarding estimating methodology. (Scorsone, Tr. 5195 (Mr. Scorsone testified that it was "entirely appropriate" to exchange information about projects "already sold" prior to the acquisition)). CB&I's margin on its March 2000 competing bid was **[xxxx]** million. (RX 127 at CB&I-H008204, *in camera*).

Response to Finding No. 819:

The proposed finding is misleading, factually incorrect, speculative, unsupported by the evidence, and grossly mischaracterizes the evidence. First, Complaint Counsel improperly calculates the gross or total margin contained in CX 906; Complaint Counsel failed to include SG&A (administrative fees) amounting to over 5% in its calculation. Second, there is no record evidence suggesting that CB&I exchanged pricing information for competitive projects with PDM prior to the acquisition. Third, Complaint Counsel improperly attempts to compare pricing information from a March 2000 bid involving a 750,000 barrel tank to a re-estimating exercise (that occurred after the acquisition) involving a 850,000 barrel tank. Finally, for the reasons stated in RFOF 782 and RFOF 783, Complaint Counsel improperly characterizes RX 127 as containing CB&I's March 2000 bid, and also fails to properly calculate the gross margin from this document.

820. A note at the bottom of the "Tank Estimate Summary Sheet" shows that, based on PDM's actual sold price, the margin is nearly double the margin CB&I would have earned: **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 906 at CB&I 31076-HOU, *in camera*).

Response to Finding No. 820:

The proposed finding is not supported by the evidence and mischaracterizes CX 906. First, Complaint Counsel failed to question a single witness regarding the handwritten notations contained in CX 906, and thus, any conclusions drawn from these handwritten notations is pure speculation. Second, Mr. Scorsone testified that CX 906 cannot provide an accurate estimate of what CB&I could have built the Cove Point project for. (Scorsone, Tr. 4985) (FOF 3.638-3.640). Thus, it is inappropriate for Complaint Counsel to compare this inaccurate estimate to PDM's previous bid.

821. CB&I's estimate of the margin it would have earned had it bid on Cove Point – **[xxxx]** – is approximately half of what the merged entity currently expects to earn on Cove Point. (*See* CX 906 at CB&I 31076-HOU, *in camera* (**[xxx]**);CCFF 814 **[xxx]**).

Response to Finding No. 821:

The proposed finding is factually incorrect and mischaracterizes the evidence for the reasons stated in RFOF 818 through RFOF 820.

822. If CB&I and PDM had not merged, the customer at Cove Point could have avoided these price increase, and may have been able to reduce prices even further by leveraging CB&I and PDM against each other.

Response to Finding No. 822:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

823. Thus, the price of the 850,000 barrel Cove Point tank has jumped from the pre-merger levels of **[xxxxxxxxx]** in March of 2000 to (1) PDM's initial post-merger quote of **[xxxxxxxxxxxxx]** in September of 2000, then again to (2) PDM's post-merger bid of **[xxxxxxxxx xxxx]** in November of 2000, and then once again to (3) the current price of **[xxxxxxxxxxxx]**. At the same time, margins have jumped from **[xxxxxxxxx]** in March of 2000 to approximately **[xxxx xxxxxxxxxxx]** today.

Response to Finding No. 823:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

824. Respondents presented no evidence that these price and margin increases on Cove Point were in any way impacted by any foreign or domestic competitor.

Response to Finding No. 824:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

825. The table attached hereto shows the history of PDM's and CB&I's prices, profit and margin for Cove Point, from early 2000 (when CB&I and PDM were in head-to-head competition) through December 2002.[6]

[6] CB&I's June 21, 2001, Industrial Quarterly Review shows CB&I's "margin," but not CB&I's "profit" without "SGA." (RX 323 at CB&I 004066-HOU). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 1160 at CB&I/PDM-H 4007485, *in camera*), **[xxxx xxxxxxxxxxxx]**. Accordingly, the table includes a projected "profit" figure as of June 21, 2001, which is calculated

Response to Finding No. 825:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

826. The table attached hereto graphically shows the price history of Cove Point. The blue bars represent the decreasing prices quoted by CB&I and PDM in head-to-head competition for the 750,000-barrel tank. The red bars represent the increasing prices quoted by PDM after Respondents agreed to merge. The green bar represents the price CB&I internally estimated it would have bid on Cove Point had the merger not occurred.

Response to Finding No. 826:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

827. The table attached hereto graphically shows the history of dollar margins ("profit" plus "SGA") on Cove Point. As shown by the red bars, the projected margin on Cove Point increased substantially after CB&I and PDM signed the letter of intent to merge. As shown by the blue bar, Respondents' projected margin pre-merger was substantially below the levels anticipated today. The green bar shows the margin CB&I estimated it would have earned on Cove Point had the merger not occurred.

Response to Finding No. 827:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

828. The table attached hereto takes the same information from the previous table and graphs the data in percentages.

Response to Finding No. 828:

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

829. The table attached hereto graphically shows the history of dollar "profits" ("margin" minus "SGA") on Cove Point. As shown by the red bars, the projected profit on Cove Point increased substantially after CB&I and PDM signed the acquisition letter of intent. As shown by the blue bar, Respondents' projected profit pre-merger was substantially below the

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as CB&I's projected "profit," as of November 2, 2000, plus the difference between CB&I's "margin," as projected on June 21, 2001, and CB&I's "margin" as projected on November 2, 2000.

levels anticipated today. The green bar shows the profit CB&I estimated it would have earned on Cove Point had the merger not occurred.

<u>Response to Finding No. 829:</u>

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

830. The table attached hereto takes the same information from the previous table and graphs the data in percentages.

<u>Response to Finding No. 830:</u>

The proposed finding is not supported by record evidence, and is factually incorrect, and misleading for the reasons contained in RFOF 779 through RFOF 820.

7. *The [xx] Projects*

831. CB&I's ability to convince **[xxxxxxxxxxxxxxxxxx]** to enter into sole-source negotiations illustrates five important themes. (1) Based on actual prices obtained from CB&I, PDM and Whessoe, **[xx]** knew that CB&I and PDM offered significantly lower prices than other firms. (2) **[xxx]** knew that with the acquisition of PDM, CB&I dominated the United States market. (3) Without PDM to turn to, **[xxx]** could encourage competition only by turning to untested, higher-priced alternatives. (4) Requiring guaranteed access to resources necessary to complete LNG projects in the United States, **[xxx]** has no choice but to acquiesce to CB&I' s demand that **[xxx]** work exclusively with CB&I, which may increase the costs to **[xxx]**. (5) A sole-source relationship to provide engineering, procurement and construction services and the LNG tank itself is far more lucrative for CB&I than having to competitively bid with other firms or to bid just for the LNG tank alone.

<u>Response to Finding No. 831:</u>

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." In fact, the evidence contradicts the proposed finding. (*See* RFOF 852-882).

832. **[xxx]** is a global petrochemical company based in **[xxxxx]** with operations all over the world. (JX 33 at 19-20 (**[xxxxx]**, Dep.)). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx].[7] (JX 33 at 9-10 (Sawchuk, Dep.)).

<u>Response to Finding No. 832:</u>

CB&I has no specific response to this finding.

8. ***A Sole-Source/Turnkey Contract Leads to Higher Prices for Customers***

833. Because the three projects were in the early stages of development in 2001, **[xxx]** weighed its options about how to bring the projects to completion. Among other things, at issue was (a) who would perform the engineering, procurement and construction functions for the entire facility, (b) who would supply the LNG tanks, and (c) how should the relationship with the firm(s) be structured, *i.e.*, selected through competitive bidding among multiple suppliers or a sole-source relationship with one firm. (CX 693 at **[xxx]** 01 026-028).

<u>Response to Finding No. 833:</u>

CB&I has no specific response to this finding.

834. The development and planning of an LNG tank construction project can be broken into three major phases. The first phase is "Front End Engineering and Design" ("FEED"). (JX 31 at 50-51 (Puckett, Dep.)). The FEED phase involves a study of the site and assessment of what the construction project will entail. (Puckett, Tr. 4548; Price, Tr. 546). The second phase is the selection of a contractor to handle the "Engineering, Procurement and Construction" ("EPC") of the LNG facility. (Puckett, Tr. 4543). Among other things, the EPC contractor is responsible for all aspects of the construction of the LNG facility, including procurement of the tank, tank support systems, equipment, materials, and engineering. (Puckett, Tr. 4543). The third phase is the selection of a firm to supply the LNG tank itself.

<u>Response to Finding No. 834:</u>

The proposed finding is misleading, incomplete and inaccurate because it fails to account for the fact that an owner can choose to negotiate on a sole-source basis. (*See* FOF 3.460-3.467). In addition, the proposed finding is confusing and inconsistent because it contends that the second phase in the planning and development of an "LNG tank construction project" involves selecting a contractor to work on the entire "LNG facility."

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[7] Because the **[xxxxxxxxx]** and **[xxxxxxxx]** projects have not, to date, been publicly announced, their locations and names are kept confidential. (JX 31 at 9 (**[xxxxxxx]**, Dep.)).

835. The LNG industry uses the phrase "turnkey" to refer to a project in which one firm is retained to handle most or all of the various phases of the construction project, including the EPC contracting and LNG tank construction. (Puckett, Tr. 4570; Price, Tr. 520-521).

Response to Finding No. 835:

CB&I has no specific response to this finding.

836. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 364 at CB&I-E 009279; *see* CX 906 at CB&I 031075-HOU, CB&I 031076-HOU, *in camera* **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx]**).

Response to Finding No. 836:

The first sentence of the proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." The evidence cited to support the rest of the proposed finding is speculative and incomplete as Complaint Counsel failed to elicit any testimony regarding these documents. For example, the documents do not establish, as the proposed finding attempts to infer, that turnkey providers enjoy higher margins. The fact is, a single contractor can often provide an owner with lower costs. (*See* Bryngelson, Tr. 6134; Scorsone, Tr. 4959; *see also* FOF 3.463).

837. Generally, "turnkey, design build projects typically return higher margins than stand-alone storage tank projects." (CX 660 at PDM-HOU 005013). Mr. Scorsone agreed that industry participants view a turnkey project to result in "higher margins." (Scorsone, Tr. 2812-3).

Response to Finding No. 837:

The proposed finding is incomplete because it fails to acknowledge that using one contractor can provide an owner with greater flexibility, lower costs, and can also save time when a project is under development. (Bryngelson, Tr. 6134; Scorsone, Tr. 4959; *see also* FOF

3.463). It is well established that an owner has the power to choose the contracting method it believes will work best. (*See generally* FOF 3.460-3.467).

838. Generally, a sole-source supplier earns higher margins than if competing against other firms in a competitive bidding situation. (*See* CX 112 at PDM-HOU 011513-4 (PDM observes that CB&I's price to an LNG customer "is probably substantially high due to their perceived sole-source position"); Kamrath, Tr. 2030 ("we found that always a competitive bid resulted in a better cost for us, lower cost **[xxxxxxxxxxx]**"); **[xxxxxxxx]**, Tr. 720-21 (cost of sole-sourced LNG tank from CB&I was **[xxxxxx]**more than comparable facilities") (*in camera*).

Response to Finding No. 838:

The proposed finding is misleading, incomplete and contradicted by the evidence. It is well established that sole-sourcing is a valid contracting options that many owners prefer. (*See generally* FOF 3.460-3.467). Sole-sourcing can provide an owner with greater flexibility, lower costs, and can also save time when a project is under development. (Bryngelson, Tr. 6134; Scorsone, Tr. 4959; *see also* FOF 3.463). Furthermore, the documents cited in the proposed finding fail to establish that sole-source contractors provide higher margins. CX 112 relates to Peoples Gas' proposed methane project; it is well established that this methane facility is irrelevant because it is unrelated to the LNG industry. (*See* FOF 3.646, 3.647; *see also* RFOF 267). Additionally, PDM did not know what CB&I's margins were, it merely ventured a guess. (*See* CX 112, at PDM-HOU 011514). The cited testimony of Mr. Kamrath and Ms. Outtrim is also purely speculative. Neither witnesses testified that they had knowledge of any of the costs or margins associated with a sole-source contract.

839. Even more lucrative is to be the sole-source EPC contractor. Mr. Price from Black & Veatch explained that as a sole-source EPC contractor "we don't have to develop the lowest cost. You can be – put more profit into the project because you don't have any competition." (Price, Tr. 558-9).

Response to Finding No. 839:

The proposed finding is misleading, inaccurate and incomplete because it fails to recognize that sole-source contracts are often beneficial to, and chosen by, owners. ((*See*

generally FOF 3.460-3.467; *see also* RFOF 838). Further, the flaws in Mr. Price's testimony have been extensively addressed. (*See* RFOF 990; *see* also FOF 3.658-3.665). **[xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* 3.478-3.479).

840. By securing a sole-source relationship with a customer, CB&I earns 8-10% for negotiated work versus an average of 2.5% for CB&I's total work sold. (CX 227 at CB&I-PL045109). In a review of its North American operations, CB&I compared its 1997 margin levels for negotiated work against its average total margin for all work sold in each product line. (CX 227 at CB&I-PL045109). For low temperature and cryogenic tanks, CB&I' s average total margin for all work sold was 2.5%; its margin for negotiated work was 8-10%, three to four times as high. (CX 227 at CB&I-PL045109).

<u>Response to Finding No. 840:</u>

The proposed finding is misleading, inaccurate and speculative because Complaint Counsel failed to elicit any testimony regarding CX 227. Further, CX 227 is irrelevant because it relates to data from 1997, more than three years prior to the Acquisition. (*See* CX 227, at CB&I-PL045109). Additionally, Complaint Counsel merely speculates as to what the data on this document represents. Complaint Counsel does concede, however, that these old margins relate to *all* low temperature and cryogenic projects and are not specific to LNG tanks or LNG projects. Further, the proposed finding fails to account for the fact that sole-source contracts can provide owners will lower prices. (Bryngelson, Tr. 6134; Scorsone, Tr. 4959; *see also* FOF 3.463).

841. CB&I prefers to perform LNG projects on a negotiated basis, in other words, as the sole-source turnkey contractor. (Glenn, Tr. 2659-60).

<u>Response to Finding No. 841:</u>

CB&I has no specific response to this proposed finding.

842. Generally, petrochemical facility owners prefer to avoid a sole-source or turnkey relationship with a contractor because doing so will likely increase the costs to the facility owner and, therefore, owners prefer competitive bidding. A project manager explained that separate competitive bidding made it "easier to subcontract something that we want done, rather than

having to go through and pay CB&I 10% of everything that Joe does over here, when you can save that 10% by having Joe do what you want him to do." (Crider, Tr. 6719).

<u>Response to Finding No. 842:</u>

The proposed finding is misleading and inaccurate to the extent it does not recognize that subcontracting certain portions of an LNG tank job does not necessarily increase the costs of a particular job. (Bryngelson, Tr. 6143; *see also* FOF 3.543). In some cases, subcontracting actually lowers costs because subcontractors with an expertise in a particular area are able to use a standardized approach in performing work. (Bryngelson, Tr. 6143-44; *see also* FOF 3.543). Similarly, subcontracting can reduce the price of a bid because specialized subcontractors may be better at certain job functions than the general contractor, which could improve the overall schedule. (Cutts, Tr. 2472; *see also* FOF 3.543).

843. For example, Dynegy "had the option of either going out for somebody who [would] do the entire project for us, everything, or we had the choice to go out and break it up into what we felt were logical pieces for the project." (Puckett, Tr. 4544). Dynegy "made the decision that we would go out for separate quotes for the tanks, view that as a separate contract, and we would also go out and purchase most of the other major equipment separately from the EPC firm, with their support but still run it across Dynegy's books. Simple answer, we didn't want that EPC firm to be doing additional markups on items that we felt that we could run across our books." (*Id.*)

<u>Response to Finding No. 843:</u>

The proposed finding is misleading and incomplete because it fails to acknowledge the many reasons an owner would choose to enter into a sole-source negotiation. (*See* FOF 3.460-3.467). Although Dynegy chooses to utilize a competitive bidding process, other owners have decided that a sole-source agreement would be more beneficial. (*See generally* FOF 3.468-3.492).

844. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx]**. (CX 428 at CB&I-E 009331; CX 364 at CB&I-E 009279).

Response to Finding No. 844:

The first sentence of the proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." The proposed finding is also misleading, incomplete and factually inaccurate to the extent it implies CB&I and PDM are the only tank suppliers a general contractor can select for an LNG project. The very document cited by Complaint Counsel states that other possible LNG tank suppliers include: TKK, IHI, MHI, Entropose, Whessoe and Technigaz. (CX 428, at CB&I-E 009331). The evidence clearly establishes that many foreign suppliers have entered the U.S. market since the Acquisition. (*See generally* FOF 3.57-3.227).

845. CB&I is one of the few firms in the world that has the capability to serve as both the EPC contractor and the LNG tank supplier. (CX 428 at CB&I-E 009331; CX 310 at CB&I 049044).

Response to Finding No. 845:

The proposed finding is misleading and inaccurate to the extent it infers that there are not a sufficient number of competitors capable of serving as EPC contractors and LNG tank suppliers. EPC contractor competition is plentiful. (*See generally* FOF 3.228-3.246). Most recently, Skanska/Whessoe beat CB&I, Kvaerner, Technip, Kellogg Brown & Root, and Bechtel for Dynegy's EPC contract. (Puckett, Tr. 4546-47; *see* also FOF 3.265, 3.272). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4760; *see also* FOF 3.307).

846. CB&I knows that its ability to perform the EPC function and build LNG tanks gives it a competitive advantage on LNG tank projects. In 1997, CB&I was approached by Lotepro, the engineering firm that had partnered with Whessoe on the Memphis project only to be resoundingly beaten on price by CB&I (and PDM), which had bid for the engineering work and the supply of the LNG tank itself. CCFF 847. Lotepro felt their engineering bid was competitive but their total price was "really strained by not being able to include a CB&I or PDM tank." (CX 186 at CB&I-PL012447). Lotepro inquired whether CB&I would be interested in teaming with Lotepro now on future LNG projects. (*Id.*)

Response to Finding No. 846:

The first sentence of the proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." The irrelevancy of the Memphis bids has already been established in detail. (*See* FOF 3.493-3.508; *see also* RFOF 135). The proposed finding is also misleading and incomplete to the extent that it attempts to establish that Lotepro has few tank suppliers to choose between by citing a 1997, pre-Acquisition, document. (*See* CCFF 846; CX 186, at CB&I-PL012447). The proposed finding fails to account for the fact that liquefaction suppliers have more tank suppliers to choose from post-Acquisition than they did pre-Acquisition; many foreign LNG tanks suppliers have entered the U.S. market. (*See generally* FOF 3.57-3.227.)

847. Following an internal analysis based on the outcome of the Memphis project, CB&I decided "it is in CB&I's best interest NOT to quote separate tank price [to Lotepro]." (CX 186 at CB&I-PL012446). CB&I reasoned that quoting "a separate tank price will only serve to make the process-only contractors viable...If we had quoted a tank only price, the combination of Lotepro process and CB&I tank would have been a serious threat to CB&I total facility price...Lotepro's total facility bid using Whessoe tank and Pritchard's bid using TKK tank did not turn out to be very competitive." (*Id.*)

Response to Finding No. 847:

The proposed finding is misleading, irrelevant and incomplete for the reasons set forth in RFOF 846.

848. CB&I declared that it would "quote turnkey for the total facility with process and tank, and NOT bid tank only" on United States LNG projects. (CX 186 at CB&I-PL012446). CB&I liked "our chances better in what then boils down to a 2 horse race." (*Id.*)

Response to Finding No. 848:

The proposed finding is misleading, irrelevant and incomplete for the reasons set forth in RFOF 846.

849. CB&I and PDM were the two horses that competed most closely for LNG tanks in the United States. By acquiring PDM, CB&I turned it into a one-horse race, thereby giving CB&I an even greater leg up against other firms to secure not only the LNG tank business itself,

but also the more lucrative EPC work. Without a low-cost LNG tank supplier that can compete against CB&I's prices, an EPC engineering firm will likely face the same competitive disadvantages as Lotepro and Black & Veatch did in the Memphis project. For the LNG facility owner, the race would also come down to one horse – CB&I.

Response to Finding No. 849:

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." The proposed finding also fails to acknowledge that there are more potential EPC contractors and LNG tank suppliers now than there were prior to the Acquisition. (*See* RFOF 845, 846). Numerous potential EPC contractors, like Skanska/Whessoe, Technigaz and TKK, are also able to construct LNG tanks. (*See generally* FOF 3.228-3.246). The proposed finding is also misleading, irrelevant and incomplete for the reasons set forth in RFOF 846.

850. Mr. Glenn of CB&I alluded to the sole-source, turnkey strategy during the October 31, 2002 investors conference call when he said that CB&I's margin levels are "high" because CB&I is "trying to focus more of our energy, more of our efforts, more of our resources on the higher margin work." (CX 1731 at 41-42).

Response to Finding No. 850:

The proposed finding is misleading, speculative and not an appropriate "finding of fact." Complaint Counsel attempts to assert a statement that it believes Mr. Glenn "alluded to" as a "finding of fact." This is inappropriate. The fact is, contrary to the proposed finding's contention, Mr. Glenn's above cited quotation does not refer to a "sole-source, turnkey strategy." Complaint Counsel fails to recognize that Mr. Glenn was speaking about CB&I's business in general across all product markets. (Glenn, Tr. 4402-03). Likewise, Mr. Glenn did not limit his comments, in any way, to the four product markets in this litigation. (Glenn, Tr. 4403).

851. It is this higher-margin sole-source/turnkey strategy that drives CB&I's relationship with **[xxx]**.

<u>Response to Finding No. 851:</u>

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact."

9. *The Absence of Effective Competition Leaves [xxx] with No Choice but to Enter Into Sole-Source, Turnkey Negotiations with CB&I*

852. Until 2001, CB&I had performed some of the preliminary design work. (JX 33 at 10 (**[xxxxxxx]**, Dep.)). For at least one project, CB&I wanted a more expansive role: **[xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (CX 693 at **[xxxxx]** 01 026).

<u>Response to Finding No. 852:</u>

The proposed finding is misleading and incomplete because it fails to recognize that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx]** (CX 693, at BP 01 026).

853. **[xxx]** prepared a memorandum, dated June 19, 2001, to brief **[xxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** about the available options. (CX 693 at **[xxx]** 01 026, *in camera*). The memorandum was prepared by [Ben Ho and Mark Howard.] (*Id.* at **[xxx]** 01 028, *in camera*).

<u>Response to Finding No. 853:</u>

Respondents have no specific response.

854. **[xxxxx]** first assessed the **[xxxxxxxxxxxx]** and the various firms within it that could be considered for the projects. The list included numerous general contractors from the United States, Europe and Asia **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 693 at **[xxx]** 01 026-7).

<u>Response to Finding No. 854:</u>

Respondents have no specific response.

855. **[xxxx]** identified only **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 693 at **[xxx]** 01 027).

<u>Response to Finding No. 855:</u>

Respondents have no specific response.

856. **[xxx]** stated that with respect to LNG tank suppliers, **[xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 693 at **[xxx]** 01 027).

<u>Response to Finding No. 856:</u>

The proposed finding is misleading and incomplete because it fails to account for Mr. Sawchuck's testimony regarding CX 693. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6105-06). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6106). For example, Technigaz and Zachry had not even formally announced its alliance until after CX 693 was written. (*See* RX 43 at ZCC000002). Furthermore, the proposed finding ignores the fact that BP believes that the current level of competition will provide it with a fair and reasonable LNG tank price. (Sawchuck, Tr. 6075; *see* also FOF 3.427).

857. **[xxx]** stated that since the acquisition of PDM, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]**. (CX 693 at **[xxx]** 01 027) (emphasis supplied).

<u>Response to Finding No. 857:</u>

The proposed finding is misleading and incomplete because it fails to account for Mr. Sawchuck's testimony regarding CX 693. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6099). **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6100). **[xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6100). Furthermore, the proposed finding ignores the fact that BP believes that the current level of competition will provide it with a fair and reasonable LNG tank price. (Sawchuck, Tr. 6075; *see* also FOF 3.427).

858. The memorandum adds that the use of CB&I as a "main contractor" has "potential limitations." (CX 693 at **[xxx]** 01 027). Among other things, CB&I seeks "an up-front commitment to the entire project." (*Id.*) CB&I is "technically strong," but "have yet to open up

to us about technology or show signs of wishing to reduce costs or schedule through technical innovation." (*Id.*) CB&I is "very negative towards novel tank concepts that do not require welded steel plate" because CB&I views itself as "'metal erectors.'" (*Id.*) This last observation was important because **[xxx]** was researching the use of concrete materials in LNG tanks that may reduce construction time and costs considerably. (*Id.* at 01 028).

<u>Response to Finding No. 858:</u>

The proposed finding is misleading and incomplete because it fails to recognize that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]** (*See* CCFF 857; CX 693 at BP 01 027). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 693 at BP 01 026). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 693 at BP 01 026).

859. **[xxx]** took a cautious tone with respect to Whessoe and its new owner Skanska. The memorandum observes that "CB&I quoted Whessoe as a new entrant into the US market in their FTC submission," and that Whessoe had "confirmed their interest" in the United States to **[xxx]**. (CX 693 at **[xxx]** 01 027). The memorandum adds that Whessoe "did not perform at all well in Trinidad, and Bechtel had to provide substantial project management support." (*Id.* at **[xxx]** 01 028) It was "not yet clear" to **[xxx]** what Skanska's strategy for Whessoe will be, but Skanska is a "very major civil contractor" in the United States and "may help Whessoe to compete there." (*Id.*)

<u>Response to Finding No. 859:</u>

The proposed finding is misleading an incomplete because it relies on a 2001 document yet fails to account for Mr. Sawchuck's more recent testimony. Mr. Sawchuck testified that BP would include Whessoe on a potential bidder list for LNG projects in the United States. (Sawchuck, Tr. 6062; *see also* FOF 3.78). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr. 6092; *see also* FOF 3.78). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Sawchuck, Tr.

6088; *see also* FOF 3.78). Additionally, the sufficiency of Whessoe's performance in Trinidad has been well established. (See RFOF 538).

860. **[xxx]** had only a brief discussion about Technigaz. The memorandum states that Technigaz is "not active in the US," but, based on the "technical exchanges" with Technigaz, appeared "experienced," "professional," and a "credible contractor in most parts of the world." (*Id.*).

Response to Finding No. 860:

Like CCFF 859, the proposed finding is misleading an incomplete because it relies on a 2001 document yet fails to account for **[xxxxxxxxxxxx]** more recent testimony. **[xxxx xxxxxxxxxx]** testified that **[xxxxxxxxxxxxx]** accepted Technigaz's bid for an LNG project in Bilboa, Spain. (**[xxxxxxxxxx]**, Tr. 6053; *see also* FOF 3.183). Furthermore, **[xxxxxxxxxxxxxx]** believes that Technigaz has the technical capabilities to construct and execute an LNG import terminal. (**[xxxxxxxx]**, Tr. 6062-63; *see also* FOF 3.183). Additionally, at the time this CX 693 was written Technigaz was not active in the U.S.; Technigaz did not announce its alliance with Zachry until almost seven months after CX 693 was written. (*See* RX 43, at ZCC000002). The proposed finding's assertions that Technigaz is an "experienced," "professional" and "credible contractor in most part of the world" is correct.

861. Having assessed the firms that could supply the LNG tanks as a subcontractor or as a main contractor, **[xxx]** asked what would be the best way of going forward. **[xxx]** "key choices in the US will be: • do we form a closer relationship with CB&I in order to guarantee access to the resources we need for our US regas projects? • or do we deepen the market in the US by encouraging competition?" (CX 693 at **[xxx]** 01 028).

Response to Finding No. 861:

The proposed finding is misleading and incomplete to the extent it does not convey the fact that CX 693 was written in 2001 before many foreign LNG tank suppliers entered the U.S. (*See* RX 43 at ZCC000002). Regardless of **[xxxx]** efforts to encourage competition, foreign tanks suppliers have entered the U.S. (*See generally* FOF 3.57-3.227).

Furthermore, the proposed finding ignores the fact that **[xxxx]** believes that the current level of competition will provide it with a fair and reasonable LNG tank price. (Sawchuck, Tr. 6075; *see also* FOF 3.427).

862. The memorandum states that the answer will turn on CB&I's performance in the preliminary design and cost work it has agreed to perform on one of the projects. (CX 693 at **[xxx]** 01 028).

Response to Finding No. 862:

Respondents have no specific response.

863. **[xx]** does not "believe that a 'single source' arrangement with CB&I is likely to be appropriate outside of the US, where we would prefer them to offer conventional FEED and EPC services." (*Id.*) One reason a single source arrangement may not be appropriate elsewhere is because **[xxx]** would have a greater competitive selection of firms with experience constructing LNG tanks outside of the United States. **[xxx]** believed it had to make a special exception here because CB&I "dominate[s] the US market." (CX 693 at **[xxx]** 01 027).

Response to Finding No. 863:

The proposed finding is misleading and factually incorrect in so far that it contends that **[xx]** was forced to enter into a sole-source agreement. **[xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* CCFF 857; CX 693 at **[xxx]** 01 027). CB&I agreed to an arrangement whereby **[xxx]** maintained the option of sole-sourcing with CB&I or conducting a competitive bid process. (**[xxxxx]**, Tr. 6058-59; *see also* FOF 3.412). Furthermore, **[xxx]** believes that the current level of competition will provide it with a fair and reasonable LNG tank price. (**[xxxx]**, Tr. 6075; *see also* FOF 3.427). RFOF 856 addressed what little, if any, weight should be given to the document's contention that CB&I dominated the U.S. market in 2001.

864. In July and August of 2001, **[xx]** further clarified why it would be prudent to turn exclusively to CB&I in the United States.

<u>Response to Finding No. 864:</u>

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact."

865. On July 27, **[xxx]** executive in charge of the three new United States LNG facilities circulated an e-mail to **[xxxxxxxxxxxxxx]** and Tom Quigley regarding "CB&I's acquisition of PDM." Gerald Glenn of CB&I asked **[xxx]**, a **[xxx]** executive to provide an affidavit in connection with the FTC's action "to the effect that CB&I's acquisition of [PDM] does not significantly affect the competitive of construction of low temperature and cryogenic industrial storage tanks." (CX 691 at **[xxx]** 01 033). Glenn cited to **[xxx]** "potential international competitors such as Skanska/Whessoe, TKK, MHI and Bouygues **[xxxxxxxx]** and maintains that the market for construction of such tanks will remain competitive." (*Id.*) **[xxx]** added that "Gerald and I have a relationship that I value so if I could help him out on this I would like to do so." (*Id.*) **[xxx]** pointed out that "[t]his is a bit of a sticky one but maybe some advice from the two of you would help me decide the right course of action." (*Id.*)

<u>Response to Finding No. 865:</u>

Respondents have no specific response.

866. **[xxx]**. (CX 691 at **[xxx]** 01 032, *in camera*).

<u>Response to Finding No. 866:</u>

Respondents have no specific response.

867. Sawchuk then wrote to his supervisor: "While we could provide a reasonable argument that CB&I has competition in the US, especially in the conventional metal tank business, the reality for today is that in the US, they are the leading company in the LNG Tank business and the other competitors will need to demonstrate their capabilities in this market. This may occur however it will be highly dependent on the eventual expansion of the market in the LNG area." (CX 691 at **[xxx]** 01 032, *in camera*).

<u>Response to Finding No. 867:</u>

The proposed finding is misleading and incomplete to the extent it fails to acknowledge Mr. **[xxxxxxxxxx]** testimony regarding post-Acquisition competition. **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]** (Sawchuck, Tr. 6089-90). Furthermore, the proposed finding ignores the fact that BP

believes that the current level of competition will provide it with a fair and reasonable LNG tank price. (**[xxxxxxxxxx]**, Tr. 6075; *see also* FOF 3.427). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* FOF 3.424-3.426). **[xxx]** has a list of potential tank contractors that it would consider accepting bids from for the construction of one or more of the LNG tanks on the various projects in the United States. (**[xxxxxxxx]**, Tr. 6062; *see also* FOF 3.423). The potential bidder list includes: Whessoe, Mitsubishi Heavy Industries, IHI, Daewoo, Hyundai, Technigaz and CB&I. (**[xxxxxxxxx]**, Tr. 6062; *see also* FOF 3.423). **[xxx]** believes that all seven of these companies have the capabilities and skills to construct LNG tanks in the United States. (**[xxxxxxx]**, Tr. 6062-63; *see also* FOF 3.423).

868. **[xxx]** possesses real data on which to base its decision that the cost-effective strategy going forward is to enter into a sole-source relationship with CB&I.

Response to Finding No. 868:

The proposed finding fails to cite any evidence in support of its conclusions and is not an appropriate "finding of fact." In addition, the proposed finding is misleading, incomplete and factually inaccurate for the reasons set forth in RFOF 867.

869. In November 1998, **[xxx]** compiled "bids" from PDM, CB&I, and Whessoe for various sizes and types of LNG tanks. (RX 157 at **[xxx]** 02 001-002, 02 004, *in camera*). **[xxx]** then prepared a chart analyzing each firm's "bids" for various sizes and types of LNG tanks. The table below repeats **[xxx]** analysis of single-containment LNG tanks.

[xxxxxxxxxxx]						
[xxx]	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxx]	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxx]	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**
[xxx]	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**	**[xxxxx]**

(RX 157 at **[xxx]** 02 004, *in camera*).

<u>Response to Finding No. 869:</u>

The proposed finding is factually incorrect, misleading, and incomplete. First, because Complaint Counsel failed to question a single witness from **[xxxxx]** about the numbers contained in the above-referenced chart, Complaint Counsel cannot attest to the reliability of these records. For example, Complaint Counsel cannot show how these numbers were developed, what they mean, where they came from, or whether they relate to a foreign or U.S. project. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 157 at **[xxxxx]** 02 004). **[xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (RX 157 at **[xxxx]** 02 001). This budget pricing, provided over four years ago, is not representative of firm, fixed pricing that these companies are capable of submitting today. (FOF 7.1-7.38). Since that time, Skanska (with a large U.S. presence) acquired Whessoe, and is vigorously competing for U.S. LNG projects today. (FOF 3.57-3.73).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx] (RX 157 at **[xxx]** 02 004). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]**

870. CB&I's Scorsone testified to the accuracy of the analysis. "**[xx]**, being one of the leading global, very global, petroleum/petrochemical companies, gas company, has spent time developing a rather sophisticated pricing model that one of their Ph.D. engineers **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx]** -- has developed, that some of our engineers have worked with this model and discussed the model with **[xxxxx]** and have come away very impressed that it very, very accurately can predict the cost of some of these facilities." (Scorsone, Tr. 4996).

<u>Response to Finding No. 870:</u>

The proposed finding is factually incorrect and misleading. First, **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx],** but the record does not reflect that **[xxxxxxx]** was even an employee of **[xxx]** in 1998. Further, Mr. Scorsone never testifed about the accuracy of the numbers or analysis contained in RX 157. In fact, Mr. Scorsone is prohibited from viewing this document as it was granted in-camera treatment for **[xxx]**.

871. **[xxx]** "very, very accurate[]" pricing model shows that Whessoe's prices are nearly double CB&I's prices. (Scorsone, Tr. 4996; RX 157 at **[xxx]** 02 004, *in camera*).

<u>Response to Finding No. 871:</u>

The proposed finding is factually incorrect, misleading, and mischaracterizes the evidence for the reasons stated in RFOF 869 and RFOF 870.

872. Whessoe's prices for a single containment LNG tank were far higher than CB&I's, ranging from **[xxxxxx]** higher, for **[xxxxxxxxxxxxxxx]** cubic meter tanks, to **[xxxxxxx]** higher for an **[xxxxxxxxx]** cubic meter tank. (RX 157 at **[xxx]** 02 004, *in camera*).

Response to Finding No. 872:

The proposed finding is misleading and mischaracterizes the evidence for the reasons stated in RFOF 869.

873. **[xxx]** internal pricing analysis underscores why it viewed CB&I as the "leading company in the LNG Tank business" and that CB&I "now dominate the US market." (CX 693 at **[xxx]** 01 027, *in camera*; CX 691 at **[xxx]** 01 032, *in camera*).

Response to Finding No. 873:

The proposed finding is misleading and mischaracterizes the evidence. First, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (**[xxxxxxxxx]**, Tr. 6099). In fact, Mr. **[xxxxxxxxx]** deposition testimony (read into the record), occurred months after CX 693 was written. Mr. **[xxxxxxx]**, a corporate representative of **[xxx]**, stated **[xxx]** belief that the current level of competition in the U.S. LNG market will provide **[xxx]** with a fair and reasonable LNG tank price. (**[xxxxxx]**, Tr. 6075) (FOF 3.427). It is a complete mischaracterization of the record to quote the older viewpoint when observing that viewpoint has changed.

874. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (RX 157 at **[xxx]** 02 004, *in camera*).

Response to Finding No. 874:

The proposed finding is misleading and unsupported by the evidence. First, for the reasons stated in RFOF 869 and RFOF 870, Complaint Counsel failed to demonstrate the reliability and relevance of the pricing information contained in RX 157. Second, **[xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx]** (RX 157 at **[xxx]** 02 004).

875. Based on **[xxx]** data, PDM was CB&I's closest competitor for LNG tanks. (RX 157 at **[xxx]** 02 004, *in camera*).

<u>Response to Finding No. 875:</u>

The proposed finding is misleading and inaccurate for the reasons set forth in RFOF 869, RFOF 870, and RFOF 874. Further, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 157 at **[xxx]** 02 004).

876. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]**. (RX 157 at **[xxx]** 02 004, *in camera*).

<u>Response to Finding No. 876:</u>

The proposed finding is misleading and inaccurate for the reasons set forth in RFOF 869, RFOF 870, and RFOF 874. Further, **[xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 157 at **[xxx]** 02 004). Under these circumstances, CB&I would have to actually lower its pricing to match the level of Whessoe's pricing.

877. Without PDM as a competitive constraint, CB&I can increase its prices **[xxxxxxx]** for **[xxxxxxxxxxxxxxxx]** cubic meter tanks before Whessoe becomes competitive. (RX 157 at **[xxx]** 02 004, *in camera*).

<u>Response to Finding No. 877:</u>

The proposed finding is misleading, incomplete and inaccurate for the reasons set forth in RFOF 869, RFOF 870, and RFOF 874. Additionally, because the pricing contained in RX 157 was submitted in 1998, prior to Skanska's acquisition of Whessoe, Whessoe's pricing is not remotely predictive of its ability to price LNG tanks today. Further, **[xxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx]** (RX 157 at **[xxx]** 02 004). For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxxxxx] (RX 157 at **[xxx]** 02 004).

878. Without PDM as a competitive constraint, CB&I can increase its prices for a **[xxxxxxx]** cubic meter tank by **[xxxxx]** before Whessoe's prices become competitive. (RX 157 at **[xxx]** 02 004, *in camera*).

<u>Response to Finding No. 878:</u>

The proposed finding is misleading, incomplete and inaccurate for the reasons set forth in RFOF 869, RFOF 870, and RFOF 874. Additionally, because the pricing contained in RX 157 was submitted in 1998, prior to Skanska's acquisition of Whessoe, Whessoe's pricing is not remotely predictive of its ability to price LNG tanks today. Further, **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** (RX 157 at **[xxx]** 02 004). For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 157 at **[xxx]** 02 004).

879. **[xxx]** internal analysis, using real-life data, demonstrates that in order to "deepen the market in the US by encouraging competition," **[xxx]** would have to pay Whessoe significantly more for LNG tanks than it would pay to CB&I. (CX 693 at **[xxx]** 01 028, *in camera*).

<u>Response to Finding No. 879:</u>

The proposed finding is misleading, incomplete and inaccurate for the reasons set forth in RFOF 869, RFOF 870, and RFOF 874. Additionally, because the pricing contained in RX 157 was submitted in 1998, prior to Skanska's acquisition of Whessoe, Whessoe's pricing is not remotely predictive of its ability to price LNG tanks today**.** **[xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 693 at **[xxx]** 01 028).

880. Despite the fact that CB&I could increase its prices significantly to **[xxx]** and still beat Whessoe, and the fact that a turnkey or sole-source arrangement generally results in higher

margins for the EPC contractor and LNG tank supplier, acquiescing to CB&I's pressure to enter into a sole-source turnkey relationship would at least provide **[xxx]** with "guarantee[d] access to the resources we need for our US regas projects." (CX 693 at **[xxx]** 01 028, *in camera*).

<u>Response to Finding No. 880:</u>

For the reasons set forth in RFOF 869, RFOF 870, and RFOF 874, there is no evidence suggesting that CB&I could increase its costs and still beat Whessoe. This finding assumes that CB&I has perfect knowledge of Whessoe's costs; as Dr. Simpson admits, CB&I has imperfect knowledge of its competitors because LNG tanks are sold through a sealed bid process. (Simpson, Tr. 3073, 3771) (FOF 7.83). Further, Complaint Counsel fails to cite any evidence supporting its claim that sole-source arrangments result in higher margins. To the contrary, sole-sourcing with one contractor can provide an owner with less costs, greater flexibility, and can save time when a project is under development. (Bryngelson, Tr. 6134; Scorsone, Tr. 4959) (FOF 3.463). Additionally, Complaint Counsel fails to acknowledge that **[xxx]**, a sophisticated multi-national company, rejected CB&I's sole-source approach, and maintained the option of conducting a competitive bid process for the LNG tanks. (Sawchuck, Tr. 6058-59, 6069) (FOF 3.411-3.412).

881. Given the limited choices, **[xxx]** has decided to negotiate for sole-source agreements with CB&I for its three pending LNG import terminal projects in the United States. (**[xxxxxxxxx]**, Tr. 4995, *in camera*).

<u>Response to Finding No. 881:</u>

The proposed finding is factually incorrect, misleading, incomplete, and mischaracterizes the evidence. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 4995) (FOF 3.413). **[xxx]** has a list of potential tank contractors that it would accept bids from including: Whessoe, MHI, IHI, Daewoo, Technigaz, and CB&I. (Sawchuck, Tr. 6062) (FOF 3.423). **[xxx]** believes that the

current level of competition will provide a fair and reasonable LNG tank price if decides to go the competitive bidding route. (**[xxxxxxxxx]**, Tr. 6075).

882. The following graph shows that the CB&I, PDM, and Whessoe values depicted in **[xxx]** pricing analysis lie along trend lines. (RX 157 at **[xxx]** 02 004, *in camera*; **[xxxx]**, Tr. 8122, *in camera*; CX 1760 at 1 (demonstrative)):

Response to Finding No. 882:

The proposed finding and chart is misleading, incomplete and inaccurate for the reasons set forth in RFOF 869, and RFOF 870.

10. *Respondents' Pricing Pattern for Cove Point Compared to [xxx] Pricing Analysis Illustrates Why CB&I Can Exercise Market Power*

883. The prices quoted to **[xxx]** by CB&I, PDM and Whessoe for various sizes of LNG tanks can be plotted to establish price curves for each firm. CB&I's and PDM's price quotes on the 2000 Cove Point project can also be plotted against the 1998 **[xxx]** quotes. CCFF 891. After examining the data observations, a comparison can be made between the prices quoted on the Cove Point project and the prices quoted to **[xxx]** for its tanks.

Response to Finding No. 883:

The proposed finding is misleading, irrelevant, factually incorrect, and mischaracterizes the evidence. First, for the reasons stated in RFOF 869 and RFOF 870, the pricing information quoted to **[xxx]** by CB&I, PDM, and Whessoe are irrelevant, unreliable, and cannot accurately establish price curves for each firm.

Second, there is no record evidence suggesting that budget pricing for two different projects (Cove Point and **[xxx]**), at two different locations, during two different time periods, for two different customers that inevitably have two different sets of specifications is relevant. In fact, there is no evidence even suggesting that the budget pricing **[xxx]** obtained was for a U.S. LNG project. As Mr. Eyermann testified: "[t]he price of an LNG tank has very many factors. It depends on the size, on the location, on the foundation, and there are so many facets to it that you cannot possibly compare an LNG tank built in Dabhol, India with an LNG tank in

Malaysia with an LNG tank on the Gulf Coast of Texas. . . The labor rates, the labor efficiencies are completely different. . . LNG tanks are such a big cost factor and such a multifaceted construction that you cannot possibly compare one or the other." (Eyermann, Tr. 7071-72).

Third, despite the complexity involved in efforts to compare LNG tank pricing, Complaint Counsel failed to have an expert witness make this comparison. Instead, Complaint Counsel makes broad generalizations without accompanying testimony. Accordingly, Complaint Counsel's attempt to compare these two sets of numbers is nothing more than unreliable and pure speculation.

884. The comparison demonstrates five important points: 1) Immediately prior to the acquisition, competition between CB&I and PDM disciplined the two firms to keep their bids to customers within a price curve best demonstrated by bids given to **[xx]** in 1998. CCFF 891, 893; 2) After the letter of intent was signed, PDM attempted to increase the price curve, indicating an across-the-board price increase. CCFF 907; 3) Post-acquisition, CB&I is no longer constrained by any competitor's pricing, and has abandoned adherence to any price curve. CCFF 913; 4) CB&I's post-acquisition bids to Cove Point reflect a 61.6% price increase over pre-acquisition pricing levels. CCFF 926; 5) Post-acquisition, CB&I possesses sufficient information about foreign competition to know how much it can increase its price before foreign firms become a price constraint. CCFF 935.

Response to Finding No. 884:

For the reasons set forth in RFOF 883, and RFOF 885 through RFOF 927, the proposed finding is conclusory, argumentative, factually inaccurate, unsupported by the evidence, based on lack of expert testimony, and mischaracterizes the evidence. Complaint Counsel's expert witness had ample opportunity before and during trial to develop pricing comparisons and be subject to cross-examination. Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions or testimony from the authors of the documents upon which Complaint Counsel cites.

885. There are three sections of the Cove Point/**[xxx]** comparison. Part I of the comparison demonstrates the similarities between CB&I's and PDM's bidding practices in 2000 for the Cove Point project and in 1998 for the **[xxx]** project. Part II of the comparison details PDM and CB&I's behavior after the letter of intent was signed, and illustrates that currently,

CB&I pricing deviates from any price curves that existed prior to the acquisition because, in the competitive void that exists post-acquisition, CB&I has no price constraints (other than the significantly higher prices of Whessoe). Part III examines the comparison and relevant calculations on a demonstrative aid.

Response to Finding No. 885:

For the reasons set forth in RFOF 883, and RFOF 885 through RFOF 927, the proposed finding is conclusory, argumentative, factually inaccurate, unsupported by the evidence, based on lack of expert testimony, and mischaracterizes the evidence. Complaint Counsel's expert witness had ample opportunity before and during trial to develop pricing comparisons and be subject to cross-examination. After trial, Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions or testimony from the authors of the documents upon which Complaint Counsel cites.

11. *Phase I: PDM Restrained CB&I's Pre-merger Prices*

886. Prior to the acquisition, PDM's preliminary budget price for the Cove Point 750,000 barrel LNG tank was **[xxxxxxxxxxx]**. (CX 226 at CB&I-PL044978, *in camera*; CCFF 781.

Response to Finding No. 886:

The proposed finding is incomplete, misleading, and is unsupported by the evidence. First, Complaint Counsel failed to ask any witness at trial about CX 226, and thus, its interpretation of this document is suspect. Second, CX 226 is a CB&I document. CB&I was speculating as to what PDM's pricing was for the Cove Point project based on CB&I's discussions with Cove Point. (CX 226 at CB&I-PL44978). Thus, Complaint Counsel's attempt to extract what PDM's preliminary budget price was for the Cove Point project is based on pure speculation.

887. Competition between CB&I and PDM lowered both firms' prices for the 750,000 barrel tank from **[xxxxxxxxx]** to what CB&I believed to be approximately **[xxxxxxxxxx]**. (CX 226 at CB&I-PL044979, *in camera*). CCFF 785.

Response to Finding No. 887:

The proposed finding is incomplete, misleading, and is unsupported by the evidence. First, Complaint Counsel failed to ask any witness at trial about CX 226, and thus, its interpretation of this document is suspect. Second, CX 226 is a CB&I document. In this document, CB&I was speculating as to what PDM's pricing was for the Cove Point project based on CB&I's discussions with Cove Point. (CX 226 at CB&I-PL44978). Thus, Complaint Counsel's attempt to extract how much CB&I and PDM's pricing decreased is based on pure speculation, and is not supported by the evidence.

888. A 750,000 barrel tank equals 119,237 cubic meters, or approximately 120,000 cubic meters. (*See* Price, Tr. 539 (one cubic meter of liquid x 6.29 = barrels of liquid)).

Response to Finding No. 888:

Respondents have no specific response.

889. The threat of PDM winning the Cove Point project prompted CB&I to lower its final bid for the Cove Point tank to **[xxxxxxxx]** dollars for a 750,000 barrel (*120,000 cubic meter) tank, a price only $100,000 dollars less than CB&I's price quoted to **[xxx]** in 1998 for its 120,000 cubic meter tank. (CX 226 at CB&I-PL044979; RX 157 at **[xxx]** 02 004, *in camera*). CCFF 787.

Response to Finding No. 889:

For the reasons stated in RFOF 883, the proposed finding is inaccurate, based on speculation, not supported by the evidence, and not supported by expert testimony. Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination. After trial, Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model

without seeking any expert opinions or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

890. PDM's price to Columbia for the Cove Point tank was **[xxxxxxxxxxx]**, although CB&I believed it to be approximately **[xxxxxxxxxx]**. (CX 1058 at PDM-HOU017465, *in camera*; CX 226 at CB&I-PL044979).

<u>Response to Finding No. 890:</u>

The proposed finding is speculative and unsupported by the evidence. [**xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Rather than asking any witnesses at trial about CX 1058, Complaint Counsel instead attempts to speculate as to the meaning of certain undefined numbers and terms contained in this document.

891. PDM's quote of **[xxxxxxxxxxxx]** for the Cove Point 750,000 barrel (*120,000 cubic meter) tank immediately preceding the acquisition is almost identical to the pre-acquisition **[xxxxxxx]** price that PDM quoted to **[xxxx]** in 1998 for the same size tank. Moreover, the two prices lie exactly on the price curves of the bids given to **[xxx]** in 1998. The difference in the two prices is indicated in the following table: [

[xxx]	**[xxxxxxxxx]**	**[xxxxxxxxx]**
[xxxxxxxxxxxxxx]	**[xxx]**	**[xxx]**[8]
[xxxxxxxxxxxxxx]	**[xxx]**	**[xxx]**[9]

]

<u>Response to Finding No. 891:</u>

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions. Complaint Counsel's expert

[8] (CX 1058 at PDM-HOU017465).

[9] (RX 157 at **[xxx]** 02 004 *in camera*).

witness failed to do so, and thus, was not subject to cross-examination. After trial, Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

892. The minuscule difference in the price is accounted for by the slight difference in tank size. The Cove Point tank is 0.6% smaller than the equivalent **[xxx]** tank, and costs 0.6% less than the **[xxx]** tank. (CX 1058 at PDM-HOU017465, *in camera*; RX 157 at **[xxx]** 02 004, *in camera*).

Response to Finding No. 892:

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. First, there is no record evidence or expert testimony supporting Complaint Counsel's claim that the "minuscule difference" in the prices Complaint Counsel erroneously compares are a result of the "slight difference in the tank size." Rather, this statement is based on pure speculation without any fact witness testifying about the prices or documents Complaint Counsel relies on.

Second, Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination. After trial, Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

893. CB&I's pre-acquisition **[xxxxxxx]** price for the Cove Point 750,000 barrel (*120,000 cubic meter) tank is almost identical to the pre-acquisition **[xxxxxxxxxxx]** bid for **[xx]**'s 120,000 cubic meter tank, and lies exactly on the price curves of the bids given to **[xx]** for the various sized tanks. (CX 226 at CB&I-PL044978; RX 157 *in camera*; CX 1760

(demonstrative), *in camera*). The comparison between the two bids is represented on the following table: [

[xxx]	**[xxxxxxxxxxxxxxxx]**	**[xxxxxxxxxxxxxxxx]**
[xxxxxxxxx]	**[xxx]**	**[xxx]**[10]
[xxxxxxxxx]	**[xxx]**	**[xxx]**[11]

]

Response to Finding No. 893:

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination. After trial, Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

894. Like the PDM bid, the minuscule difference in CB&I's price is accounted for in the slight difference in tank size. The Cove Point tank is 0.6% smaller than the equivalent **[xxx]** tank, and costs 0.5% less than the **[xxx]** tank. (RX 157 at **[xxx]** 02 004, *in camera*).

Response to Finding No. 894:

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. First, there is no record evidence or expert testimony supporting Complaint Counsel's claim that the "minuscule difference" in the prices Complaint Counsel erroneously compares are a result of the

[10] (CX 226 at CB&I-PL044979).

"slight difference in the tank size." Rather, this statement is based on pure speculation without any fact witness testifying about the prices or documents Complaint Counsel relies on.

Second, Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination on this subject. After trial, Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions, or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

895. Overall, the **[xxxxxxxxx]** CB&I price proposed by Mr. Marine for the 119,237 cubic meter (750,000 barrel) Cove Point LNG tank is only **[xxxxxx]** below CB&I's equivalent price quotation for the same size **[xxx]** tank. (RX 157 at **[xxx]** 02 004, *in camera*; CX 226 at CB&I-PL044979).

<u>Response to Finding No. 895:</u>

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. Also, **[xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxx]** Rather, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 226 at CB&I-PL044979). Complaint Counsel failed to establish that Mr. Marine (who never testified in these proceedings) has the foundation and authority to change CB&I's pricing. Thus, any price comparison analysis that Complaint Counsel attempts to make based on a number burried in a document, of which no witness testified to at trial, is mere speculation and unreliable.

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[11] (RX 157 at **[xxx]** 02 004 *in camera*).

896. PDM's **[xxxxxxxxxxxxx]** price to Columbia for the 750,000 barrel tank, as of March 29, 2000, was equivalent to its price quote to **[xxx]** for the same size tank after accounting for the difference in price and size. (CX 1058 at PDM-HOU017465; RX 157; CX 1760 (demonstrative), *in camera*, emphasis supplied).

Response to Finding No. 896:

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. First, [**xxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Rather than asking any witnesses at trial about CX 1058, Complaint Counsel instead attempts to speculate as to the meaning of certain undefined numbers and terms contained in this document. Second, Complaint Counsel makes an unfounded conclusion, without supporting testimony from an expert or an engineer, that the prices it erroneously compares are "equivalent" "after accounting for the difference in price and size." This statement is based on pure speculation without any fact witness testifying about the prices or documents Complaint Counsel relies on.

897. When CB&I and PDM sharpened their pencils to compete for projects before the acquisition, both firms were forced to maintain a price that was within a close range of their costs in order to win contracts. The price curve established with CB&I and PDM's bids to **[xx]** in 1998 still accurately depicted a competitive range of pricing in late 2000.

Response to Finding No. 897:

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. Complaint Counsel fails to cite any evidence supporting the proposition that CB&I's and PDM's pricing submitted in 1998 "accurately depicted a competitive range of pricing in late 2000." Complaint Counsel also fails to disclose who "established" this "price curve" relating to CB&I and PDM's bids, as Dr. Simpson neither included this information in his expert report, nor did he testify about this subject during trial. Accordingly, the conclusory remarks made in this proposed finding are grossly speculative, highly suspect, and unsupported by the evidence.

12. ***Phase II: Post-merger, CB&I Has Increased Prices***

898. At the time that the letter of intent was signed on August 29, 2000, Williams had already increased the specifications of the proposed Cove Point tank to 850,000 barrels (135,135 cubic meters) and initiated another round of bidding. (Scorsone, Tr. 4964-6; Harris, Tr. 8061-2; see Price, Tr. 539 (one cubic meter of liquid x 6.29 = barrels of liquid)); CCFF 789.

<u>Response to Finding No. 898:</u>

The proposed finding is misleading to the extent it suggests that Williams did not further change the specifications for the Cove Point project after the letter of intent was signed. For example, Mr. Scorsone testified that the **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5334) (FOF 3.633). **[xxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5337-38).

899. At this point in the bidding process, CB&I declined to further pursue a contract for the Cove Point tank. Based on the fact that CB&I and PDM had met and discussed pending bids, it is reasonable to infer that Respondents had either implicitly or explicitly agreed that CB&I not bid. (Scorsone, Tr. 5113; CX 617 at 6; Thompson, Tr. 2068; CX 1705 at PDM-HOU009169).

CHI:1176893.3

Response to Finding No. 899:

The proposed finding is misleading and is unsupported by the evidence. First, there is no evidence suggesting that CB&I "declined to further pursue a contract for the Cove Point tank." In fact, there is no evidence suggesting that CB&I was actually invited by Williams to submit another bid for the Cove Point project. Second, there is no evidence supporting Complaint Counsel's claim that CB&I and PDM met to discuss pending LNG tank bids prior to the acquisition. Any information that was shared between PDM and CB&I prior to the acquisition were for "non-competition sensitive projects already sold and were entirely appropriate" "in the context of due diligence." (Scorsone, Tr. 5195) (RFOF 796).

900. On September 8, 2000, PDM sent new budgetary prices for both a 750,000 barrel and 850,000, barrel tank. (CX 1388 at CB&I/PDM-H 4015363; CCFF 792. PDM would charge **[xxxxxxxxxxxxx]**, for a 750,000 barrel LNG tank, and **[xxxxxxxxxxxx]** for an 850,000 barrel LNG tank. (CX 1388 at CB&I/PDM-H 4015363).

Response to Finding No. 900:

The proposed finding mischaracterizes the purpose of why PDM submitted budgetary pricing on September 8, 2000. This budgetary pricing did not represent what "PDM would charge" for the Cove Point LNG tanks. A budget price is "not a buying offer." (Scorsone, Tr. 5250). Rather, budget prices are numbers used by an owner to set up an investment budget. (Kistenmacher, Tr. 925). Budget prices typically have an accuracy of plus or minus 40%, and are regularly referred to as a "guesstimate" or a SWAG -- a "scientific wild assed guess." (Hall, Tr. 1863-66; Carling, Tr. 4472) (FOF 3.599, 3.600). Accordingly, Complaint Counsel's attempt to equate PDM's budget pricing to what PDM would actually charge for the project is wholly inappropriate. (FOF 7.1-7.38).

901. On September 8, 2000, PDM's price for the 850,000 barrel tank was **[xxxxxxx]**, *i.e.*, **[xxxxxx]**, more than its price for the 750,000 barrel tank. (CX 1388 at CB&I/PDM-H 4015363 *in camera*). This difference is consistent with, and only slightly more than, the **[xxx]**

difference in the equivalent prices quoted by PDM to **[xx]** for these size LNG tanks. (RX 157 *in camera*; CX 1760 (demonstrative), *in camera*).

Response to Finding No. 901:

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. There is no record evidence or expert testimony supporting Complaint Counsel's claim that the difference in the budgetary pricing PDM provided to Williams for two different size tanks in 2000 is "equivalent" to the pricing differential for two tanks that PDM may have provided BP. Rather, this statement is based on pure speculation without any fact witness testifying about the prices or documents Complaint Counsel relies on.

Further, Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions relating PDM's budget pricing. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination on this subject. Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions, or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

902. Although the price quotations that **[xx]** received from CB&I, PDM, and Whessoe did not include a quote for a 135,135 cubic meter (850,000 barrel) tank, the range of bids that **[xxx]** received can be used to calculate prices for a 135,135 cubic meter single containment LNG tank. (RX 157 at **[xxx]** 02 004 *in camera*). The prices quoted by the three companies for a 120,000 cubic meter tank and for a 140,000 cubic meter tank, and the interpolated prices for a 135,135 cubic meter (850,000 barrel) LNG tank, are shown in the table below: [

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]
[xxxxxxxxxxxxxxxxxxxxxxxx]

[xxxxx xxx]	**[xxxx]**	**[xxxx]**	**[xxxx]**
[xxx]	**[xxxxxxxx]**	**[xxxxxxxx]**	**[xxxxxxxx]**
[xxx]	**[xxxxxxxx]**	**[xxxxxxxx]**	**[xxxxxxxx]**
[xxx]	**[xxxxxxxx]**	**[xxxxxxxx]**	**[xxxxxxxx]**

] (*Id.*)

<u>Response to Finding No. 902:</u>

For the reasons set forth in RFOF 883, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. Also, because Complaint Counsel failed to question a single witness from **[xxx]** about the numbers contained in the above-referenced chart, Complaint Counsel cannot attest to the reliability of these records. For example, Complaint Counsel cannot show how these numbers were developed, what they mean, where they came from, or whether they relate to a foreign or U.S. project. **[xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx]** (RX 157 at **[xxx]** 02 004). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]**

Complaint Counsel's contrived chart further includes "interpolated" data, without the assistance of an expert, to ascertain the price of a 135,135 cubic meter LNG tank. Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions relating PDM's, CB&I's, and Whessoe's budget pricing. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination on this subject. Complaint Counsel now seeks to introduce its own speculative and unreliable pricing comparison model without seeking any expert opinions, or testimony from the authors of the documents upon which Complaint Counsel cites. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

903. CB&I's and PDM's **[xxx]** price quotations for a 120,000 cubic meter LNG tank and for a 140,000 cubic meter LNG tank show that over this range the percent increase in the price of the tank is substantially smaller than the percent increase in the capacity of the tank. (RX 157 at **[xxx]** 02 004 *in camera*; CX 1760 (demonstrative), *in camera*).

Response to Finding No. 903:

For the reasons set forth in RFOF 883 and RFOF 902 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony. Complaint Counsel attempts to make a tenuous, if not unfounded, generalization about the trends of LNG tank pricing as it relates to tank capacity. Unsurprisingly, Complaint Counsel tries to make this generalization by citing to one document, from 1998, that contains budget pricing information. (RX 157 at **[xxx]** 02 004). Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions relating PDM's, CB&I's, and Whessoe's budget pricing. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination on this subject. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

904. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxx]**. (RX 157 at **[xx]** 02 004 *in camera*; CX 1760 (demonstrative), *in camera*).

Response to Finding No. 904:

For the reasons set forth in RFOF 883 and RFOF 902 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony. Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions relating PDM's, CB&I's, and Whessoe's budget pricing. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-examination on this subject. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

905. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 1388 at CB&I/PDM-H 4015363, *in camera*).

Response to Finding No. 905:

For the reasons set forth in RFOF 883 and RFOF 902 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony. Complaint Counsel attempts to make a tenuous, if not unfounded, generalization about the trends of LNG tank pricing as it relates to tank capacity. Unsurprisingly, Complaint Counsel tries to make this generalization by citing to one document, from 1998, that contains budget pricing information. (RX 157 at **[xxx]** 02 004). Complaint Counsel's own expert witness had ample opportunity before, and during, trial to develop pricing models, pricing curves, and reports incorporating expert opinions relating PDM's, CB&I's, and Whessoe's budget pricing. Complaint Counsel's expert witness failed to do so, and thus, was not subject to cross-

examination on this subject. Accordingly, any such anaylsis is inherently suspect and not remotely reliable.

906. PDM's **[xxxxxxxx]** adjustment for the difference in tank size does not explain the movement of PDM's entire price curve after the letter of intent was signed nor other subsequent price increases post-acquisition.

Response to Finding No. 906:

For the reasons set forth in RFOF 883 through RFOF 905 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony.

907. PDM's September 8, 2000 bids reflect an overall price increase, and suggest that, after the letter of intent was signed, the price curve for PDM jumped to higher levels than PDM's price curve pre-acquisition. PDM's September 8, 2000 Cove Point bids indicate a **[xxxx]** increase above its equivalent pre-acquisition price quotes to **[xx]** for the same size tanks. (CX 1388 at CB&I/PDM- H 4015363; RX 157 *in camera*; CX 1760 (demonstrative) *in camera*, emphasis supplied).

Response to Finding No. 907:

For the reasons set forth in RFOF 883 through RFOF 905 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony.

908. Moreover, PDM's proposed price for the 850,000 barrel tank, was also **[xxx]** above PDM's interpolated price quote for an 850,000 barrel (135,135 cubic meter) LNG tank. (CX 1388 at CB&I/PDM-H 4015363; see RX 157 at **[xx]** 02 004 *in camera* ; CX 1760 (demonstrative), *in camera*).

Response to Finding No. 908:

For the reasons set forth in RFOF 883 through RFOF 905 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony.

909. On November 1,2 and thereafter, PDM raised the price quote on Cove Point: to **[xxxxxxxxxxxx]** on November 1; to [**xxxxxxxxxx**] on November 2; to **[xxxxxxxxxxx]** thereafter. Each of these price increases was well above PDM's pre-merger price curves. (CX 1160 at

CB&I/PDM-H 4007485, *in camera*; CX 1388, *in camera*; RX 157 at **[xx]** 02 004, *in camera*; Scorsone, Tr. 5333, *in camera*).

Response to Finding No. 909:

For the reasons set forth in RFOF 796 through RFOF 815 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony.

910. CB&I's current price of **[xxxxxxxx]** for the Cove Point LNG tank is **[xxxxxx]** above CB&I's equivalent **[xx]** price of **[xxxxxxxx]** for a tank of that size, and **[xxxxxx]** above PDM's equivalent **[xx]** price of **[xxxxxxxxxx]** price for the same size tank. (**xxxxxxxxx** Tr. 5333 *in camera*; RX 157 at **[xx]** 02 004 *in camera*; CX 1760 (demonstrative) *in camera*).

Response to Finding No. 910:

For the reasons set forth in RFOF 883 through RFOF 905 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony. Additionally, Complaint Counsel is inappropriately attempting to compare actual, firm, current pricing for the Cove Point project to budget pricing that CB&I and PDM submitted to **[xxx]** in 1998. (FOF 7.1-7.38).

911. While increasing the price of the Cove Point LNG tank since the acquisition, CB&I has still maintained the price below Whessoe's interpolated price of **[xxxxxx]** million for a tank of that size. (RX 157 at **[xx]** 02 004 *in camera*; CX 1760 (demonstrative) *in camera*). CB&I could still increase the price of the **[xxxxxxxxx]** Cove Point LNG tank by an additional **[xxxxxx]** before reaching Whessoe's equivalent price for that size tank. (RX 157 at **[xx]** 02 004 *in camera*; CX 1760 (demonstrative), *in camera*).

Response to Finding No. 911:

For the reasons set forth in RFOF 883 through RFOF 905 the proposed finding is misleading, speculative, conclusory, unsupported by the evidence, and unsupported by expert testimony. Additionally, Complaint Counsel is inappropriately attempting to compare actual, firm, current pricing for the Cove Point project to budget pricing that Whessoe allegedly submitted to **[xxx]** in 1998. (FOF 7.1-7.38).

13. *The [xx]/Cove Point Comparison Shows that Foreign Firms Cannot Restrain CB&I as Effectively as PDM*

912. The following graph shows the history of PDM's and CB&I's prices for the Cove Point LNG tank, from early 2000 through December 2002, as well as the price quotations submitted to **[xx]** by CB&I, PDM and Whessoe for various size single containment LNG tanks. Trend lines show approximate prices for CB&I, PDM and Whessoe for intermediate tank sizes.

Response to Finding No. 912:

For the reasons set forth in RFOF 779 through RFOF 820, the proposed finding and the accompanying graph representing pricing for the Cove Point project is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. For the reasons set forth in RFOF 869 through RFOF 882, the proposed finding and the accompanying graph representing the budget pricing submitted to **[xx]** in 1998 is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

913. The most important point made by the graph is that PDM and CB&I's pricing after the letter of intent was signed *does not fall within a range of any price curve*. CB&I's current pricing, reflected on the graph, shows the lack of pricing methodology in the post-acquisition period when compared with pre-acquisition levels of pricing to **[xx]** or Columbia Gas.

Response to Finding No. 913:

For the reasons set forth in RFOF 779 through RFOF 820, the proposed finding and the accompanying graph representing pricing for the Cove Point project is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. For the reasons set forth in RFOF 869 through RFOF 882, the proposed finding and the accompanying graph representing the budget pricing submitted to **[xxx]** in 1998 is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony. For the reasons set forth in

RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

914. As shown in the above graph, PDM's initial price to Columbia for the Cove Point LNG tank, approximately **[xxxxxxx]**, was substantially **[xxxxx]** above PDM's corresponding price quote to **[xx]** of **[xxxxxxxxxxx]** interpolated for the same size tank, 750,000 barrels (119,237 cubic meters). (*in camera*)

Response to Finding No. 914:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the referenced graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

915. As further shown in the above graph, CB&I's price to Columbia of **[xxxxxx xxxxxxxx]**, as recorded in CB&I's March 3, 2000, Bid Review, is substantially below PDM's initial price quotation and slightly (5.3%) above CB&I's price quote to **[xx]** of [xxxxxxxx] interpolated for the same size tank, 750,000 barrels (119,237 cubic meters). (RX 127 at CB&I-H008204).

Response to Finding No. 915:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

916. As recognized by the customer and recognized by CB&I's Mr. Marine, competition from CB&I, prior to the acquisition, brought PDM's price down to **[xxxxxxxxxxxx]**, 6% below PDM's corresponding price quote to **[xx]**, interpolated for a tank of approximately the same size, and exactly on the price quote trendline to **[xx]** for the 750,000 barrel tank. (CX 226 at CB&I-PL044978).

Response to Finding No. 916:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

917. As further shown in the above graph, CB&I's proposed price, as recommended by Mr. Marine on March 29, 2000, is exactly on CB&I's price quote trendline to **[xx]** for the 750,000 barrel (119,237 cubic meter) tank.

Response to Finding No. 917:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

918. As further shown in the above graph, PDM' s September 8, 2000, price quotes to Williams for the 750,000 barrel LNG tank is **[xxxx]** higher than PDM's March 2000 price of **[xxxxxxxxxxx]** as estimated by CB&I's Mr. Marine. (CX 226 at CB&I-PL044978; CX 1388 at CB&I/PDM-H 4015363).

Response to Finding No. 918:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

919. As further shown in the above graph, PDM's September 8, 2000 price quotes to Williams are above PDM's equivalent price quotes to **[xx]** for the same size tanks. The price quote to Williams is approximately **[xxxx]** above the equivalent price quote to **[xx]** for the 750,000 barrel (119,237 cubic meter) LNG tank and **[xxxx]** above the equivalent price quote to **[xx]** for the 850,000 barrel (135,135 cubic meter) LNG tank. (RX 157 at **[xx]** 02 004; CX 1388 at CB&I/PDM-H4015363, *in camera*).

Response to Finding No. 919:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

920. As further shown in the above graph, PDM's September 8, 2000, price quotes to Williams, show a **[xxx]** difference in price between the 750,000 barrel tank and the 850,000 barrel LNG tank approximately equivalent to the **[xxx]** difference in price indicated by the trend line for PDM' s price quotes to **[xx]**. (CX 1388 at CB&I/PDM-H 4015363, *in camera*).

Response to Finding No. 920:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

921. As further shown in the above graph, PDM's November 1, 2000, estimate of **xxxx** million for the 850,000 barrel (135,135 cubic meter) LNG tank is **[xxxx]** higher than PDM's initial price of approximately **[xxxxxxxxx]** for the 750,000 barrel tank, before competition from CB&I forced PDM to reduce its price. (CX 1160 at CB&I/PDM-H 4007485, *in camera*; CX 226 at CB&I-PL044978).

Response to Finding No. 921:

For the reasons set forth in RFOF 779 through RFOF 820, the proposed finding and the accompanying graph representing pricing for the Cove Point project is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

922. The **[xxxx]** increase in price is almost identical to the **[xxxxx]** difference in price for the two size tanks contained in PDM's September 8, 2000, price quote to Williams, and is comparable to, and only slightly higher than, the **[xxxxxx]** difference between PDM's equivalent price quotes to **[xxx]** for those size tanks: **[xxxxxxxxxx]** for a 750,000 barrel (119,237 cubic meter) tank and **[xxxxxxxxxxx]** for an 850,000 barrel (135,135 cubic meter) tank). (CX 1388 at CB&I/PDM-H 4015363; RX 157 at **[xxx]** 02 004, *in camera*).

Response to Finding No. 922:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

923. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx** (CX 226 at CB&I-PL044978; CX 1388 at CB&I/PDM-H 4015363, *in camera*; CCFF 785.

Response to Finding No. 923:

For the reasons set forth in RFOF 779 through RFOF 820, the proposed finding and the accompanying graph representing pricing for the Cove Point project is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

924. As further shown in the above graph, PDM's further **[xxxx]** increase in the price of the tank, following Mr. Scorsone's November 1, 2000, meeting to review the price prior to submitting PDM's bid to Williams on November 2, 2000, brought the price up to **[xxxxxxxxxxx]**, **[xxxxx]** above PDM's **[xxxxxxxxxxxxxx]** interpolated price quote to **[xx]** for an 850,000 barrel (135,135 cubic meter) tank. (RX 157 at **[xx]** 02 004; CX 1160 at CB&I/PDM-H 4007485, *in camera*).

Response to Finding No. 924:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

925. The above graph further shows the **[xxxxxxxxx]** price CB&I would have bid on the 850,000 barrel tank as stated on CB&I's February 21, 2001, Estimate Summary Sheet. As shown on the graph, the price paid by Williams is **[xxxxxx]** above CB&I's estimate for the tank. (CX 906 at CB&I 031076-HOU, *in camera*). CCFF 818.

Response to Finding No. 925:

For the reasons set forth in RFOF 816 through RFOF 820, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project contained in CX 906 (Estimate Summary Sheet) to actual pricing for the Cove Point project is misleading, unsupported by the evidence, and unsupported by expert testimony.

926. Finally, the graph shows CB&I's current price of **[xxxxxxxxx]** for the Cove Point LNG tank. As shown in the graph, the current price is **[xxxxx]** above the price stated on CB&I's February 21, 2001, Estimate Summary Sheet and **[xxxxxx]** above CB&I's interpolated price quote to **[xx]** of **[xxxxxxxxxxx]** for the 850,000 barrel (135,135 cubic meter) tank. (**xxxxxxxxx** Tr. 5333, *in camera*).

Response to Finding No. 926:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

927. As shown in the graph, CB&I could nevertheless increase its current price for the tank by an additional [11.7%] before reaching Whessoe's interpolated price quote of **[xxxxxx xxxxxxxx**] to **[xx]** for the 850,000 barrel (135,135 cubic meter) tank. (RX 157 at **[xx]** 02 004, *in camera*)

Response to Finding No. 927:

For the reasons set forth in RFOF 883 through RFOF 911, the proposed finding and the accompanying graph attempting to compare pricing for the Cove Point project to **[xxx]** budget pricing is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

928. Absent the acquisition, CB&I and PDM would have constrained each others' pricing to levels that are within the ranges of the two firms' price curves prior to the acquisition. Because CB&I is now unrestrained, it is now able to increase its price more than **[xxx]** above pricing levels that existed prior to the acquisition.

Response to Finding No. 928:

For the reasons set forth in RFOF 898 through RFOF 911, the proposed finding is misleading, speculative, unsupported by the evidence, and unsupported by expert testimony.

14. *The Memphis, Tennessee Project: Pre-merger Price Competition Between Respondents*

929. Since Cove Point, CB&I has used PDM's "fat" and "excessive" cost estimates on Cove Point as a benchmark to implement higher prices and margins to other LNG customers.

Response to Finding No. 929:

The proposed finding is inaccurate, conclusory, argumentative, misleading, and unsupported by citations or the evidence.

930. The LNG projects for Memphis Light, Gas & Water ("Memphis") illustrate three important themes of this case. (1) Prior to the merger, CB&I and PDM competed vigorously to win this project, and Memphis benefitted in the form of lower prices (and CB&I suffered in the form of single-digit margins). (2) Prior to the merger, foreign firms – Whessoe and TKK – bid against CB&I and PDM but were not competitive because their costs and prices were at least 40% higher. (3) Since the merger, CB&I recognizes that with the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint, CB&I can now raise prices and earn significantly higher margins.

Response to Finding No. 930:

For the reasons set forth below (RFOF 931-942), the proposed finding is grossly inaccurate, conclusory, argumentative, misleading, and unsupported by citations or the evidence.

931. In 1994, Memphis sought bids for the construction of a peak-shaving plant in Capleville, Tennessee. (Hall, Tr. 1778-1779; Price, Tr. 650). This peak-shaver would provide additional LNG supply to compensate for peak demand of LNG in the year 2001. (Hall, Tr. 1779).

Response to Finding No. 931:

Respondents have no specific response.

932. Memphis viewed CB&I and PDM as the most capable domestic suppliers for the project. Clay Hall, project engineer and manager for Memphis, believed that "essentially we had two viable companies in the United States that could compete" for the project – CB&I and PDM. (Hall, Tr. 1799-1800).

Response to Finding No. 932:

The proposed finding is misleading and incomplete. In addition to CB&I and PDM, Mr. Hall also testified that "we had others overseas that could compete". In fact, Memphis "actively encouraged" Black & Veatch and Lotepro to "team up with a foreign tank builder to compete . . . ." (Hall, Tr. 1799).

933. Memphis sought additional bidders to maximize competition and obtain a lower price. (Hall, Tr. 1800). Memphis encouraged Black & Veatch, an engineering firm, "to team up with a foreign tank builder to compete, " and also encouraged Lotepro, a German engineering firm, to compete in the bidding process. (Hall, Tr. 1799).

Response to Finding No. 933:

Respondents have no specific response.

934. Black & Veatch partnered with TKK for the LNG tank portion of the project, and Lotepro partnered with Whessoe. (CX 319 at CB&I-ATL003104; Hall, Tr. 1804-1805).

Response to Finding No. 934:

The proposed finding is inaccurate, misleading, and overstates the evidence. Black & Veatch never entered into a formal partnership with TKK, as TKK clearly came in on a one-shot deal in 1994 to work with Black & Veatch on the Memphis project. (Price, Tr. 650) (FOF 3.508). IHI was initially going to build the LNG tank for Black & Veatch, but Black & Veatch's tank contractor changed during the course of the bidding process. (Hall, Tr. 1804-05) (FOF 3.500). Black & Veatch actually listed three different tank contractors in its bid for the Memphis project: (1) IHI/Rocky Mountain Fabricators; (2) TKK/Graver Tank; and (3) Sunkyong Belmont/Titan Constructors. (CX 319).

Lotepro never entered into a formal partnership with Whessoe, as Whessoe was reluctant to get involved in the Memphis bid, and would not bid the entire LNG tank to Lotepro. (Kistenmacher, Tr. 895, 939-40) (FOF 3.497). In fact, Lotepro "had difficulties" getting Noell Whessoe to even provide an engineering quote for the Memphis project. (Kistenmacher, Tr.

940) (FOF 3.497). This stands in stark contrast from Skanska/Whessoe's voluntary, even eager, market participation today.

935. The prices quoted by CB&I, PDM, Lotepro/Whessoe and Black & Veatch/TKK for the LNG tank portion of the project reflect CB&I's and PDM's significant cost advantage vis-a-vis foreign firms. The following chart shows each firm's bid for the LNG tank. (CX 829 at 5; Hall, Tr. 1876; Price, Tr. 648).

Firm	Price
PDM	$10,500,000
CB&I	$10,500,000
Lotepro/Whessoe	$15,000,000
Black & Veatch/TKK	$16,700,000

Response to Finding No. 935:

The proposed finding is inaccurate, incomplete, misleading, mischaracterizes the evidence, and is unsupported by the evidence. It is not remotely clear from the record what CB&I's and PDM's "tank only" prices were. Although Memphis "requested a specific breakout of the price for the LNG tank, both PDM and Lotepro ignored the requirement and did not breakout their tank costs." (RX 888; Scorsone, Tr. 5010) (FOF 3.506). Thus, it is difficult to determine what the cost break-out of PDM's tank bid was for the Memphis project. (Scorsone, Tr. 5011-12) (FOF 3.506). Evidence suggests that PDM's tank price may have been between $13 million and $15 million. (Simpson, Tr. 5548-50) (FOF 3.506). Further, PDM's bid was disqualified because it had approximately 157 shortcomings that were out of line with the request for proposal. (Hall, Tr. 1823-24; Scorsone, Tr. 5012) (FOF 3.505). Therefore, PDM's bid was "not quoted on the same item" as CB&I's bid. (Hall, Tr. 1839-40) (FOF 3.505).

The record evidence is unclear as to whether the $10.5 million price associated with CB&I's bid included CB&I's engineering costs. (RX 888). Other evidence suggests that CB&I's tank bid (which may have included its engineering costs) for the Memphis project, was between $13 million and $15 million. (Simpson, Tr. 5548-50) (FOF 3.506).

Lotepro incorporated an LNG tank construction quotation from Titan Constructors in its Memphis bid. (Kistenmacher, Tr. 895-96) (FOF 3.498). Noell Whessoe's engineering package accounted for $1 million of the $15 million tank bid, while Titan Constructor's construction/erection costs accounted for the remaining $14 million. (Kistenmacher, Tr. 900, 938) (FOF 3.498).

Black & Veatch's tank price, using TKK's design, was approximately $13 million. (RX 888) (FOF 3.502). Of the $13 million tank price, over $10 million of the cost was attributed to materials and labor that would be supplied by Graver for the project. (RX 888) (FOF 3.502).

936. Memphis considered the level of competition between CB&I and PDM to be very "very competitive." (Hall, Tr. 1804).

Response to Finding No. 936:

Respondents have no specific response.

937. In contrast, Whessoe's bid was 43% higher than CB&I and PDM, and TKK's bid was 59% higher. (*See also* Hall, Tr. 1810; Price, Tr. 561; Kistenmacher, Tr. 901).

Response to Finding No. 937:

The proposed finding mischaracterizes Whessoe's and TKK's participation in the Memphis project. Whessoe merely submitted an engineering package which accounted for $1 million of the $15 million tank bid that Lotepro provided. (Kistenmacher, Tr. 900, 938) (FOF 3.498). The balance of the Lotepro tank bid was provided by Titan Constructors. (Kistenmacher, Tr. 900, 938) (FOF 3.498). Similarly, TKK's pricing accounted for less than 25% of the $13 million tank price submitted by Black & Veatch. (RX 888) (FOF 3.502). Additionally, the percentages (43% and 59%) contained in the proposed finding appear to be arbitrary, as none of Complaint Counsel's citations support these numbers.

938. Lotepro later lamented to CB&I that Lotepro's bid on the Memphis project "was really strained by not being able to include a CB&I or PDM tank, and his current market study

prompted his call to discuss whether [CB&I's] position [about partnering with Lotepro] may have changed at all since [Memphis]." (CX 184 at CB&I-PL012440).

Response to Finding No. 938:

The proposed finding mischaracterizes CX 184, as Lotepro never "lamented".

939. To this day, Black & Veatch has "concerns" about whether a foreign tank supplier can provide a "competitive price" against CB&I. (Price, Tr. 634-635).

Response to Finding No. 939:

The proposed finding is not supported by the preponderance of the evidence. Mr. Price's "concerns" about foreign tank suppliers do not represent the views of Black & Veatch, as Black & Veatch has touted its "alliance" with Skanska/Whessoe as as a positive aspect of Black & Veatch's corporate LNG strategy. (RX 935) (state of mind) (FOF 3.662). In fact, Black & Veatch never even requested budget pricing from CB&I for the Dynegy project because it was working with Skanska, and thus, "it was natural" to request a budget price from Whessoe. (Price, Tr. 603-04) (FOF 3.661). Mr. Price also lacks foundation to make any statements on behalf of Black & Veatch because he has not seen the bids submitted for the Dynegy project, and did not know that Dynegy was satisfied with the foreign tank suppliers' prices. (Price, Tr. 609-10, 641, 667) (FOF 3.660, 3.664). Further, Black & Veatch has neither procured an LNG tank, nor received any firm, fixed-price bids for an LNG trank from either PDM or CB&I since at least 1990. (Price, Tr. 644) (FOF 3.665).

940. PDM was not selected because its specifications for non-tank portions of the project, such as paving the driveways, did not meet Memphis' specifications. (Hall, Tr. 1878-1879).

Response to Finding No. 940:

The proposed finding is misleading, incomplete and is not supported by the citation. PDM's bid had approximately 157 shortcomings that were out of line with Memphis' request for proposal. (Hall, Tr. 1823-24) (FOF 3.505). PDM also failed to address a variety of

engineering issues. (Hall, Tr. 1838-40) (FOF 3.505). The citation to Mr. Hall's testimony does not indicate that the shortcomings contained in PDM's bid were "for non-tank portions of the project".

941. Memphis awarded the contract to CB&I. (Hall, Tr. 1777; CX 46 at CB&I 033870-ATL).

Response to Finding No. 941:

Respondents have no specific response.

942. CB&I's firm fixed price to Memphis included an **[xxx]** profit margin.

Response to Finding No. 942:

The proposed finding is inaccurate, misleading, incomplete, and unsupported by any citation to record evidence. Complaint Counsel cannot cite to a single document or any testimony corroborating the proposed finding.

943. The Memphis project shows that foreign firms are at a significant cost disadvantage against CB&I. In the absence of PDM, CB&I's closest competitor, CB&I could have increased its tank price between *43%* and *59%* before one of the foreign firms would have constrained CB&I's bid. *See also Merger Guidelines* § 2.21, n. 21 ("A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller.").

Response to Finding No. 943:

The proposed finding is irrelevant, inaccurate, speculative, conclusory, and is not supported by the evidence. The Memphis project is irrelevant in that it happened over nine years ago, and neither TKK nor Whessoe had "planted their flag at that point". (Scorsone, Tr. 5014) (FOF 3.507). Neither TKK nor Whessoe were committed to entering the U.S. market in 1994: (1) TKK participated in the Memphis project on a "one-shot deal in 1994" (Price, Tr. 650) (FOF 3.508); and (2) Whessoe was very reluctant to get involved in the Memphis project, did not form a partnership with Titan Constructors to construct the tank, and only provided an engineering package acounting for $1 million of the $15 million tank price. (Kistenmacher, Tr. 895, 900-01,

938-40 (FOF 3.497, 3.498, 3.499). TKK's and Whessoe's participation in the Memphis project stands in stark contrast their present day efforts in forming partnerships, and competing on several U.S. LNG projects. (FOF 3.57-3.140). Complaint Counsel did not, and cannot, cite any evidence supporting how CB&I "could have increased its tank price" during the Memphis project.

15. ***The Memphis, Tennessee Project: Post-Merger Price Increase by CB&I***

944. In 2002, Memphis sought pricing information for another 300,000 barrel LNG peak shaving tank. (Hall, Tr. 1824-1825).

Response to Finding No. 944:

The proposed finding is misleading, inaccurate, and incomplete. Mr. Hall testified that he requested some "budgetary guesses", not a formal pricing estimate, for an LNG tank to be used in 2008. (Hall, Tr. 1824-25). Complaint Counsel states that the tank size would be 300,000 barrels, but fails to cite any record evidence supporting this assertion.

945. In January 2002, Memphis contacted CB&I's Eric Frey, a business development manager. Memphis called CB&I because CB&I is the **[xxxxxxxxxxxxxx]** that can provide **[xxxxxxxxxx]** tank pricing in the United States. (CX 422 at CB&I-E009500, *in camera*; Hall, Tr. 1825, 1826, 1827).

Response to Finding No. 945:

The proposed finding is misleading and incomplete. Mr. Hall called CB&I because Memphis has a "working relatiohship with CB&I", and Mr. Hall has "contacts there . . . ." (Hall, Tr. 1825-26).

946. Memphis did not contact other LNG firms because Memphis cannot "trust" the pricing information from foreign firms. (Hall, Tr. 1828).

Response to Finding No. 946:

The proposed finding is incomplete and is irrelevant. Mr. Hall testified that he did not approach a foreign tank supplier because he "had a working relationship already with

CB&I, had the contacts, I knew who to call." (Hall, Tr. 1828). Mr. Hall lacks foundation to discuss foreign LNG tank companies because Memphis is not a current participant in the LNG tank market, and admitted that he would need a lot of additional information from Whessoe and TKK to determine if they were viable competitors in the U.S. (Hall, Tr. 1832-33, 1846-48, 1853-54) (FOF 3.650, 3.655, 3.657).

947. On January 15, 2002, Mr. Frey e-mailed Marty Smith, a CB&I vice president of global LNG sales, with the proposal to quote Memphis a price that "reflect about a **[xxx]** margin after Total Internal Cost." (RX 732 at CB&I 071501, *in camera*).[12]

Response to Finding No. 947:

The proposed finding is ambiguous, misleading and incomplete. Customers do not purchase LNG tanks based on a budget price. (Carling, Tr. 4472-73) (FOF 3.607). Margins contained in budget prices are not remotely representative of the actual profit margin that CB&I seeks in fixed, firm price bids. (Scorsone, Tr. 5003) (FOF 3.606). As explained in FOF 3.599-3.606, there are numerous contingencies and uncertainties when CB&I submits budget pricing to a customer. Because CB&I's internal budget documentation does not contain a line item for these contingencies, CB&I accounts for these contingencies in the margin line calculation of the budget estimate. (Scorsone, Tr. 5002-03) (FOF 3.606). Thus, although a margin line item on a budget price may be **[xxx]**, this does not mean that CB&I will seek a **[xxx]** profit margin if, and when, a firm, fixed price bid is submitted. (Scorsone, Tr. 5003) (FOF 3.606).

948. On January 15, Mr. Smith instructed Mr. Frey to quote Memphis **xxx** million, almost **[xxxxxxxx]** higher than what Frey had originally prepared. (RX 732 at CB&I 071502, *in camera*; CX 422 at CB&I-E 009500, *in camera*; **xxxxxxxxxx**, Tr. 5323, *in camera*). Mr. Smith explained that Mr. Frey's original estimate was **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 732 at CB&I 071501, *in camera*).

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12 Frey testified at his deposition that the **[xx]**% margin quoted to Memphis represented "about **[xx]**% of what you want to call margin on this other estimate and about **[xx]**% of cushion." (CX 416 at 71 **([xxx]**), *in camera*). Assuming the **[xx]**% margin is comprised of a **[xx]**% "margin" and a **[xx]**% "cushion," as Frey contended, CB&I's margin still represents a **[x]**% increase over pre-acquisition margins.

Response to Finding No. 948:

The proposed finding is misleading, and incomplete. The purpose of preparing the budgetary estimate was to provide a rough idea of LNG tank pricing over the next 10 to 50 years, while assisting Memphis in conducting a long-term planning exercise. (Hall, Tr. 1864-65; Scorsone, Tr. 5251) (FOF 3.608). Mr. Smith instructed Mr. Frey to increase the budget price because nine percent nickel steel pricing has fluctuated considerably over the past 12 months. (CX 422). Mr. Smith further stated: "Since we do not know when the tank would be bought we are trying to ensure that our budget price is at least considerate of this situation. (i.e. includes a small contingency for material escalation)". (CX 422).

949. On January 16, Mr. Frey quoted Memphis a budget price of **[xxx]** million for a 300,000 barrel tank. (RX 732 at CB&I 071499-500, *in camera*).

Response to Finding No. 949:

The proposed finding is incomplete. The budget price CB&I provided "was not a buying offer." (Scorsone, Tr. 5250) (FOF 3.609). Rather, the estimate that CB&I provided to Memphis was a SWAG -- a "scientific wild assed guess." (Hall, Tr. 1865-66) (FOF 3.609). Mr. Hall testified that Memphis did not provide CB&I nearly enough information to receive an accurate price, and agreed that "volumes more" information would be required for this purpose. (Hall, Tr. 1865-66) (FOF 3.609). Because Memphis was asking CB&I to "extrapolate" into the future, and because it did not provide detailed information, Mr. Hall was not expecting a number of more than plus or minus 40% accuracy. (Hall, Tr. 1866-68).

950. On July 17, 2002, Clay Hall of Memphis e-mailed Mr. Frey to comment that "we all know that CB&I/PDM is, in fact, the only qualified US based firm capable of executing the work." (CX 786 at CB&I 065153).

Response to Finding No. 950:

The proposed finding based on CX 786 is inaccurate, misleading, and not supported by the preponderance of the evidence. First, Complaint Counsel is citing a document containing an e-mail written by its own witness, Clay Hall. Yet, Complaint Counsel failed to elicit this evidence from Mr. Hall on the witness stand. Second, CX 786 is ambiguous because it does not specify whether Mr. Hall is discussing an LNG project, or any number of different potential projects. Finally, even if CX 786 can be construed as relating to an LNG project, Mr. Hall lacks foundation to testify about the current LNG market. Since 1994, Mr. Hall has not conducted any searches for builders of field-erected LNG tanks, he does not monitor the LNG markets, and he admits that he is not familiar with the current state of competition in the LNG market. (Hall, Tr. 1843-45, 1857) (FOF 3.653).

951. Mr. Hall added that Memphis is "concerned about where we're going to get competition for our bids in the next few years ... because we don't *see* anyone out there with experience that could come into the market and compete with CB&I/PDM." (Hall, Tr. 1830).

Response to Finding No. 951:

The proposed finding is irrelevant. Mr. Hall lacks foundation to testify about the LNG market: (1) since 1994, Mr. Hall has not conducted any searches for builders of field-erected LNG tanks; (2) Mr. Hall does not monitor the LNG markets; and (3) Mr. Hall admits that he is not familiar with the current state of competition in the LNG market. (Hall, Tr. 1843-45, 1857) (FOF 3.653). Mr. Hall also testified that he would investigate the foreign tank builders were he to actually build a new tank. (FOF 3.655, 3.657).

952. Based on the 1995 Memphis bidding experience, CB&I knew that it had a competitive advantage against foreign firms. Joe Godown, a CB&I employee, wrote in a November 30, 1994, e-mail that there was an absence of "tough competition" from foreign firms because an "economical" LNG tank price was not "available" from Whessoe. (CX 319 at CB&I-ATL003104). Carroll Davis, a CB&I vice president, observed that Whessoe's and TKK's bids "did not turn out to be very competitive." (CX 184 at CB&I-PL012440).

Response to Finding No. 952:

The proposed finding is irrelevant. Noell Whessoe's and TKK's participation in the Memphis bid in 1994 do not bear upon CB&I's current perceptions of their ability to compete in the U.S. (Scorsone, Tr. 5013) (FOF 3.507). First, the Memphis project occurred nine years ago. (Scorsone, Tr. 5014) (FOF 3.507). Second, neither Noell Whessoe nor TKK announced plans to construct LNG facilities in the U.S. in 1994. (Scorsone, Tr. 5014) (FOF 3.507). CB&I's current state of mind is influenced by current events, not the 8 year-old Memphis bidding. (FOF 3.451-3.459).

953. Respondents presented no evidence that its post-merger pricing to Memphis was negatively impacted by any competitor, foreign or domestic.

Response to Finding No. 953:

The proposed finding is irrelevant. There was no actual work at stake in connection with CB&I providing Memphis the budget estimate; the budget price was given to Memphis as a matter of courtesy -- to assist Memphis. (Hall, Tr. 1864-65; Scorsone, Tr. 5251) (FOF 3.608). In fact Memphis expected the SWAG from CB&I to be higher than it otherwise might be for two reasons: (1) Memphis assumed that CB&I would assume that Memphis was planning on making its budget based on the numbers; and (2) the number was not provided under competitive conditions -- in other words, no formal bidding process had been entered into at this point. (Hall, Tr. 1869-70) (FOF 3.610). Memphis is at least five or six years away from entering into a bidding process. (Hall, Tr. 1869-70).

954. In the 1995 Memphis bidding contest, CB&I had to bid at a low price that garnered it only an **xx** margin in order to beat PDM. Post-merger, unrestrained by PDM and knowing that foreign firms cannot provide an "economical" or "very competitive" price, CB&I exercised market power by offering a higher price that includes at least a **[xxxx]** margin, a nearly four-fold increase from pre-merger levels.

Response to Finding No. 954:

The proposed finding is factually incorrect, unsupported by the evidence, and argumentative. First, Complaint Counsel fails to cite any evidence demonstrating that CB&I's margin in 1995 was 8%. Second, Complaint Counsel fails to distinguish between a fixed, firm price bid (as submitted in 1994), and a budget price (as provided in 2002). For the reasons set forth in RFOF 947-954. (*See also* FOF 3.608-3.613).

16. *The Fairbanks, Alaska Project: Post-Merger Price Increase by CB&I*

955. The LNG project for Fairbanks Natural Gas, LLC in Alaska ("Fairbanks") illustrates that, since the merger, CB&I recognizes that the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint provide CB&I with the opportunity to raise prices and earn significantly higher margins.

Response to Finding No. 955:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." In fact, the evidence in the record contradicts the proposed finding. CB&I perceives fierce competition and realizes that it must price competitively. (*See* FOF 3.451-3.459). CB&I does not believe that it can get away with a 5% price increase on LNG tanks now that PDM is no longer a competitor of CB&I. (Scorsone, Tr. 5062-63; *see also* FOF 3.453).

956. In 2002, Fairbanks explored the possibility of expanding its storage capacity with a field-erected LNG tank. Fairbanks considered LNG tanks capable of storing one million and five million gallons. (CX 370 at 21, 30 (Britton, Dep.); Simpson, Tr. 3107).

Response to Finding No. 956:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence.[1] Respondents humbly move that all argument related to this exhibit be stricken.

957. Fairbanks retained the services of CDS Research, an LNG consulting firm, to assist in the project. CDS Research helped prepare a budget for the project. CDS Research's methodology consisted of taking the "industry standard for benchmarking at costs per gallon and then factored in an adjustment factor for size of the tank and referred back to ... recent projects to kind of do a comparison ... " (CX 370 at 97 (Britton, Dep.)).

Response to Finding No. 957:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Further, even if the document was properly admitted into evidence, the proposed finding is misleading, incomplete, irrelevant and factually incorrect. The proposed finding represents that CDS Research "helped prepare a budget for the [2002] project." Complaint Counsel fails to cite any evidence supporting this assertion because it is incorrect. CDS Research assisted with a 1999 Fairbanks business plan. (CX 370, at 18-19, 96-97). Thus, the quote used in the proposed finding relates to the work CDS performed in 1999, two years prior to the Acquisition.

958. CDS Research's analysis included a "15% adjustment factor on the industry standard for size of the facility ... the industry standard budget pricing for the size." (CX 370 at 98 (Britton, Dep.)).

[1] CX 370 was not included in any of the joint exhibit lists or entered into evidence by the Court. Although Respondents entered into a letter agreement with Complaint Counsel agreeing to the admission of parts of the Dan Britton deposition transcript, CX 370 includes deposition testimony that was specifically excluded per the letter agreement. See December 1, 2002 Letter Agreement; CX 370. Additionally, Complaint Counsel failed to move CX 370 or any other exhibit containing a redacted version of the Dan Britton deposition transcript into evidence. Despite the fact that CX 370 is not in evidence, Complaint Counsel repeatedly cites it in support of many of its proposed findings. Therefore, this Court should ignore any of Complaint Counsel's proposed findings that rely on CX 370.

Response to Finding No. 958:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Further, even if the document was properly admitted into evidence, the proposed finding is misleading and irrelevant because Mr. Britton is referring to the business plan CDS Research helped develop in 1999. (CX 370, at 96-97).

959. Based on CDS Research's analysis, Fairbanks concluded that a one-million gallon field-erected LNG tank would cost approximately $2.2 million dollars. (CX 370 at 18, 19, 21 (Britton, Dep.)). Fairbanks further concluded that the total cost of the LNG tank and the necessary systems would be approximately $5 million. (CX 370 at 46-8 (Britton, Dep.)).

Response to Finding No. 959:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Even if Complaint Counsel believed that CX 370 was properly moved into evidence, the proposed finding cites deposition testimony, CX 370 at 48, which was specifically excluded by letter agreement. Moreover, even if CX 370 was properly admitted into evidence, the proposed finding is misleading, incomplete and factually inaccurate. Fairbanks did not have a valid and reliable method for concluding what an LNG tank ought to cost.

Fairbanks admitted that it did not know how to use its previous estimating experience, with smaller facilities, to extrapolate pricing for its 2002 LNG project. (CX 370, at 44). While Fairbanks attempted to use the budgetary numbers from the 1999 business plan as a basis to determine what a field-erected LNG would cost in 2002, Fairbanks did not know if the budgetary numbers in the 1999 business plan were turnkey numbers or tank-only numbers. (CX

370, at 31-32). In fact, Mr. Britton testified that there was a great deal about CDS Research's 1999 business plan that Fairbanks did not know. (CX 370, at 95:19-96).

Another problem is that Fairbanks did not know how to extrapolate 1999 prices into 2002 prices. For example, in determining its expected 2002 LNG tank price, Fairbanks failed to account for inflation and increased costs over time and instead simply extrapolated up from the 1999 price. (CX 370, at 55-56). Fairbanks also failed to take into account 2002 prices for materials, labor and other items. (CX 370, at 74). Likewise, Fairbanks did not know if steel prices had increased since 1999 or if steel tariffs would increase costs. (CX 370, at 62). Additionally, Fairbanks is currently unaware of foreign LNG tank suppliers. (CX 370, at 33-35).

960. CDS Research contacted multiple tank suppliers in order to create a competitive bidding situation for Fairbanks. CDS Research found that suppliers were unwilling to provide budgetary pricing information. (CX 370 at 33 (Britton, Dep.)).

Response to Finding No. 960:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Further, even if the document was properly admitted into evidence, the proposed finding is misleading and incomplete. Mr. Britton, whose testimony the proposed finding relies upon, stated that he did not specifically know who CDS Research contacted. (CX 370, at 33). CDS Research did not discuss with Mr. Britton who they contacted. (CX 370, at 33). Mr. Britton does not know, therefore, that CDS Research "contacted multiple tank suppliers."

961. The only firm willing to submit pricing information was CB&I. Having only one competitor left Fairbanks in an undesirable position because it prefers to "have more than one company to get quotes from." (CX 370 at 89 (Britton, Dep.); *see* Simpson, Tr. 3120 (Dr. Simpson concluded that foreign builders of LNG tanks were not interested in building this tank for Fairbanks)).

Response to Finding No. 961:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Further, even if the document was properly admitted into evidence, the proposed finding is misleading and incomplete. Additionally, the first sentence is not supported by the evidence. The proposed finding misconstrues the quote it cites. Mr. Britton provided the above cited quote in response to a question regarding his opinion of post-Acquisition competition. (*See* CX 370, at 89). Mr. Britton responded: "My only opinion is that it's always nice when you have more than one company to get quotes from. I don't have an opinion specific to this case." (CX 370, at 89). The quote does not have anything to do with the budget prices Fairbanks solicited for its 2002 LNG project.

962. On May 17, 2002, CB&I prepared a total budget price of $14.2 million for the turnkey services provided on the one million gallon tank.[13] (RX 407 at CB&I 066666; *see* Simpson, Tr. 3107 (The 20% margin was much higher than margin levels prior to the acquisition).

Response to Finding No. 962:

The proposed finding is incomplete, misleading and speculative. First, Complaint Counsel failed to elicit any admissible testimony regarding RX 407. Thus, the record is completely devoid of any specific information about the document including, inter alia, who wrote the document and when, who viewed the document and when and what the document means. The conclusions Complaint Counsel draws from RX 407, therefore, are completely speculative. Second, as for Dr. Simpson's belief that the "20% margin was much higher than margin levels prior to the [A]cquisition," he failed to account for the following factors: a budget

price for a project in Alaska will be "very rough" unless the customer provides very specific information; Fairbanks, Alaska is in a very remote location, and is a very difficult area to work; it is more expensive to work in Alaska than in the continental U.S.; due to the climate CB&I will encounter safety issues and productivity problems working in Alaska. (Scorsone, Tr. 5004-06; *see also* FOF 3.615). There are more unknowns when CB&I submits budget estimates or ROM prices for projects in Alaska than there are for projects in the continental U.S. (Scorsone, Tr. 5006; *see also* FOF 3.616).

963. CB&I's internal estimate worksheet shows that of the $14.2 million total price, the price of the one-million gallon tank was $3.6 million. (RX 407 at CB&I 066666).

Response to Finding No. 963:

The proposed finding is incomplete, misleading and speculative. Complaint Counsel failed to elicit any admissible testimony regarding RX 407. The conclusions Complaint Counsel draws from RX 407, therefore, are completely speculative. (*See* RFOF 962).

964. CB&I's $3.6 million price was $1.4 million higher than Fairbanks' estimate of $2.2 million based on its consultant's analysis. (RX 407 at CB&I 066666; CX 370 at 19 (Britton, Dep.)).

Response to Finding No. 964:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Additionally, Complaint Counsel failed to elicit any admissible testimony regarding RX 407. The conclusions Complaint Counsel draws from RX 407, therefore, are completely speculative. (*See* RFOF 962). Even if CX 370 was properly admitted into evidence, the proposed finding is still misleading and incomplete because it fails to recognize that Fairbanks did not have a reasonable basis to rely on

[13] CB&I quoted a total budget price of $18 million for the same service on the five million gallon tank. (RX 407 at CB&I 066664-066665; CX 370 at 42 (Britton, Dep.)).

the $2.2 million budget price provided in 1999 business plan prepared by CDS Research. (*See* RFOF 959).

965. Fairbanks expected "margina[l]" cost increases between 1999 and 2002, but saw no reason that such increases would be "significant" enough to raise the tank price by more than 60%. (CX 370 at 21 (Britton, Dep.)).

Response to Finding No. 965:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Further, even if CX 370 was properly admitted into evidence, the proposed finding is still misleading and incomplete because it fails to recognize that Fairbanks did not have a reasonable basis with which it could expect what an LNG tank would cost in 2002. (*See* RFOF 959).

966. In addition to the $3.6 million for the tank alone, CB&I estimated $7.3 million in other costs for the component systems and plant facilities. (RX 407 at CB&I 066666). This $10.9 million figure "includes 20% margin." (RX 407 at CB&I 066666). CB&I then added 30% to the $10.9 million figure to account for the location. (RX 407 at CB&I 066666).

Response to Finding No. 966:

The proposed finding is misleading and speculative. Complaint Counsel failed to elicit any admissible testimony regarding RX 407. The conclusions Complaint Counsel draws from RX 407, therefore, are completely speculative. (*See* RFOF 962). For example, Complaint Counsel does not know how CB&I arrived at the estimates on this document, what factors are accounted for in the "margin," or what the makes up the "30%" figure. The document itself states that the 30% figure is only a suggestion. (CX 407, at CB&I 066666).

967. Respondents presented no evidence that its post-merger pricing to Fairbanks was negatively impacted by any competitor, foreign or domestic.

Response to Finding No. 967:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact."

17. *Comparing Fairbanks' Post-Merger Price with British Columbia Gas' Pre-Merger Price*

968. From Fairbanks' perspective, CB&I's pricing to Fairbanks compares unfavorably with PDM's pricing on a comparable project before the merger.

Response to Finding No. 968:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact."

969. In 1996, BC Gas sought budget prices from PDM for various sized LNG tanks to be built in Vancouver, British Columbia. (CX 791 at PDM-HOU 2015258).

Response to Finding No. 969:

Respondents have no specific response.

970. PDM's response included a budget estimate of $3.6 million Canadian dollars for a 1.2 million gallon LNG tank. (CX 791 at PDM-HOU 2015260 (the project was calculated was a 1.38 exchange rate)). Calculating what the price would have been in U.S. dollars in 1996, PDM's price would have converted to $2.6 million. (*See* CX 370 at 94 ("Q: Do you know what the exchange rate was in 1996?/ A: Probably about 1.4.") (Britton, Dep.)).

Response to Finding No. 970:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Additionally, Complaint Counsel failed to elicit any admissible testimony regarding CX 791. The conclusions Complaint Counsel draws from CX 791, therefore, are completely speculative. (*See* RFOF 962). For example, neither Complaint Counsel nor its expert knows how the figures listed on CX 791 were formulated. (Simpson, Tr. 5387-88).

971. PDM's $2.6 million price to BC Gas was only $400,000 more than the $2.2 million estimate CDS Research provided to Fairbanks, which was based on "industry standard for benchmarking at costs per gallon" and "recent projects." (CX 370 at 97 (Britton, Dep.)).

Response to Finding No. 971:

The proposed finding attempts to support its conclusions by relying on CX 370, an exhibit that has not been admitted into evidence. (*See* RFOF 956). Respondents humbly move that all argument related to this exhibit be stricken. Further, even if CX 370 had been properly admitted into evidence, the proposed finding is incomplete, inaccurate and speculative because it relies on several faulty premises. First, PDM did not have a $2.6 million price to BC Gas. In CX 791, CB&I appears to provide BC Gas a price of $3.6 million for a 1.2 million gallon tank. (*See* CX 791, at PDM-HOU 2015260). Second, the proposed finding attempts to compare the 1996 PDM Canadian budget to a budget price CDS Research compiled in 1999 for a business plan to Fairbanks. Comparing these two prices is not meaningful because the proposed finding fails to take into account that the two prices include the following: different sized tanks; different locations; different time periods; different constructors. Third, The BC Gas budget estimate was prepared in 1996 by Jeff Steimer, a PDM salesman without training in estimating; Mr. Steimer derived this estimate by extrapolating from a prior estimate to a different client. (*See* CX 791). By contrast, CB&I derived the Fairbanks estimate in 2002 using a formal budgetary exercise. (*Compare* RX 626 to CX 791). The conclusions drawn by the proposed findings are therefore speculative and irrelevant.

972. PDM's $2.6 million price was for a 1.2 million gallon LNG tank, whereas Fairbanks sought a 1.0 million gallon tank. Applying a downward adjustment in the price to account for smaller size of the Fairbanks tank, PDM's $2.6 million price to BC Gas would have been lower for a 1.0 million gallon tank. (*See* CX 791 at PDM-HOU 2015258).

Response to Finding No. 972:

The proposed finding is inaccurate, misleading and speculative. Complaint Counsel failed to elicit any admissible testimony regarding CX 791. The conclusions Complaint Counsel draws from CX 791, therefore, are completely speculative. (*See* RFOF 962).

Additionally, comparing a 1996 Canadian PDM budget price to a 1999 CDS budget price generated for a business plan is not meaningful. (*See* RFOF 971). Lastly, the proposed finding is not an appropriate finding of fact because it attempts to draw an inference that is not supported by the evidence (i.e. the price "would have been lower").

973. Dr. Simpson compared the budget price for the Fairbanks project to budget price provided by PDM to BC Gas in 1996 for a 1.2 million- gallon LNG tank. The expert found that the low end for the range of accuracy for the Fairbanks price exceeded the high end for the range of accuracy for the BC Gas price by approximately 20 percent. (Simpson, Tr. 3108-3110; CX 791).

Response to Finding No. 973:

This finding is irrelevant and misleading. It is irrelevant because Dr. Simpson's analysis is wholly devoid of merit, as it attempts to compare two different budget prices at two different points in time -- essentially comparing apples and oranges. As Respondents have already established, budget pricing is often rough and inaccurate, and is not suitable for use in the manner contemplated by this finding. Further, the Fairbanks budget price contained a very high margin figure to account for lack of information and contingencies associated with an Alaska project, such as a cold climate, a short construction seasons, and burdensome labor regulations. (*See* FOF 3.614-3.617). There is no evidence in the record to suggest that the BC Gas budget price was calculated in a similar manner. In fact, the evidence is squarely to the contrary. It was prepared in 1996 by Jeff Steimer, a PDM salesman without training in estimating; he derived the estimate by extrapolating from a prior estimate to a different client. (*See* CX 791). By contrast, CB&I derived the Fairbanks estimate in 2002 using a formal budgetary exercise. (*Compare* RX 626 to CX 791). Further, Complaint Counsel has not shown that the costs for the BC Gas job (such as material or shipping costs) would be the same as those on the Fairbanks job located deep in interior Alaska. In fact, Dr. Simpson acknowledged that these factors would be relevant in any comparison of the two projects. (Simpson, Tr. 5385).

Accordingly, this finding is misleading to the extent it implies that CB&I has implemented price increases post-Acquisition.

974. Dr. Simpson testified that he did not believe that general inflation could account for the price increase (Simpson, Tr. 3110). Dr. Simpson noted that wages for construction workers had increased about four percent per year between the two bids, but that steel prices had fallen during this period and that CB&I and PDM had become more efficient over time (Simpson, Tr. 3110).

Response to Finding No. 974:

This finding is irrelevant and misleading for the reasons set forth in response to Finding No. 973.

975. Dr. Simpson did not believe the location of the LNG tank in Fairbanks could explain the price increase because the tank in British Columbia was also located in a remote area. (Simpson, Tr. 3110-11).

Response to Finding No. 975:

This finding is irrelevant and misleading for the reasons set forth in response to Finding No. 973.

976. Finally, Dr. Simpson testified that he did not believe that the price difference could be explained by a lower cost for Canadian labor because the field erection cost of a project is only about 25 percent of the price and because PDM did not have a trained work force in western Canada in 1996. (Simpson, Tr. 3111 (citing to CX 1204)).

Response to Finding No. 976:

This finding is irrelevant and misleading for the reasons set forth in response to Finding No. 973.

977. Using and factoring all of the variables that should have made CB&I's Fairbanks price equal to, if not lower than, PDM's BC Gas price, PDM's pre-merger price to BC Gas of $2.6 million on a 1.2 million gallon tank as a benchmark, CB&I's post-merger price to Fairbanks of $3.6 million on a 1.0 million gallon tank appears anticompetitive.

Response to Finding No. 977:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." The proposed finding is further misleading, incomplete and

speculative because it relies on countless unfounded and unsupported assumptions to arrive at its ultimate conclusion. (*See* RFOF 971).

18. *The Dynegy Project: CB&I Attempts to Exercise Market Power*

978. The LNG project for Dynegy illustrates two important themes of this case. (1) CB&I recognizes that with the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint, CB&I will attempt to leverage its market power and force customers to accept CB&I's terms and forego competitive bidding. (2) If a customer balks, CB&I will walk away and leave the customer to deal with higher-priced competitors.

Response to Finding No. 978:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, the proposed finding is directly contradicted by the evidence. The fact is that CB&I tried to submit a tank-only bid but Dynegy refused to let CB&I bid because it was satisfied with the three bids it had already received from foreign bidders. (*See* Puckett, Tr. 4559-60; Glenn, Tr. 4137; *see generally*, FOF 3.297-3.306).

979. In 2001, Dynegy announced that it would build an LNG regasification facility containing three LNG tanks in Hackberry, Louisiana. (Puckett, Tr. 4540).

Response to Finding No. 979:

Respondents have no specific response.

980. On the Dynegy project, in order to maximize competition and obtain the best price, Dynegy chose to "break the project up into pieces," rather than let one firm handle all phases of the project on a turnkey basis. (Puckett, Tr. 4543-44). CCFF 843. Dynegy separated the LNG tank contract from the EPC contract and sought competitive bidding for the LNG tanks. (Puckett, Tr. 4544). Dynegy's project manager explained that Dynegy chose to competitively bid the LNG tanks because "experience has shown us that when we can competitively bid a project...we will typically get what we think will be the best value." (*Id.* at 4571).

Response to Finding No. 980:

The proposed finding is misleading, incomplete and factually inaccurate. First, although the evidence establishes that Dynegy decided to break the Hackberry project into its major components, the evidence does not suggest, as the proposed finding implies, that Dynegy

decided to proceed in this manner to "maximize competition and obtain the best price." (*See* CCFF 980; Puckett, Tr. 4543-44). Second, the quotation cited in the last sentence of the proposed omits the fact, through the use of ellipses, that Mr. Puckett testified that competitive bidding is a good procedure when an owner has the time to conduct a bidding process. (Puckett, Tr. 4571). In many cases, an owner does not have the time or resources necessary to conduct a competitive bidding process. (*See generally,* FOF 3.460-3.467). Ultimately, an owner chooses the contracting method it prefers. (*See generally,* FOF 3.460-3.467).

981. In order to minimize competition and obtain the highest margin, CB&I attempted to force Dynegy to accept CB&I as a turnkey contractor so that it could supply the LNG tanks as well as facilitate the other portions of the project.

Response to Finding No. 981:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, the proposed finding is contradicted by evidence presented at trial. Dynegy actually rejected CB&I's turnkey proposal on two separate occasions, as well as CB&I's effort to submit a tank-only bid for this project. (Puckett, Tr. 4558-4559; Glenn, Tr. 4410; *see also* FOF 3.269, 3.270, 3.300).

982. Dynegy included CB&I on a list of prospective candidates to competitively bid for the FEED study, but CB&I "elected at that time to remove [its] name from consideration for performing the FEED study." (CX 518 at CB&I 019777-HOU; *see also* Glenn, Tr. 4244 (Glenn confirmed that CB&I elected not to participate in the FEED study proposal because it did not want to send its facility information on the tanks for others to evaluate)).

Response to Finding No. 982:

The proposed finding is misleading and incomplete. The proposed finding ignores the fact that CB&I ultimately submitted a proposal to become Dynegy's EPC contractor. (Glenn, Tr. 4128-29; *see also* FOF 3.270). Dynegy rejected this approach and disqualified CB&I as a bidder for the EPC portion of the job. (Puckett, Tr. 4558; Glenn, Tr. 4410; *see also* FOF 3.270).

983. Dynegy used a competitive bidding process to select its EPC contractor. Seeking as many competitors as possible, Dynegy interviewed CB&I, Kvaerner, Technip, Skanska, KBR, and Bechtel. (Puckett, Tr. 4544-46).

Response to Finding No. 983:

Respondents have no specific response.

984. CB&I refused to bid on the EPC portion of the project if it could not construct the facility on a turnkey basis, *i.e.*, be the entity that would perform the EPC function, including selecting the LNG tank supplier, and the entity that supplied the LNG tanks. (Glenn, Tr. 4242; Puckett, Tr. 4570). On November 20, 2001, Michael Miles, CB&I's representative to Dynegy, alerted Dynegy that CB&I would not bid because of an "internal company decision" that the "project as structured does not fit our corporate strategy." (CX 139 at CB&I 019781-HOU; *see also* Glenn, Tr. 4242).

Response to Finding No. 984:

The proposed finding is misleading, incomplete and factually inaccurate. Evidence cited by Complaint Counsel does not support this proposed finding. For example, Complaint Counsel erroneously cites CX 139 and Mr. Glenn's testimony to support its contention that CB&I refused to bid on Dynegy's EPC contract. (*See* CCFF 984). The testimony Complaint Counsel cites, however, refers to CB&I's initial decision not to bid on the LNG tank portion of the Dynegy project; a decision CB&I later reversed. (*See* Glenn, Tr. 4242, *see also* FOF 3.297-3.306). The fact is, CB&I submitted a proposal to become Dynegy's EPC contractor and Dynegy rejected CB&I's approach and disqualified CB&I as a bidder. (Puckett, Tr. 4558; Glenn, Tr. 4128-29, 4410; *see also* FOF 3.270). Dynegy selected Skanska/Whessoe based on a deal it negotiated for the Front End Engineering and Design ("FEED") work, Skanska's experience on recent LNG projects for other owners, its ability to execute the Hackberry project, and its willingness to perform the project on Dynegy's schedule. (Puckett, Tr. 4548-49; *see also* FOF 3.272).

985. CB&I preferred to bid Dynegy turnkey because "[t]urnkey, design build projects typically return higher margins than stand alone storage tank projects." (CX 660 at PDM-HOU005013). Executives at CB&I such as Mr. Scorsone acknowledge that turnkey is indicative

of "higher margins" to many industry participants. (Scorsone, Tr. 2812-13; *see* CX 431 at 46 (Glenn, Dep.)).

Response to Finding No. 985:

The proposed finding is misleading, inaccurate and lacking evidentiary support. For example, the first sentence erroneously attempts to support an affirmative statement about *CB&I's* intentions regarding the Dynegy project with a *PDM* document. (*See* CCFF 985; CX 660). The PDM document does not adequately support the proposed finding's assertion. The second sentence suffers from the same evidentiary deficiency. The proposed finding cites Mr. Scorsone's deposition testimony in which he is reading into the record sections of a PDM document. The citation does not support the proposition. (*See* Scorsone, Tr. 2812-13).

986. Dynegy's point person on the Hackberry project, William Puckett, understood CB&I's position to be that CB&I was "not interested in participating in the terminal portion of the project if [Dynegy was] going to competitively bid the LNG tanks." (CX 518 at CB&I 019777-HOU; Puckett, Tr. 4558; CX 1528 at CB&I 071381 ("CB&I...would not competitively bid the LNG tanks")).

Response to Finding No. 986:

The proposed finding is misleading, incomplete and factually inaccurate because it completely ignores the fact that CB&I submitted a proposal to become Dynegy's EPC contractor and Dynegy rejected CB&I's approach and disqualified CB&I as a bidder. (Puckett, Tr. 4558; Glenn, Tr. 4128-29, 4410; *see also* FOF 3.270). As one of the documents cited by Complaint Counsel reveals, CB&I had concerns about submitting a tank-only bid to one of its competitors and preferred a turnkey approach. (*See* CX 1528 at CB&I 071381; *see also* FOF 3.298). The fact is, CB&I ultimately decided to submit a tank-only bid to Dynegy after Dynegy assured it that its competitors would not have access to CB&I's bid. (*See generally* FOF 3.297-3.306).

987. Acceding to CB&I's ultimatum would have denied Dynegy the fruits of competitive bidding – lower LNG tank prices. Thus, on August 3, 2001, Dynegy informed

CB&I that it was dropped from consideration on the EPC contract. Dynegy reasoned that CB&I could not be expected to "provide a competitive price for the LNG tank, given that this scope would be self-performed by CB&I." (CX 516 at CB&I 019867-HOU).

Response to Finding No. 987:

The proposed finding fails to cite any evidence to support its argumentative first sentence and it is not an appropriate "finding of fact." In fact, the first sentence is contradicted by evidence showing that many owners prefer a sole-source contracting method as opposed to a competitive bidding process. (*See generally* FOF 3.460-3.467). Further, the proposed finding's third sentence is misleading and incomplete. The claim that Dynegy reasoned that CB&I could not "provide a competitive price" is not supported by the evidence (*See* CCFF 387; CX 516, at CB&I019867-HOU). CB&I believed that it could provide a competitive price for the LNG tanks and the balance of the plant that "would provide the best overall value to Dynegy." (CX 516, at CB&I019867-HOU).

988. CB&I urged Dynegy to reconsider. (Puckett, Tr. 4559; Glenn, Tr. 4245; CX 516 at CB&I 019867-HOU). CB&I's tactic was to remind Dynegy of the regulatory difficulties Dynegy would face without CB&I's experience and contacts. On August 14, 2001, Miles wrote Dynegy that "CB&I brings unmatched experience in preparing the documents describing the facility that are necessary for permitting and/or filings for FERC authorization permits... This critical stage of your project in Hackberry is best undertaken by CB&I, whom the permitting agencies, most especially FERC, know and respect." (CX 516 at CB&I 019867-HOU, CB&I 019868-HOU).

Response to Finding No. 988:

The proposed finding is misleading, inaccurate and incomplete. First, CB&I did not "urge CB&I to reconsider." The evidence shows that CB&I offered on two occasions to complete the project on a turnkey basis; Dynegy rejected both of CB&I's proposals. (Puckett, Tr. 4558-4559; Glenn, Tr. 4410; *see also* 3.269, 3.270, 3.300). Second, CB&I's sales pitch regarding its FERC experience is irrelevant because Dynegy was able to get the resources it needed to complete its FERC filing without CB&I's assistance. (Puckett, Tr. 4551-51; *see also*

FOF 3.312). In fact, FERC recently gave preliminary approval to Dynegy to build the Hackberry facility. (RX-926; *see also* FOF 3.525). The need to make a filing with FERC is not an entry barrier to the LNG market. (*See generally,* FOF 3.519-3.527).

989. On October 17, 2001, Dynegy chose Skanska, who would work with Black & Veatch, to perform the EPC portion of the project. (Puckett, TR. 4547-48; CX 138 at CB&I 019913). Skanska was chosen because it agreed to Dynegy's condition that the LNG tank supplier be selected from a competitive bidding process open to multiple suppliers, not just itself. (CX 138 at CB&I 019913-HOU).

Response to Finding No. 989:

The proposed finding is misleading, incomplete and factually inaccurate. Although the proposed finding attempts to establish Dynegy's reasoning behind choosing Skanska/Whessoe as its EPC contractor through a CB&I document, Dynegy itself is a better more reliable source of information. Mr. Puckett made it clear that Dynegy chose Skanska/Whessoe based on a deal it negotiated for the FEED work, Skanska's experience based on the recent work it had done for Enron in Dabhol, Skanska/Whessoe's ability to execute the Hackberry project, and its willingness to meet Dynegy's expected schedule. (Puckett, Tr. 4548-49; *see also* FOF 3.272).

990. In late 2001, Dynegy solicited tank pricing from CB&I, TKK/ATV, Technigaz, and Skanska/Whessoe. (Puckett, Tr. 4552-53). Black & Veatch was eager to have CB&I's bid because of "concerns that if we do not have a domestic tank price for that project that the prices that [Dynegy] would receive for those tanks would be higher." (Price, Tr. 622).

Response to Finding No. 990:

The proposed finding is misleading because it gives improper weight to Mr. Price's testimony. First, Mr. Price, as a Black & Veatch employee, is a head-to-head competitor of CB&I. (Price, Tr. 641; *see also* FOF 3.659). Second, Mr. Price's testimony is inconsistent because on the one hand he claims he is "concerned" about not receiving a domestic tank price but on the other hand he failed to solicit a budget price for a "domestic supplier" for the Dynegy

project. (Price, Tr. 603-04; *see also* FOF 3.661). Third, there is no evidence to suggest that Mr. Price ever shared his "concerns" with his client, Dynegy. Mr. Price did not even know that Dynegy was satisfied with the bids it received. (Price, Tr. 667; *see also* 3.664). In sum, Mr. Price's "concerns" should be given little weight. (*See* FOF 3.658-3.665).

991. CB&I refused to submit its LNG tank pricing information to Dynegy's EPC contractor, the Skanska/Black & Veatch team. (CX 517 at CB&I 019784-HOU).

Response to Finding No. 991:

Respondents have no specific response.

992. CB&I believed that construction by CB&I of the LNG tanks would aid Skanska in observing CB&I's crews, suppliers and construction methods. (CX 1528 at CB&I 071381). In an October 22, 2001 internal e-mail, CB&I's Marty Smith advised Miles against submitting a bid to Dynegy: "Mike, right now I can't *see* any merits to bid the tanks to this group. Besides Skanska, B&V is also a competitor... They may eventually get here but we don't need to give them any assistance." (CX 1528 at CB&I 071381).

Response to Finding No. 992:

The proposed finding is incomplete because it fails to account for the fact that CB&I had serious concerns about submitting its pricing and engineering designs to its competitor. (*See* FOF 3.297-3.306). When Dynegy promised not to share this information with Black & Veatch and agreed to review the bids itself, CB&I decided to submit a bid. (*See* FOF 3.302, 3.303).

993. CB&I advised Dynegy that it would submit a price for the LNG tanks only "directly to Dynegy" and that the bid would only be "a lump sum, firm fixed price proposal for the total EPC scope of the project." (CX 517 at CB&I 019784-HOU).

Response to Finding No. 993:

The proposed finding is misleading, inaccurate and incomplete because CB&I did not, as the proposed finding suggests, refuse to submit a bid unless it was allowed to bid on the total EPC scope of the project. The evidence contradicts the proposed finding because CB&I

eventually attempted to submit a tank-only bid. (Glenn, Tr. 4412; Puckett, Tr. 4578; *see also* FOF 3.3.03).

994. Dynegy rejected CB&I's conditions, and CB&I chose not to submit a bid for the LNG tanks. (CX 518 at CB&I 019777-HOU; Puckett, Tr. 4556-7; Glenn, Tr. 4248).

Response to Finding No. 994:

The proposed finding is misleading and incomplete because it fails to account for the fact that CB&I attempted to submit a tank-only bid. (Glenn, Tr. 4412; Puckett, Tr. 4578; *see also* FOF 3.3.03). CB&I initially declined to submit a tank-only bid because it had serious concerns about submitting its pricing and engineering designs to its competitor. (*See* FOF 3.297-3.306). When Dynegy promised not to share this information with Black & Veatch and agreed to review the bids itself, CB&I decided to submit a bid. (*See* FOF 3.302, 3.303). Dynegy *rejected* CB&I's bid offer. (*See* FOF 3.304).

995. Because CB&I refused to bid, Dynegy was "very concerned" about "maintaining competition" for the LNG tank. (Price, Tr. 609). Dynegy attempted to persuade CB&I to rethink its position: Dynegy "invested time and effort to insure that there would not be any conflict of interest," by establishing a procedure whereby CB&I's and other tank bids would be evaluated by someone other than Skanska. (CX 518 at CB&I 019777-HOU). Dynegy offered that if this procedure was not sufficient, CB&I should "please let us know what would meet your needs to bid the LNG tanks." (CX 518 at CB&I 019777-HOU).

Response to Finding No. 995:

First and foremost, Complaint Counsel completely misrepresents the record by asserting that "Dynegy was 'very concerned' about 'maintaining competition'". (CCFF 995). First, Complaint Counsel attempts to support this false statement by citing Brian Price, an employee of Black & Veatch and *not* Dynegy. The flaws in Mr. Price's testimony have been extensively addressed. (*See* RFOF 990; *see* also FOF 3.658-3.665). Second, and more importantly, the proposed finding entirely ignores the fact that Mr. Puckett, of Dynegy, testified that he had *no doubt* Dynegy did the right due diligence in selecting competent bidders to bid on

the LNG tanks. (Puckett, Tr. 4587). Dynegy was satisfied with the three tank-only bids it received. (Puckett, Tr. 4559-60; Glenn, Tr. 4137; *see also* FOF 3.304). The first sentence of the proposed finding is patently false and contrary to the evidence.

The remaining part of the proposed finding is also misleading and inaccurate. Complaint Counsel incorrectly asserts that CB&I failed to bid because it wanted become the EPC contractor of the entire terminal. Although CB&I initially made a turnkey pitch, which Dynegy rebuffed, Complaint Counsel fails to recognize that CB&I was concerned about submitting a tank-only bid because it did not want Black & Veatch and Skanska/Whessoe to view its bidding documents. (*See generally*, FOF 3.3.297-3.306). Complaint Counsel fails to account for the fact that in CX 518, the document cited in the proposed finding, Dynegy finally recognized CB&I's concern and for the first time offered to conceal CB&I's bid documents from Black & Veatch. (CX 518 at CB&I 019777-78-HOU). Dynegy's assurances satisfied CB&I's concerns and led CB&I to attempt to submit a tank-only bid; Dynegy rebuffed this attempt. (See FOF 3.303, 3.304). Complaint Counsel completely ignores these facts.

996. By the time CB&I changed its mind, it was too late. Dynegy felt compelled to decline CB&I's offer to bid "due to both the timing ... it was so late in the bidding cycle in that we had received bids, if I recall, that I did not feel it would be fair to the other bidders." (Puckett, Tr. 4572).

Response to Finding No. 996:

The proposed finding is incomplete and misleading because it ignores the fact that one of the reasons Dynegy would not accept CB&I's late bid was that Dynegy was satisfied with the three bids it had already received. (Puckett, Tr. 4559-60; *see also* FOF 3.304). Dynegy had ample time to accept CB&I's late bid because CB&I attempted to submit its bid only two or three weeks after Dynegy made its offer to review the bids itself. (Glenn, Tr. 4136; *see also* FOF 3.303). In fact, after learning from Mr. Puckett that Dynegy would not accept its bid, Mr. Glenn

personally phoned Dynegy's CEO, Chuck Watson. (Glenn, Tr. 4137; *see also* FOF 3.305). Based on his conversation with Mr. Watson, Gerald Glenn believed Dynegy was perfectly happy with the three bids it received. (Glenn, Tr. 4137; *see also* FOF 3.305) (state of mind). CB&I's perception was that Dynegy believed it had everything it needed to proceed with the Hackberry project and did not need CB&I's bid. (Glenn, Tr. 4137; *see also* FOF 3.305) (state of mind).

997. Dynegy is likely to pay a higher price for the LNG tanks supplied by TKK, Whessoe or Technigaz than it would if CB&I had bid.

Response to Finding No. 997:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." In fact, the proposed finding is contradicted by the evidence as Mr. Puckett testified that all three bids were within Dynegy's expected price range; Dynegy was satisfied with the bids. (Puckett, Tr. 4557, 4559-60; *see also* FOF 3.288, 3.304).

998. Dynegy does not have the "staff, experience and knowledge to analyze the bids and make an informed decision," so it must rely on the analysis of its consultants about LNG tank prices. (CX 138 at CB&I 019913-HOU).

Response to Finding No. 998:

The proposed finding is misleading and incomplete because it relies on a CB&I document to support an assertion about Dynegy's ability to analyze the Hackberry bids. (*See* CCFF 998; CX 138 at CB&I 019913-HOU). Complaint Counsel has provided no credible evidence to support its finding. In fact, the evidence contradicts this finding: Dynegy agreed to accept CB&I's bid itself and analyze the bids without Black & Veatch's assistance. (CX 518 at CB&I 019777-78-HOU).

999. Dynegy's consultant, Brian Price of Black & Veatch, was involved in the bidding for the Memphis project in 1994 and has first-hand knowledge about the higher prices of foreign suppliers. There, Black & Veatch partnered with TKK against CB&I, PDM and Lotepro/Whessoe. As explained earlier, TKK's LNG tank price was at least 43% higher, and Whessoe's price was at least 59% higher than CB&I's and PDM 's tank prices. CCFF 937.

Response to Finding No. 999:

The proposed finding is misleading, incomplete and inaccurate because it insinuates that Brian Price had access to and knowledge of the Dynegy bids. This is simply not accurate. Mr. Price specifically testified that he never saw the bids. (Price, Tr. 610; *see also* 3.660). The flaws in Mr. Price's testimony have been extensively addressed. (*See* RFOF 990; *see also* FOF 3.658-3.665). Further, the proposed finding attempts to buttress Mr. Price's credibility by pointing to his knowledge about the 1994 Memphis bids. This is a hollow argument, however, as the irrelevancy of the Memphis bids has already been established in detail. (*See* FOF 3.493-3.508; *see also* FOF 3.135).

1000. Based on his experience on the Memphis project and industry knowledge, Mr. Price expressed "concerns" that the price Dynegy will pay for the LNG tanks would be "higher" without CB&I's participation in the bidding. (Price, Tr. 622).

Response to Finding No. 1000:

The irrelevancy of Mr. Price's "concerns," particularly in light of the fact that he never felt the need to share his concerns with his client, have been well established. (*See* RFOF 990, 995, 999; *see* also FOF 3.658-3.665).

1001. CB&I also knows that its LNG prices in the United States are lower than the prices of its Dynegy competitors. CB&I learned from the Memphis bidding example that foreign firms could not provide "economical" or "competitive" LNG prices. CCFF 952, 939. CB&I tells the public in its SEC filings that it has a "competitive advantage" against foreign firms because of its superior knowledge of local business conditions. CCFF 426. CB&I's merger integration and planning documents state that CB&I will use its "pricing advantage" against foreign competitors to its strategic advantage. CCFF 433.

Response to Finding No. 1001:

This finding is inaccurate, misleading, and unsupported by the evidence. Complaint Counsel allegations regarding CB&I's knowledge of competitors' costs is wholly without support. In fact, recent information, including information regarding bidding contests elsewhere in North America, has led CB&I to believe that its competitors' costs are equal to or

lower than CB&I. (*See, e.g.*, FOF 3.236, 3.323, 3.325, 3.330, 3.451-3.453) Complaint Counsel's claim that CB&I has "learned" anything from the Memphis project is unsupported by the evidence, as it is evident that the Memphis project provides only stale, dated data. (*See, e.g.*, FOF 3.493-3.508). Further, this finding is misleading to the extent it relies on CB&I's prior SEC filings, as those filing are very general in nature and do not specifically examine particular product lines, such as LNG tanks. Any statements by CB&I regarding its competitors' costs are naturally made without specific information regarding those costs, as CB&I has no access to that information. Finally, this finding is misleading to the extent it implies that CB&I has any ability to dictate terms to LNG owners. As the Dynegy fact pattern made clear, CB&I cannot attempt to do so without risking the loss of significant work. (*See* FOF 3.297-3.306).

1002. Technigaz cannot provide competitive tank prices. Technigaz/Zachry submitted a bid for the LNG tanks, but **[xxxxxxxxxxxxxxxxxxxxxxxxxxx]** in August of 2002. (Fahel, Tr. 1632, *in camera*).

Response to Finding No. 1002:

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, the fact that Dynegy ultimately eliminated **[xxxxxxxxxxxxxxx]** from the bidding process does not mean **[xxxxxxxxxxx]** is unable to provide competitive pricing; obviously each project can only have one winner. The proposed finding is further contradicted by the fact that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4691; *see also* FOF 3.307).

1003. It remains to be seen whether the Dynegy project can be completed on a reliable and timely basis, in the same manner that CB&I and PDM did throughout the 1990s when they won every LNG project in the United States. Black & Veatch is concerned that the foreign suppliers will not meet Dynegy 's construction schedule, a concern Black & Veatch would not have had with PDM. (Price, Tr. 626-628).

Response to Finding No. 1003:

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, the allegation that Black & Veatch and Mr. Price are concerned about a foreign tank suppliers' ability to meet Dynegy's construction schedule is suspect because they did not express such a concern to Dynegy. Further, Black & Veatch is partnered with one of the companies it is concerned about, Skanska/Whessoe. (See Puckett, Tr. 4579; *see also* FOF 3.64). Despite its "concerns," Black & Veatch appears to be touting its alliance. (Eyermann, Tr. 6992; RX 935, at CHE0357; *see also* FOF 3.65) (state of mind). The flaws in Mr. Price's testimony have been extensively addressed. (*See* RFOF 990; *see* also FOF 3.658-3.665).

1004. Respondents contend that the Dynegy project demonstrates that entry by foreign firms has occurred and is sufficient to restrain CB&I from engaging in anticompetitive conduct. Respondents' contention is belied by Gerald Glenn's statements to the investment community on October 31, 2002, which is void of any perceived competitive threat:

> Well, I don't know that there are fewer. There are some that have run on hard times. There are those that have stubbed their toe. You know, you're only as good as your last job. And we're really proud of the fact that, you know, a lot of owners out there, if they go to build a sophisticated project, like an LNG project or an LNG tank, **they don't want to take a chance on a low price and a potential second class job or shoddy welding or any of that kind of stuff**. The kind of work that we do is very specialized, very sophisticated. We have an excellent track record.
>
> 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.**

(CX 1731 at 44-45) (emphasis supplied).

Response to Finding No. 1004:

This finding is inaccurate and misleading to the extent it relies on CX 1731. CX 1731 does not "belie" the fact that foreign competitors have successfully entered the LNG market. Rather, it suggests that CB&I does not understand its competitors' ability to price low when CB&I cannot earn a profit on the same price. Further, Mr. Glenn does not have foundation to make statements about competitors' costs. Complaint Counsel has not provided any evidence that indicates that CB&I knows its competitors costs. Conversely, the evidence indicates that CB&I does *not* know its competitors' costs. (FOF 7.82-7.88) If CB&I knew its competitors' costs and had a cost advantage, it would win every project. However, CB&I has lost more than half the jobs available post-merger. (Harris, Tr. 7223). There is simply no support for the notion that CB&I is only losing because competitors are simply "taking a big dive," and Mr. Glenn has never offered testimony suggesting that he is knowledgeable about competitors' costs. Finally, ultimately customers will pay less *if* what Mr. Glenn is saying is true -- and it represents the competitive environment CB&I would be competing in. In fact, the Dynegy fact illustrates CB&I's lack of information regarding its competitors' costs. (*See* RFOF 1001).

1005. Respondents presented no evidence that CB&I's post-merger strategy with Dynegy was influenced by the presence of TKK, Technigaz and Whessoe. While Respondents point to the fact that some foreign firm will likely win the LNG tank contract with Dynegy, Respondents did not present any business documents indicating that its executives felt competitive pressure because of the foreign suppliers.

Response to Finding No. 1005:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, Mr. Glenn and Mr. Scorsone testified extensively regarding CB&I's current view of competition in the LNG market. (*See* FOF 3.451-3.459).

1006. The teaching of the Dynegy project is that CB&I attempts to leverage its dominant position against customers in order to extract higher prices and margins. In order to

avoid CB&I' s stranglehold, some customers perceive no other choice but to seek inferior alternatives. This is neither competition nor sufficient entry. It is an anticompetitive effect.

Response to Finding No. 1006:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." What the Dynegy project truly teaches is that owners have access to alternative LNG tank suppliers. Dynegy received three satisfactory bids from three separate LNG tank suppliers. (Puckett, Tr. 4559-60; *see also* FOF 3.304). Dynegy was so satisfied with the bids it received that it was able to completely exclude CB&I from its bidding process. (Puckett, Tr. 4559-60; Glenn, Tr. 4137; *see generally,* FOF 3.256-3.315).

19. *The Yankee Gas Project: CB&I Attempts to Exercise Market Power*

1007. The LNG project for Yankee Gas is similar to the themes of the Dynegy project, except that with Yankee Gas, CB&I's strong-arm tactics have achieved considerable success.

Response to Finding No. 1007:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, it is flatly contradicted by the record evidence. (*See* Reply Brief at Part III, *supra*).

1008. In 2001, Yankee Gas, a natural gas distribution company, initiated plans to construct a 360,000-barrel LNG peak shaving facility in Waterbury, Connecticut. (JX 21 at 17-18 (Andrukiewicz, Dep.)).

Response to Finding No. 1008:

Respondents have no specific response.

1009. During the first quarter of 2001, Yankee Gas retained the services of CHI Engineering ("CHI"), a consulting firm, to perform a preliminary engineering and budget study. (JX 21 at 23 (Andrukiewicz, Dep.); CX 1507 at CB&I 059483).

Response to Finding No. 1009:

Respondents have no specific response.

1010. On April 23, 2001, CHI issued a request for prices exclusively for the LNG tank portion of the project rather than "facility turnkey pricing." (CX 1507 at CB&I 059483).

Response to Finding No. 1010:

The proposed finding is misleading and incomplete because it fails to acknowledge that CHI sent a second request of prices for the liquefaction process. (CX 1507, at CB&I 059483).

1011. CHI's request was sent to CB&I, Skanska/Whessoe and Technigaz. (CX 1507 at CB&I 059483; JX 21 at 24 (Andrukiewicz, Dep.)).

Response to Finding No. 1011:

Respondents have no specific response.

1012. As with the Dynegy project, CB&I did not want to deal with a middleman. CB&I wanted the owner's ear alone and refused to submit pricing information unless it was selected as the turnkey contractor.

Response to Finding No. 1012:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." In fact, the proposed finding is flatly contradicted by the evidence as CB&I submitted a tank-only budget price to CHI. (*See* Andrukiewicz, Tr. 6445; RX 4, at 4/4; *see also* FOF 3.342).

1013. On May 4, 2001, Frey wrote Chris Beschler, VP of Operations at Yankee Gas, that CB&I wanted to do the work on a turnkey basis, emphasizing its experience and capability in that type of project. (CX 417 at CB&I 026845-6-HOU).

Response to Finding No. 1013:

The proposed finding is misleading, incomplete and factually incorrect. Although Mr. Frey's letter highlighted CB&I's turnkey experience, the letter explicitly stated that Mr. Frey hoped to discuss with Mr. Beschler "how CB&I would be an excellent choice to support *any* project Yankee Gas Services may have in the LNG industry." (CX 417, at CB&I 026845-HOU)

(emphasis added). Thus, the proposed finding is clearly contradicted by the evidence because CB&I was willing to discuss and support any Yankee Gas project, be it tank-only or turnkey.

1014. CB&I told Yankee Gas that it would not submit pricing information for the tank portion to CHI because CHI was a "competitor," even though in its own internal documents CB&I refers to CHI as a "relatively small consulting/engineering firm" in New Hampshire. (CX 430 at CB&I 026934-HOU; CX 1507 at CB&I 059483). There is no evidence that CHI has ever constructed any kind of field-erected storage tank in the United States.

Response to Finding No. 1014:

The proposed finding is inaccurate and misleading. It completely ignores the fact that CB&I *did* submit tank-only budget pricing to CHI. (*See* Andrukiewicz, Tr. 6445; RX 4, at 4/4; *see also* FOF 3.342). Thus, the proposed finding is misleading and factually inaccurate. Additionally, it is undisputed that CB&I viewed CHI as a competitor. (*See* CX 430, at CB&I 023964-HOU; Andrukiewicz, Tr. 6466; *see also* FOF 3.355). CB&I's concerns were well-founded, as CHI expressed an interest in being involved in the project. (Andrukiewicz, Tr. 6459-60; *see also* FOF 3.354). Based on CHI's interest in competing for the project, Yankee Gas determined that CHI should not provide further engineering services. (Andrukiewicz, Tr. 6450; *see also* FOF 3.354). Yankee Gas considers CHI to be a potential EPC contractor. (Andrukiewicz, Tr. 6450; *see also* FOF 3.354).

1015. CB&I's Eric Frey, the sales representative to Yankee Gas, vowed to "make every effort to restructure how the project will be bid and executed." (CX 430 at CB&I 026934-HOU).

Response to Finding No. 1015:

The proposed finding is irrelevant and misleading to the extent it implies that CB&I has any specific ability to force Yankee Gas or any other owner to structure a project in a particular way. (*See* FOF 3.460-3.467). It is the right of the owner to structure the project as it see fit. Further, the proposed finding is misleading to the extent it implies that CB&I withheld

pricing in an attempt to exercise market power; in fact, CB&I did submit tank-only budget pricing to CHI. (*See* Andrukiewicz, Tr. 6445; RX 4, at 4/4; *see also* FOF 3.342).

1016. CB&I acquiesced only slightly to Yankee Gas' request that CB&I temporarily table the turnkey issue, and first provide pricing information for the LNG tank alone. Frey "agreed but indicated [to Yankee Gas] that we would not be putting our best numbers on the table until we had the opportunity to meet directly with Yankee Gas." (CX 1507 at CB&I 059483). Frey instructed his team to prepare budgetary pricing "with very little detail." (CX 430 at CB&I 026934-HOU). In the meantime, Frey would "continue to pursue a meeting with Yankee Gas as soon as possible." (CX 430 at CB&I 026934-HOU).

Response to Finding No. 1016:

The proposed finding is misleading and incomplete. CB&I submitted tank-only budget pricing to CHI in June of 2001. (RX 4, at 4/4). Further, the proposed finding is misleading to the extent it implies that CB&I was attempting to "strong arm" Yankee Gas by providing rough pricing. In fact, Yankee Gas *only requested* "broad" numbers from CB&I. (CX 1507, at CB&I 059483). Yankee Gas only wanted enough information to make a "broad 'go/no go' decision." (CX 1507, at CB&I 059483). Further, this finding ignores the fact that CB&I also did not to submit precise numbers to CHI because CB&I viewed CHI as a potential competitor. (CX 1507, at CB&I 059483).

1017. On June 27, 2001, CB&I submitted a range of budget prices "with very little detail" to CHI for the tank portion of the project. (CX 1507 at CB&I 059483; CX 430 at CB&I 026934-HOU).

Response to Finding No. 1017:

The proposed finding is misleading and factually inaccurate. CB&I submitted its budgetary pricing to CHI on June 12, 2001. (RX 4, at 4/4). CB&I submitted rough pricing because: (1) the owner requested "broad" numbers; and (ii) CB&I viewed CHI as a potential competitor. (*See* RFOF 1016).

1018. CB&I understood that Yankee Gas was relatively inexperienced in the LNG industry and would have to rely on consultants to advise it on tank pricing. At a September 8, 2001, meeting with CB&I, Yankee Gas "readily admitted that they know very little about the

LNG industry and that they were banking heavily on the report from CHI." (CX 1507 at CB&I 059484).

<u>Response to Finding No. 1018:</u>

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." While Complaint Counsel correctly states that Yankee Gas relied on CHI's preliminary engineering report, it omits the fact that CHI's preliminary report indicated Yankee Gas would be required to build a double containment LNG tank. (Andrukiewicz, Tr. 6443; *see also* FOF 3.344). CHI's report specifically proposed a double containment tank, with a concrete roof, in which both the inner tank and outer tank would be made of concrete. (Andrukiewicz, Tr. 6464-65; *see also* FOF 3.344). The concrete double containment tank cited in CHI's report was specifically related to the Skanska/Whessoe proposal not the CB&I proposal. (Andrukiewicz, Tr. 6447; *see also* FOF 3.344). Thus, Yankee Gas was relying on CHI's recommendation that Yankee Gas use the Skanska/Whessoe double concrete containment LNG tank.

1019. In October of 2001, CHI announced its "intent to bid the [Yankee Gas] project turnkey." (CX 1507 at CB&I 059484).

<u>Response to Finding No. 1019:</u>

The proposed finding is misleading and incomplete because despite announcing its intentions in late 2001, Yankee Gas has not yet begun a pre-qualification process let alone solicit bids. (Andrukiewicz, Tr. 6451-52; *see also* FOF 3.356). In fact, Yankee Gas replaced CHI with SEA Consultants. (*See* FOF 3.353, 3.354). SEA Consultants is currently responsible for the Yankee Gas bidding process. (*See* FOF 3.354).

1020. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx** " (CX 1507 at CB&I 059484; *see also* CX 787 at CB&I 065244, *in camera*) (**xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**)).

Response to Finding No. 1020:

The proposed finding is misleading and factually inaccurate. Complaint Counsel erroneously cites CB&I documents to support affirmative statements about Yankee Gas. Complaint Counsel failed to present any evidence that CB&I submitted a total facility proposal to Yankee Gas. Further, Yankee Gas is not limited to two tank suppliers as Mr. Andrukiewicz testified that Yankee Gas has many potential tank constructors available. Although Yankee Gas has not yet started its pre-qualification procedure, it would consider qualifying Skanska/Whessoe, Technigaz, CB&I and CHI for the Waterbury project. (Andrukiewicz, Tr. 6453-54; *see also* FOF 3.357). Yankee Gas has not disqualified any company from the pre-qualification process. (Andrukiewicz, Tr. 6452-53; *see also* FOF 3.357). Further, Complaint Counsel fails to recognize that CHI's preliminary engineering report, a report Yankee Gas is undeniably relying upon, recommended the Skanska/Whessoe tank design. (*See* RFOF 1018). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4685; *see also* FOF 3.351). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Jolly, Tr. 4693; *see also* FOF 3.351).

1021. As CB&I had direct access to Yankee Gas, CHI turned to turn to higher-priced foreign firms for bids on the LNG tank. CHI received pricing information from Whessoe and Technigaz. (JX 21 at 24 (Andrukiewicz, Dep.); CX 1507 at CB&I 059484).

Response to Finding No. 1021:

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Additionally, the first sentence is unintelligible. The cited evidence in no way supports Complaint Counsel's allegation that current contracts are "higher-priced."

1022. CB&I knows from the Memphis bidding experience and other sources that Whessoe and other foreign firms cannot provide "economical" or "competitive" LNG tank prices in the United States. CCFF 952, 939.

Response to Finding No. 1022:

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." In fact, the proposed finding is contradicted by the evidence as CB&I believes that the new foreign competitors pose a major threat on U.S. LNG projects. (*See generally* FOF 3.451-3.459). Foreign competition poses an even greater threat for the Yankee Gas project as Yankee Gas appears to be favoring a concrete double containment tank for which CB&I does not have a design. (Andrukiewicz, Tr. 6447; Glenn, Tr. 4141; Scorsone, Tr. 4989; *see also* FOF 3.344, 3.346). It is also well established that the 1994 Memphis Gas bidding process is irrelevant to foreign LNG contractors' current pricing. (*See* FOF 3.493-3.508).

1023. Reasonably assured that its Yankee Gas competitors cannot undermine it and without PDM as a restraint, CB&I is free to exercise market power. Thus, CB&I's budget estimate for the Yankee Gas project anticipates a margin of **[xxx]**, well-above its pre-merger levels. (RX 54 at CB&I 026812-HOU, *in camera*; CX 421 at CB&I 026843-HOU; **xxxxxxx**, Tr. 5317, *in camera*). CB&I cited the price paid for the Cove Point LNG tank in setting the price for Yankee Gas. (CX 421 at CB&I 026843-HOU ("Yankee Gas margin **xxxxx**, Cove Point sold @ **xxxxxxx** with **xxxx** profit")).

Response to Finding No. 1023:

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." The first sentence is also contradicted by the evidence as described in RFOF 1022. The proposed finding's contention that CB&I's budget price to Yankee Gas was significant is likewise meritless. It is well established that budget pricing is inaccurate and unreliable for the purpose Complaint Counsel seek to use it for. (FOF 7.1-7.34). Additionally, Complaint Counsel failed to establish that the documents it relies upon were even submitted to Yankee Gas.

1024. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** (CX 787 at CB&I 065242, *in camera*).

Response to Finding No. 1024:

The proposed finding is misleading and inaccurate because it relies on a document that is over a year old. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* FOF 3.361). Yankee Gas has left all its options open. (Andrukiewicz, Tr. 6453-54; *see also* FOF 3.357).

1025. Respondents presented no evidence that its post-merger strategy with Yankee Gas was negatively impacted by any competitor, foreign or domestic.

Response to Finding No. 1025:

The proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Further, Mr. Glenn and Mr. Scorsone testified extensively regarding CB&I's current view of competition in the LNG market. (*See* FOF 3.451-3.459). Both testified that foreign competition posed a major threat on this job, especially if Yankee Gas chooses a full containment tank. (*See* FOF 3.360).

1026. If PDM had not been acquired by CB&I, Yankee Gas would be in a better negotiating position because it would have had three bidders instead of two today, one of whom – CHI – appears to have little experience in the construction of LNG tanks. Marc Andrukiewicz, Director of Gas Management at Yankee Gas, confirms that if PDM "were a separate entity ... I would be looking to as many potential constructors of these facilities as is reasonably possible to ask to bid. That serves our company the best." (JX 21 at 55 (Andrukiewicz, Dep.)).

Response to Finding No. 1026:

The first sentence of the proposed finding fails to cite any evidence to support its conclusions and is not an appropriate "finding of fact." Additionally, the proposed finding fails to recognize that Yankee Gas has a large number of tank constructors from which it can choose. (Andrukiewicz, Tr. 6453-54; *see also* FOF 3.357). There is no evidence in the record that Yankee Gas would have more options available to it absent the Acquisition. **[xxxxxxxxxx**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Jolly, Tr. 4693-94; *see also* FOF 3.163).

20. *Post-Merger LNG Margins Are Substantially Higher than Pre-Merger Margins*

1027. Respondents' business records show pre-merger margins on LNG projects ranging from **xxx** to **xxxx**. CCFF 1029-1033, 1037.

<u>Response to Finding No. 1027:</u>

The proposed finding is factually incorrect, misleading, and is unsupported by the evidence for the reasons discussed in RFOF 1029-1033, 1037.

1028. CB&I's business records show post-merger margins on LNG projects ranging from **xxx** to above **xxxx**. CCFF 1038-1041.

<u>Response to Finding No. 1028:</u>

The proposed finding is factually incorrect, misleading, and is unsupported by the evidence for the reasons discussed in RFOF 1038-1041.

1029. A 1997 overview of CB&I's business in North America records that CB&I's "Comparative Margin Levels" for "low temp/cryogenic [all the relevant products]" were 2.5% for "average total work sold," and 8-10% for "negotiated" business. CX 227 at CB&I-PL 045109).

<u>Response to Finding No. 1029:</u>

The proposed finding is misleading and factually incorrect. First, Complaint Counsel failed to question any of Respondents' witnesses, despite having ample opportunity, about the cited page contained in CX 227. Therefore, Complaint Counsel is merely speculating as it attempts to misconstrue terms such as "Comparative Margin Levels" and "Average Total Work Sold". Complaint Counsel has no idea what is or is not included in "Comparative Margin Levels" or in "Average Work Sold." Second, the line on this document referring to "low temp/cryogenic" products does not refer to "all relevant products." There are various other "low temp/cryogenic" products that CB&I builds, such as ammonia tanks, that are not relevant

products in this proceeding. In fact, this document is a snapshot in time referring to 1997 margin levels. However, in 1997, CB&I sold no LNG, LPG, or TVC work. (CCFF 136, 172, 192). Thus, at best, CX 227 shows that LIN/LOX tanks and other non-relevant products had the margins referenced in 1997. It does not identify what margins were before or after 1997, or what margins were on LNG, LPG, or TVC projects.

1030. In 1994, Memphis Light, Gas & Water sought bids for an LNG tank to be constructed at Capleville, Tennessee. CB&I quoted a price of $8,668,306 to Memphis Light, Gas & Water for its LNG tank. CB&I's price included a margin of **[xxxx]**. (CX 906 at CB&I 031074-HOU, *in camera*).

Response to Finding No. 1030:

The proposed finding is factually incorrect, misleading, ambiguous, and is even flatly inconsistent with Complaint Counsel's previous proposed findings. First, Complaint Counsel cites to a page on CX 906, without questioning a single CB&I witness about it. This page is an internal document entitled, **[xxxxxxxxxxxxxxxxxxxxxxx]** (CX 906 at CB&I 031074-HOU) (emphasis added). Second, the term "margin" in CX 906 does not refer to the gross margin which would include SG&A, and a technology services fee ("TSF"), as well as profit. In the margin comparisons Complaint Counsel is making throughout its proposed findings, Complaint Counsel goes back and forth between profit margins and gross margins, thus making apples to oranges comparisons. Third, there is no record evidence indicating that the pricing contained in CX 906 was ever sent to a customer, as it was developed as part of an internal re-estimating exercise that was conducted seven years after the 1995 Memphis bid. (Scorsone, Tr. 4984-85) (FOF 3.637-3.641). Fourth, Complaint's Counsel's speculation of CX 906 is inconsistent with the price that Complaint Counsel alleges CB&I bid for the Memphis project in CCFF 935.

1031. Prior to the acquisition, CB&I was the sole-source contractor for the Pine Needle Peakshaver Project. In 1995, CB&I quoted a price of **[xxxxxxxxxxxx]** for the Pine Needle LNG tank, including a **[xxxxx]** margin. (CX 906 at CB&I 031075-HOU, *in camera*).

<u>Response to Finding No. 1031:</u>

The proposed finding is factually incorrect, ambiguous and misleading. First, Complaint Counsel cites to a page on CX 906, without questioning a single CB&I witness about it. This page is an internal document entitled, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 906 at CB&I 031074-HOU) (emphasis added). Second, the term "margin" in CX 906 refers to the profit margin, and does not refer to gross margin, which would add profit margin, SG&A, and TSF. (*See e.g.,* RX 594 at CB&I 060834). Third, there is no record evidence indicating that the pricing contained in CX 906 was ever sent to a customer, as it was developed as part of an internal re-estimating exercise. (Scorsone, Tr. 4984-85) (FOF 3.637-3.641).

1032. In 1997, CB&I priced an LNG tank for Columbia Gas, to be built in Ohio, at **[xxxxxxxxxxxxx]**, including a margin of **[xxxx]**. (CX 168 at CB&I-PL007243, *in camera*).

<u>Response to Finding No. 1032:</u>

The proposed finding is incomplete, inaccurate, misleading, irrelevant and not supported by the evidence. First, Complaint Counsel cites to a page on CX 168, without questioning a single CB&I witness about it. Second, the proposed finding refers to a budget price, as noted on the cited page: **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx] (**CX 168 at CB&I-PL007243). Margins contained in budget prices are not remotely similar to, or representative of, actual fixed, firm priced bids. (FOF 7.1-7.38). Moreover, the term "margin" in CX 168 refers to the profit margin, and does not refer to gross margin, which would add profit margin, SG&A and TSF. (*See e.g.,* RX 594 at CB&I 060834). **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CX 168 at CB&I-PL007238).

1033. In 1997, Southern Union Company also solicited pricing for an LNG tank to be constructed at Kansas City, Missouri. CB&I submitted a price for the LNG tank of **[xxxxxxxxxx]** with a margin of **[xxxx]**. (CX 613 at CB&I-PL010926, *in camera*).

<u>Response to Finding No. 1033:</u>

The proposed finding is incomplete, inaccurate, misleading, irrelevant and not supported by the evidence. First, the proposed finding refers to a budget price as noted on the page Complaint Counsel cites: **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxx] (**CX 613 at CB&I-PL010926). Budget prices (and margins contained therein) are not remotely similar to, or representative of, actual fixed, firm priced bids. (FOF 7.1-7.38). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.]** (CX 613 at CB&I-PL010922-23). Finally, the term "margin" in CX 613 refers to profit margin and does not refer to gross margin, which adds profit margin, SG&A, and TSF. (*See e.g.*, RX 594 at CB&I 060834).

1034. In a 1998 sales document, PDM lists an LNG tank for Westcoast, Vancouver as one with a "Pending Quot[e]" of $26,676,000 with a margin of $2,861,000. (CX 426 at PDM-HOU016215).

<u>Response to Finding No. 1034:</u>

The proposed finding is misleading to the extent it suggests that PDM's margin was calculated the same way that CB&I's margin is or was calculated. The term "margin" in CX 426 refers to the profit margin and was not referring to gross margin, which adds profit margin, SG&A, and TSF. No witness at trial ever testified about CX 426. There is no evidence suggesting whether this pricing was actually given to the customer, given as a firm, fixed price bid, or whether it was given as a budget price.

1035. In 1999, Citizens Gas sought pricing information for an LNG tank to be constructed at Indianapolis, Indiana. PDM responded with a price of $15,000,000, including a margin of $2,000,000. (CX 1038 at PDM-HOU011315).

Response to Finding No. 1035:

The proposed finding is misleading and not supported by the evidence. Complaint Counsel failed to question a single witness at trial regarding CX 1038. Further, there is no evidence that PDM actually submitted a price to Citizens Gas. Even if PDM submitted a price, there is no evidence suggesting whether it was a budget price or a fixed, firm bid. The finding is also misleading to the extent it suggests that PDM's margin was calculated the same way that CB&I's margin is or was calculated. The term "margin" is ambiguous, and Complaint Counsel failed to ask any witness what the margin in CX 1038 refers to.

1036. In March 2000, CB&I quoted a price of **xxxxxxxxxxxx** to Columbia LNG for the Cove Point LNG tank, including a **xxxxxx** margin. (RX 127 at CB&I-H008204).

Response to Finding No. 1036:

The proposed finding is factually incorrect, misleading, ambiguous, and not supported by the evidence. First, no witness testifed at trial regarding RX 127. Thus, any conclusions that Complaint Counsel draws from this document is mere speculation. Second, there is no evidence that the alleged pricing was ever sent to Columbia, as the document is titled "Bid Review" and states "To Be Completed Prior to Final Proposal Submittal." (RX 127 at CB&I-H008200). The finding is also misleading to the extent it suggests that PDM's margin was calculated the same way that CB&I's margin is or was calculated. The term "margin" is ambiguous, and Complaint Counsel failed to ask any witness what the margin in RX 127 refers to.

1037. PDM's pre-acquisition quote to Columbia LNG for the Cove Point project was **xxxxxxxxxx**, with a profit of **xxxxxxxxxx** and an SG&A fee of **xxxxxxxxxx**. (CX 1058 at PDM-HOU017465).

Response to Finding No. 1037:

The proposed finding is factually incorrect, misleading, ambiguous, and not supported by the evidence. First, no witness testifed at trial regarding CX 1058. Thus, any conclusions that Complaint Counsel draws from this document is mere speculation. Second, there is no evidence that the pricing was ever sent to Columbia. The finding is also misleading to the extent it suggests that PDM's profit was calculated the same way that CB&I's profit is or was calculated. The terms "profit" and "SG&A" are ambiguous, and Complaint Counsel failed to ask any witness whether PDM used these terms consistent with CB&I. The proposed finding is also misleading and inaccurate to the extent that Complaint Counsel is trying to compare PDM's pricing contained in CX 1058 to CB&I's pricing contained in RX 127, as the two prices are wholly inconsistent with each other.

1038. In June 2001, four months after the acquisition, CB&I provided Yankee Gas with pricing information for its LNG Tank to be built in Waterbury, Connecticut. The price provided to Yankee Gas included a **[xxxx]** margin. (**xxxxxxxx**, Tr. 5317, *in camera*; CX 421 at CB&I 026843-HOU).

Response to Finding No. 1038:

The proposed finding is factually incorrect, misleading, ambiguous, and not supported by the evidence. First, there is no evidence that the pricing contained in the proposed finding was ever sent to Yankee Gas, as neither CX 421 nor Mr. Scorsone's testimony support this. In fact, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5316-17). Second, Yankee Gas does not plan on receiving firm, fixed-price bids until April or May 2003. (Scorsone, Tr. 4989). Thus, any pricing that CB&I submitted to Yankee Gas was a budget price, which can not be compared to a firm, fixed price bid. (FOF 7.1-7.38). Finally, the term "margin" is ambiguous, and Complaint Counsel failed to ask any witness

whether the margin it is referring to in CX 421 or during Mr. Scorsone's testimony is gross margin or profit margin.

1039. In January of the following year, CB&I's pricing information to Fairbanks Natural Gas for an LNG tank included a 20% margin on a $14,200,000 tank, as well as an additional 30% padding for the Alaska location. (RX 407 at CB&I 66666, 66668, 66672).

Response to Finding No. 1039:

The proposed finding is incomplete, misleading, ambiguous, and not supported by the evidence. First, the pricing contained in RX 407, and that was submitted to Fairbanks Natural Gas, was a budget price, and cannot be compared to a firm, fixed price bid. (RX 407) (FOF 7.1-7.38). A budget price for a project in Alaska will be "very rough" unless the customer provides very specific information. (Scorsone, Tr. 5006) (FOF 3.615). Fairbanks, Alaska is in a very remote location, and is a very difficult area to work. (Scorsone, Tr. 5004-05) (FOF 3.615). It is also more expensive to work in Alaska than in the lower 48 contingent states. (Scorsone, Tr. 5005). It is difficult to ship construction materials to Alaska, and due to the climate, CB&I will encounter safety issues and productivity problems working in Alaska. (Scorsone, Tr. 5005-06) (FOF 3.615). Because of the uncertainty of the project, RX 407 states that the accuracy of the proposed pricing is plus or minus 15 percent. (RX 407 at CB&I 66666).

1040. When Memphis Light, Gas & Water requested pricing for a new LNG tank to be built at its existing Capleville, Tennessee location in January 2002, CB&I's price to Memphis Light, Gas & Water included a **[xxxx]** margin and a **[xxxxxxx]** Technology Services Fee. (CX 423 at CB&I-E 009509-10, *in camera*).

Response to Finding No. 1040:

The proposed finding is ambiguous, misleading and incomplete. The pricing that Respondents submitted to Memphis was a budget price, or a SWAG -- a "scientific wild assed guess." (Hall, Tr. 1865-66; Scorsone, Tr. 5250) (FOF 3.608, 3.609). Customers do not purchase LNG tanks based on a budget price. (Carling, Tr. 4472-73) (FOF 3.607). Margins contained in

budget prices are not remotely representative of the actual profit margin that CB&I seeks in fixed, firm price bids. (Scorsone, Tr. 5003) (FOF 3.606). As explained in FOF 3.599-3.606, there are numerous contingencies and uncertainties when CB&I submits budget pricing to a customer. Because CB&I's internal budget documentation does not contain a line item for these contingencies, CB&I accounts for these contingencies in the margin line calculation of the budget estimate. (Scorsone, Tr. 5002-03) (FOF 3.606). Thus, although a margin line item on a budget price may be 30%, this does not mean that CB&I will seek a 30% profit margin if, and when, a firm, fixed price bid is submitted. (Scorsone, Tr. 5003) (FOF 3.606). Additionally, the term "margin" is ambiguous, and Complaint Counsel failed to ask any witness at trial whether the margin it is referring to in RX 423 includes gross margin, profit margin, SG&A, or technology services fee.

1041. In June 2002, **[xx]** sought tank pricing information for its Tampa facility, CB&I quoted a price to **[xx]** of **[xxxxxxxxxxxx]**, including a **[xxxx]** margin and a **[xxxxxx]** Technology Services Fee. (RX 643 at CB&I 069175, *in camera*).

Response to Finding No. 1041:

The proposed finding is factually incorrect, incomplete, misleading, ambiguous, and not supported by the evidence. First, despite having ample opportunity at trial, Complaint Counsel failed to question a single witness about RX 643. Second, there is no evidence that the pricing contained in RX 643 was ever sent to **[xxx]**, as RX 643 is a CB&I internal document containing a tank estimate summary sheet. Third, any pricing information that CB&I has submitted to **[xxx]** was a budget price, and therefore, for the reasons stated in FOF 7.1-7.38, cannot be compared to a firm, fixed price bid. (**[xxxxxxxx]**, Tr. 6075) (FOF 3.416, 7.1-7.38). Finally, the term "margin" is ambiguous, and Complaint Counsel failed to ask any witness whether the margin it is referring to in CX 643 includes gross margin, profit margin, SG&A, or technology services fee.

1042. According to Mr. Scorsone, CB&I's December 2002 pricing for the Cove Point tank is **[xxxxxxxxxxxx]**, with a **[xxxxxxxxxx]** profit and a **[xxxxxxxxxxx]** Technology Services Fee. (**xxxxxxxxxxx**, Tr. 5313-14; RX 123).

<u>Response to Finding No. 1042:</u>

The proposed finding is incomplete, misleading, ambiguous, and is unsupported by the cited evidence. First, RX 123 is a document prepared in 1999, and does not even relate to an LNG tank. (RX 123). Further, there is no support in the cited pages to Mr. Scorsone's testimony either of the price of the Cove Point tank, or of the value of Technology Services Fee. Second, the proposed finding is incomplete and misleading because **[xxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5336) (FOF 3.635). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5336) (FOF 3.635). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5336) (FOF 3.634).

1043. Net profit margins and margin as a percent above cost can be calculated using the above data for both CB&I and PDM 's LNG tank projects between 1994 and 2003:

<u>Response to Finding No. 1043:</u>

The proposed finding and the accompanying chart is factually incorrect, misleading, incomplete, based on speculation, and is not in any way supported by the evidence presented during trial. First, for the reasons set forth in RFOF 1030 through RFOF 1042, the data provided in the following chart is grossly inaccurate.

Second, rather than asking any of CB&I's witnesses about any of the documents cited within the chart, Complaint Counsel instead attempts to speculate about all of the prices contained in the cited documents. Indeed, Complaint Counsel failed to even have Dr. Simpson, its own expert witness, either create or testify about this chart. Complaint Counsel has no

testimony indicating whether these prices reflect internal estimates, budget prices, bids that were actually quoted to customers, prices that were used for forecasting purposes, or profits realized after the construction of the projects. Furthermore, because no witnesses testified about the majority of these documents, Complaint Counsel is unable to determine whether each of the margins identified in the chart were net margins, profit margins, or gross margins.

Third, Complaint Counsel's chart fails to distinguish between budget pricing that CB&I may have provided to customers for planning purposes, and fixed, firm priced bids. With the exception of only one (Cove Point), each of the post-acquisition prices referenced on the chart were budget prices. (Scorsone, Tr. 5317; RX 407; RX 643 at CB&I 069175; CX 423). For the reasons discussed in FOF 7.1 through 7.38, budget pricing is not remotely representative of the margins contained in firm, fixed price bids. (FOF 7.1-7.38).

Unsurprisingly, Complaint Counsel, on its chart, intentionally fails to include two post-acquisition projects: (1) the CMS Lake Charles, Louisiana LNG tank project; and (2) the El Paso Elba Island, Georgia LNG tank project. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx]** (Scorsone, Tr. 5074, 5077-80; J. Kelly, Tr. 6285) (FOF 3.468, 3.484-3.486).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (J. Kelly, Tr. 6283) (FOF 3.472). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 595 at CB&I 060850). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5075) (FOF 3.477). **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (RX 595 at CB&I 060850). Nonetheless, Complaint Counsel simply wants to ignore the CMS story.

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (RX 640 at CB&I 069126). **[xxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5079) (FOF 3.486).

Finally, there are several factually incorrect representations shown on the chart. For example, Complaint Counsel lists a project titled "Alabama Gas (1999)" which is identified as an LNG project involving an LNG tank. Once again, Complaint Counsel fails to ask a single witness about this project. As Robert Davis of Air Products testified, this project involved the replacement of a liquefier for its existing peak shaving facility, and <u>did not</u> involve the construction of an LNG tank. (Davis, Tr. 3193-94, 3204) (FOF 3.23). Furthermore, Complaint Counsel oddly includes a Canadian project titled "Westcoast Vancouver," but fails to include several other foreign LNG tank projects, such as projects located in Spain, India,Taiwan, and Trinidad. (CX 1058 at PDM-HOU017467).

1044. Net profit margin ("Profit Margin") is calculated as a percentage of the project price, while margin as a percent above cost ("Margin") is calculated using the equation:

$$\frac{\textbf{Profit Margin+ Technical Service Fee (SG\&A)}\text{[14]}}{\textbf{Total Price - (Profit Margin + Technical Service Fee/SG\&A)}}$$

<u>Response to Finding No. 1044:</u>

The proposed finding is factually incorrect, unsupported by the evidence, and ambiguous. Complaint Counsel fails to cite to any authority supporting that the proposed formula is the formula CB&I uses to calculate its margins. Further, there is no evidence

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[14] **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

suggesting that PDM used the proposed formula to calculate its margins. Additionally, the terms used in the proposed formula are undefined.

1045. The table shows that the pre-acquisition unweighted average of the reported profit margins is **[xxxx]**.

<u>Response to Finding No. 1045:</u>

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1046. The table also shows that the post-acquisition unweighted average reported profit margin is **[xxxxx],** a 14.5% increase over pre-acquisition margin levels.

<u>Response to Finding No. 1046:</u>

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1047. The table also shows that the unweighted average of the pre-acquisition margins is **xxxx**.

<u>Response to Finding No. 1047:</u>

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1048. The table also shows that the unweighted average of the post-acquisition margins is **xxxxx**, a 13.9% increase over pre-acquisition margin levels.

<u>Response to Finding No. 1048:</u>

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1049. The following graph repeats the information shown in the previous table, and reflects the increase in LNG tank margins post-acquisition calculated as percent above cost:

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]

Response to Finding No. 1049:

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1050. The graph demonstrates that prior to the acquisition, margin levels ranged from **xx** to **xxxxxx.**.

Response to Finding No. 1050:

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1051. The graph also demonstrates that post-acquisition, margin levels increased, ranging from **xxxxx** to **xxxxx**.

Response to Finding No. 1051:

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044.

1052. The highest margin quoted by PDM and CB&I to customers before the acquisition as a percent of cost is **xxxxx**. The lowest margin quoted to customers by CB&I post-acquisition is **xxxxx**, 1.81% higher than the highest margin quoted before the acquisition.

Response to Finding No. 1052:

The proposed finding is unsupported by the evidence, misleading, incomplete, and grossly inaccurate for the reasons set forth in RFOF 1030 through RFOF 1044. This finding is patently false, as it ignores post-acquisition firm, fixed price pricing CB&I provided to CMS and El Paso for LNG tank projects. (RFOF 1044).

C. The Merger Has Had Actual Anticompetitive Effects in the LIN/LOX Market

1053. Since the merger, CB&I has implemented the same 8.7% price increase on at least three different occasions: (1) to Linde BOC Process Plants LLC in April of 2002; (2) to Praxair in April of 2002; and (3) to Praxair again in June of 2002.

Response to Finding No. 1053:

Complaint Counsel's finding is false and misleading. Complaint Counsel's proposed finding cites three alleged price increases without relying on any evidence. The evidence has demonstrated that there have been no price increases in any post Acquisition LIN/LOX project. (*See* FOF 5.79-5.211). As an initial matter, Complaint Counsel's allegations of "three different" price increases all revolve around the same air separation facility that was to be constructed in Farmington, New Mexico. (*See* FOF 5.165-5.166, 5.178-5.179). Praxair and Linde were competing against each other for the air separation facility and both requested budget pricing from CB&I for a LIN tank with drastically different design specifications. (*See* 5.186-5.206 (Linde); 5.207-5.211 (Praxair)). The client ultimately awarded the air separation facility to Praxair and selected Kirkland, New Mexico, as the site for the project. (*See* FOF 5.165-5.166, 5.179).

Complaint Counsel's first alleged price increase to Linde in 2002 presumably relies on a *budget price* that was submitted to Chung Fan for the proposed New Mexico project. Record evidence has demonstrated the unreliability of budget pricing. (*See* FOF 7.1-7.38). Respondents also showed that Mr. Fan's analysis suggesting there was a price increase was flawed. (*See* FOF 5.185- 5.204). In addition, Mr. Fan in fact admitted that he did not observe a price increase. (*See* Fan, Tr. 1006) (stating that CB&I's "price has been consistent and has not changed . . . .") (*See also* FOF 5.185-5.206).

Complaint Counsel's second attempt at an alleged price increase involves an inaccurate comparison between projects with different scopes stages of pricing. CB&I submitted a budget price to Linde based upon general specifications for a proposed project in New Mexico. CB&I also submitted a firm fixed price to Praxair for a proposed tank for the same project. As

was demonstrated by Respondents, Complaint Counsel attempts to perform and apples to oranges comparison between the two prices. The undisputed record evidence that is ignored by Complaint Counsel demonstrates that although the two tanks were intended for the same project site, the tanks had significantly different designs with significantly different costs. (See FOF 5.207-5.211). Therefore, the mere existence of an alleged 8.7 percent price difference has no bearing because of the different scope designs and different levels of pricing.

The third price alleged price increase is an attempt to compare two budget prices from two separate Praxair projects. Complaint Counsel attempts yet another flawed apples and oranges comparison between a budget price submitted in 2000 and a budget price submitted for a different project in 2001. Complaint Counsel's alleged price difference of 8.7 percent is irrelevant because it ignores the numerous differences in scope between the two projects. This alleged price increase is the most desperate attempt of the three alleged by Complaint Counsel because during the course of the lengthy trial before this Court, Complaint Counsel failed to ask a single witness about the documents it relies on to assert this alleged price increase. Rather, Complaint Counsel relies on its own erroneous and inaccurate interpretation of documents that were never placed before any witness at trial.

Respondents demonstrated at trial that Praxair re-negotiated a sole-source partnership agreement with CB&I shortly prior to the Acquisition. (*See* Scorsone, Tr. 5018-19; *see also* FOF 5.165-5.166). Any projects between Praxair and CB&I are governed by the open book partnering agreement which established a four percent margin on all LIN/LOX projects. (Scorsone, Tr. 5019-20; *see also* FOF 5.165-5.166). No evidence was presented at trial regarding alleged price increases to Praxair because, despite flying him to Washington, D.C., in preparation for his testimony, Complaint Counsel elected not to call the representative from

Praxair. As a result, it is disingenuous for Complaint Counsel to now, at the eleventh hour, allege a price increase on behalf of a customer who was not called to testify by Complaint Counsel presumably because his testimony did not support their theory. As a result, Complaint Counsel lacks any evidence from Praxair to support its accusations of price increases.

1054. The 8.7% price increase contrasts dramatically to the period prior to the merger when CB&I and PDM would routinely undercut each other by slashing prices to the point of negative margins. CCFF 1090.

Response to Finding No. 1054:

Complaint Counsel's finding is inaccurate and misleading. As has been demonstrated by Respondents during trial and during post-trial briefing, the evidence has shown that there have been no increases in price. (*See* RFOF 1053; Fan, Tr. 1006; **[xxxxxxxxxxx xxxxxxxxxxxxxxxx]**; *see also* FOF 5.182-5.211). CB&I's internal assessment is that it has "a very hard time competing on [LIN/LOX] tanks." (RX 208) (state of mind). CB&I knows that if it increases its prices on LIN/LOX tanks, it will lose work to its competitors. (Scorsone, Tr. 5030-31) (state of mind). CB&I knows that it needs to find ways to cut its prices on LIN/LOX tanks in order to win future LIN/LOX projects. (Scorsone, Tr. 5031) (state of mind) (*See also* FOF 5.212-5.218).

1055. Respondents presented no evidence that CB&I's post-merger pricing on these three instances were negatively impacted by any competitor, foreign or domestic.

Response to Finding No. 1055:

Complaint Counsel's proposed finding is vague, illogical and not supported by any record citations. Complaint Counsel's first of the alleged "three instances" involved a budget price submitted to Linde for a proposed project. (*See* RFOF 1053). Since Linde was not awarded the air separation facility, Linde did not engage in additional pricing discussions or competitive negotiations with CB&I or any other supplier. (*See* FOF 5.179). Respondents are

uncertain what "evidence" Complaint Counsel believes Respondents were required to present since Linde lost the project and there was no opportunity for the natural negotiation process to drive prices down among the competitors. (*See* Fan, Tr. 1039-40; Scorsone, Tr. 5020; *see also* FOF 5.178-5.179).

The two other "instances" alleged by Complaint Counsel involve a firm fixed price and a budget price submitted to Praxair for the same New Mexico project. (*See* RFOF 1053). Once again, Respondents are uncertain what "evidence" Complaint Counsel believes was required since Respondents established undisputed record evidence that Praxair is obligated to contract with CB&I pursuant to their exclusive partnering agreement. Praxair is required to use CB&I for its domestic non-union LIN/LOX projects and CB&I is obligated to provide Praxair open book pricing with a four percent margin level. (*See* Scorsone, Tr. 5018-20; *see also* FOF 5.165-5.166). Due to the existence of the partnering agreement, Praxair's consideration of any other competitors would have violated their agreement. (S*ee* FOF 5.165-5.166).

1056. A fourth example of the anticompetitive effects of the merger involves MG Industries. This situation highlights how customers are handicapped by the absence of PDM as a leverage point against CB&I.

Response to Finding No. 1056:

Contrary to Complaint Counsels accusations, MG was not "handicapped" by the absence of PDM. MG has only sought pricing and awarded one project in New Johnsonville, Tennessee, since the Acquisition. CB&I originally submitted a bid to MG Industries for its New Johnsonville project at a four percent profit margin. (Scorsone, Tr. 5023). MG Industries told CB&I that its price was too high, and as a result, CB&I reduced the margin on their price submission. (Scorsone, Tr. 5023). Due to negotiation tactics used by MG Industries to demonstrate the competition for the project, CB&I lowered its price in order to win the work. (Scorsone, Tr. 5023-24; FOF 5.151). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] *see also* FOF 5.182-5.183).

1057. These four instances illustrate that, since the merger, CB&I recognizes that the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint provide CB&I with the opportunity to raise prices and earn significantly higher margins.

Response to Finding No. 1057:

Complaint Counsel's finding is false, misleading and wholly unsupported by the record evidence as is demonstrated by its inability to provide any citation in support of this proposed finding. CB&I knows that the competition in the LIN/LOX market is very "intense" and that there are a variety of well established contractors that compete against CB&I. (Scorsone, Tr. 5038-39) (state of mind). CB&I knows that it has "a very hard time competing on [LIN/LOX] tanks." (RX 208) (state of mind) (*See* FOF 5.212). CB&I internal emails demonstrate that AT&V and CBT "have hired expertise that used to work for Brown Minneapolis Tank and Graver Tank. Graver used to be very competitive in these LIN LOX tanks and it sounds like their 'know-how' moved on to another company. Matrix is another

recent player in the LIN LOX market, so there are three competitors now to CB&I." (RX 208; Scorsone, Tr. 5029-30) (state of mind) (*See* FOF 5.214).

The record evidence also demonstrates that CB&I knows if it increases its prices on LIN/LOX tanks, it will lose work to its competitors. (Scorsone, Tr. 5030-31) (state of mind). CB&I believes it needs to find ways to cut its prices on LIN/LOX tanks in order to win LIN/LOX projects. (Scorsone, Tr. 5031) (state of mind). CB&I's state of mind is corroborated by the fact that AT&V has defeated CB&I on every LIN/LOX project where the two companies have competitively bid against each other. (Scorsone, Tr. 5018; *see also* FOF 5.76-5.78).

1. *The Linde-New Mexico Project: CB&I Raises Prices by 8.7%*

1058. In 2002, Linde BOC Process Plant LLC ("Linde") sought bids for a 344,000 gallon LIN/LOX tank to be located in Farmington, New Mexico ("Linde-New Mexico"). (Fan, Tr. 1002; CX 1344 at LPPI 0000259).

Response to Finding No. 1058:

In 2002, Linde did not solicit "bids" but rather requested budget pricing for a proposed project in an undisclosed location in New Mexico. (Fan, Tr. 987-88; Scorsone, Tr. 5020-21; RX 860 at CB&I 071847; *see also* FOF 5.178-5.179). In his request for proposal, Mr. Fan did not tell CB&I the construction schedule (Fan Tr., 1073), where in the state of New Mexico the project would be located (Fan, Tr. 1075), the time of year that the tank would be constructed (Fan, Tr. 1076), the conditions of the project site (Fan, Tr. 1077), or the identity of the end-user (Fan, Tr. 1078; *see also* RX 860 at CB&I 071847). Due to the lack of specific information, CB&I interpreted Mr. Fan's request as a budget request and responded to his inquiry by submitting a budget proposal for the proposed project. (*See* CX 1344; Fan, Tr. 987-88; Scorsone, Tr. 5020-21; *see also* FOF 5.186-5.189). Complaint Counsel's proposed finding is misleading because it fails to convey that the project was merely a proposed project which did not materialize and Linde did not disclose numerous details, including the project location, in its

budget pricing requests. (Fan, Tr. 1060-62, 1073, 1075-78, Scorsone, Tr. 5020-21; *see also* FOF 5.178-5.179, 5.194-195).

1059. Chung Fan was Linde's manager for evaluating prices of LIN/LOX suppliers and recommending which vendor should be selected. (Fan, Tr. 1021). Fan has 20 years of experience reviewing pricing information from LIN/LOX suppliers. (Fan, Tr. 946, 953). Linde has always followed Fan's recommendations concerning which LIN/LOX tank suppliers to select. (Fan, Tr. 1022).

Response to Finding No. 1059:

Compliant Counsel's proposed finding is false and misleading. Complaint Counsel attempts to distort the Chung Fan's trial testimony. Mr. Fan testified that his official job title is "proposal manager" and he has "never [been] in charge or had responsibility to purchase the LIN/LOX tanks." (Fan, Tr. 947, 951; *see also* FOF 5.190). Mr. Fan does not posses the requisite knowledge, skill, experience, training or education to conduct an analysis of LIN/LOX tank prices. Mr. Fan has a masters degree in food technology and chemical engineering. (Fan, Tr. 949; 1028). Mr. Fan does not have a degree in statistics or economics. (Fan, Tr. 1028; *see also* FOF 5.191).

1060. Prior to the merger, Linde purchased most of its LIN/LOX tanks from PDM. (Fan, Tr. 1023). Linde found PDM's prices reliable because its final price did not deviate significantly from its budget price. (Fan, Tr. 1023). In its "LNG 2000" customer slide presentation, PDM cited as a contracting innovation a "Phased Contracting" procedure in which the first phase would include "enough design to come up with a fixed firm price for Phase II." (CX 124 at PDM-HOU 2011162-63).

Response to Finding No. 1060:

Complaint Counsel's proposed finding is incomplete and misleading. The last time that Linde purchased a LIN/LOX tank was in Bozarah, Connecticut, and Lincoln, Nebraska, in 1999. Linde selected PDM to construct two LIN/LOX tanks after receiving bids from CB&I, PDM and Graver. (Kistenmacher, Tr. 869-70; *see also* FOF 5.176). Prior to 1999, record evidence demonstrates that Linde used PDM for the construction of a small LIN/LOX tank in

Atlanta, Georgia, in 1996. (RX 860 at LPPI 0000292, column 7). There is no evidence of Linde purchasing any other LIN/LOX tanks from PDM. Contrary to Complaint Counsel's suggestion, Linde did not purchase many LIN/LOX tanks from PDM or any other supplier prior to the Acquisition. Linde has not been very successful at winning air separation facility projects and therefore does not purchase many LIN/LOX tanks. (Fan, Tr. 1040-42, *see also* FOF 5.205-5.206). Respondents have no specific response to the remaining of Complaint Counsel's proposed finding.

1061. Linde sent requests for quotes to AT&V, Matrix and CB&I. (Fan, Tr. 960, 962, 1002). Linde requested a "close to firm plus or minus 5% price." (Fan, Tr. 1002).

Response to Finding No. 1061:

Respondents have no specific response. (*See* FOF 5.178; 5.186-5.187).

1062. Linde was "very anxious" to *see* the price quotes for the Linde-New Mexico project because it wanted to know what would happen to prices with PDM absent from the picture. (Fan, Tr. 1003).

Response to Finding No. 1062:

Respondents have no specific response.

1063. AT&V quoted a firm-fixed price of approximately $600,000. (Fan, Tr. 960-961). Matrix responded with a firm-fixed price of over $900,000. (Fan, Tr. 962).

Response to Finding No. 1063:

Complaint Counsel's proposed finding is entirely false and misleading. There is no evidence within the record to support Complaint Counsel's claim that AT&V and Matrix submitted "firm-fixed" prices. Since Linde was not awarded the air separation facility, Mr. Fan did not call any of the suppliers to discuss the price submissions or any attempts made to negotiate a lower price. (*See* 5.179, 5.187). As a result, neither Mr. Fan nor Complaint Counsel know what type of pricing AT&V and Matrix provided to Linde. Mr. Fan's own trial testimony refutes Complaint Counsel's finding because he admitted that he did not provide the tank

suppliers with sufficient information to be able to produce a firm-fixed price. (Fan, Tr. 1078; *see also* FOF 5.194-5.195).

1064. On April 17, 2002, CB&I disregarded Linde's instructions and responded with a "budget" price, rather than a firm-fixed price as Linde had requested. (CX 1344 at LPPI 0000259; Fan, Tr. 1002-1003; *see* Harris, Tr. 7506-07 ("Linde made a request for a firm price, but the actual price that they received was a budget price.")). CB&I's "budget" price was $814,000. (CX 1344 at LPPI 0000261).

Response to Finding No. 1064:

Complaint Counsel's proposed finding is false, misleading and inconsistent with its own proposed findings. As acknowledged by Complaint Counsel above in CCFF 1061, Linde did not request a "firm-fixed price" as is suggested here, but rather a "close to firm plus or minus 5% price." (*See* CCFF 1061, Fan, Tr. 1002; *see also* FOF 5.178; 5.186-5.187). CB&I interpreted that request to be a budget price request because Linde provided an insufficient amount of information which would have been required for CB&I to produce a estimate within a plus or minus 5 percent range. (*See* RFOF 1058; Fan, Tr. 1060-62, 1073, 1075-78; *see also* FOF 5.194-5.195). Even Mr. Fan has admitted that he did not provide CB&I with sufficient information to produce a firm-fixed price. (Fan, Tr. 1078; *see also* FOF 5.194-5.195). Although Mr. Fan requested a plus or minus 5 percent price and received a budget price from CB&I, he did not call CB&I and tell them that they did not submit the type of price he requested. (Fan, Tr. 1064; *see also* FOF 5.186-5.187). Since Mr. Fan never spoke with CB&I, the budget price that he received from CB&I was not the result of any negotiation and does not take into account any reductions that CB&I may have made as a result of the negotiation process. (Fan, Tr. 1039-40; *see also* FOF 5.186-5.187). Respondent's do not dispute the actual budget quotation amount that was provided to Linde. (RX 860 at CB&I 071805).

1065. Fan agreed that he did not consider AT&V's price "reliable" because it diverged so widely from CB&I and Matrix. (Fan, Tr. 963). Fan could not *see* "how [AT&V] can they (sic) be able to do it so cheap compared to CB&I." (Fan, Tr. 963). Fan reasoned that if AT&V's

price was reliable, "CB&I should be out of business." (Fan, Tr. 963). In addition, Mr. Fan did not believe that AT&V had the necessary experience to construct the tank: "their [AT&V's] tank has not been operating for many years." (Fan, Tr. 998).

Response to Finding No. 1065:

Complaint Counsel's proposed finding is incorrect and irrelevant. Although Respondents do not dispute the fact that Mr. Fan provided the cited testimony, both Mr. Fan and Linde lack sufficient foundation to cast negative opinions of ATV. For example, BOC Process Plants has awarded two contracts to ATV, one in Midland, North Carolina, and another in Hillsboro, Oregon. (Cutts, Tr. 2504-06; V. Kelley, Tr. 5291-92; RX 813; *see also* FOF 5.31-5.34). BOC has testified that it "was satisfied with the price" it received on the field erected LIN/LOX tanks at Midland and that "BOC is satisfied with the work that AT&V did at Midland." (V. Kelley, Tr. 5285; *see also* FOF 5.31). Unlike BOC, Mr. Fan has admitted that Linde has not assessed the capabilities and experience of AT&V in the LIN/LOX market. (Fan, Tr. 1018). While AT&V's low price has caused some concerns for Linde, there has been pressure within Linde to use AT&V because "the low price make it very interesting." (Fan, Tr. 1016-18; *see also* FOF 5.178). Mr. Fan's and Complaint Counsel's questioning of the reliability of ATV's prices is easily refuted by the fact that ATV has defeated CB&I on every LIN/LOX project where the two companies have competitively bid against each other. (Scorsone, Tr. 5018; *see also* FOF 5.76-5.78). Mr. Fan is in fact correct in stating that if ATV's price is reliable, "CB&I should be out of business." (Fan, Tr. 963). CB&I believes it needs to find ways to cut its prices on LIN/LOX tanks in order to win LIN/LOX projects. (Scorsone, Tr. 5031) (state of mind). CB&I believes that it has "a very hard time competing on [LIN/LOX] tanks" against ATV. (RX 208) (state of mind)(*See also* FOF 5.212-5.218).

1066. Fan dismissed Matrix because its "price for non-union tank was always high." (Fan, Tr. 1019).

Response to Finding No. 1066:

Complaint Counsel's proposed finding is incorrect and irrelevant. Respondents' do not dispute that Mr. Fan testified as indicated, however, Mr. Fan has insufficient foundation to make such a statement due to its lack of experience with Matrix. Matrix's experiences with Praxair and Air Products and Air Liquide indicate that Matrix is not "always high" as is suggested by Complaint Counsel. Matrix was the low bidder and was awarded a LIN/LOX project by Praxair in Delaware City in 1998 over CB&I. (Newmeister, Tr. 2173; 2176-77; *see also* FOF 5.47-5.48). Praxair was satisfied with Matrix's performance. (Newmeister, Tr. 2176-77). In 2000, Matrix was again the low bidder and was awarded a LAR tank for Praxair in East Chicago. Once again, Matrix successfully completed construction of the project to the satisfaction of Praxair. Praxair was satisfied with the construction and the project was erected on schedule. (Newmeister, Tr. 2173; 2176-77; *see also* FOF 5.49). Also in 2000, Matrix was awarded a LIN tank as the low bidder by Air Products for a project in Kingsport, Tennessee. Matrix completed the Kingsport project on schedule and to the satisfaction of Air Products. Air Products awarded the tank to Matrix over CB&I and PDM, despite the fact that Matrix had never built a tank for Air Products before. (Newmeister, Tr. 2173-74; *see also* FOF 5.50). In addition, the bid prices submitted to Air Liquide for its project in Freeport, Texas, demonstrate that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx];** *see also* FOF 5.124). The evidence presented at trial demonstrates that Mr. Fan's statement is not only incorrect but lacks foundation.

1067. Fan compared CB&I's quote with a PDM quote from a year earlier and thought "Wow, it...went up." (Fan, Tr. 1004).

Response to Finding No. 1067:

Complaint Counsel's proposed finding is entirely false and misleading. As was clearly demonstrated by Mr. Fan's testimony, Mr. Fan attempted to compare CB&I's New Mexico budget price submitted in 2002 to a firm fixed price submitted by PDM in 1999. (Fan, Tr. 1069-70; *see also* FOF 5.193). Complaint Counsel's claim that "Fan compared CB&I's quote with a PDM quote from a year earlier" is false and inaccurate. Mr. Fan admitted that he attempted to compare a CB&I budget price, which was not the result of any negotiation, to a 3 year old PDM firm fixed price which was the result of significant negotiation. (Fan, Tr. 1069-70; *see also* FOF 5.193). In addition, Complaint Counsel failed to acknowledge that Mr. Fan moved away from his first impression and testified that he does not believe that CB&I has raised its prices and stated from what he has seen "their price has been consistent and has not changed . . . ." (Fan, Tr. 1006). Fan told the FTC that he had a "feeling" CB&I's price went up, but was "not sure" and "said that's personal opinion, it doesn't have much value, it's hearsay." (Fan, Tr. 1004). Fan stated that his method was not accurate enough to determine if CB&I's prices went up because he did not have CB&I's metal pricing. (Fan, Tr. 1056; *see also* FOF 5.185).

1068. In order to confirm his belief that CB&I had increased prices since the merger, Fan analyzed CB&I's price with a pricing model that Linde routinely uses to distinguish between reasonable and unreasonable price quotes from vendors. (CX 1584; Fan, Tr. 966, 1024). Using the Linde pricing model, Fan is able to accurately estimate the total price of a LIN/LOX tank within as little as 1% of the firm-fixed price that he receives from vendors. (CX 1584 at 1).

Response to Finding No. 1068:

Complaint Counsel's proposed finding is irrelevant and inaccurate. Despite Complaint Counsel's continuing assertions, Mr. Fan testified that he does not believe that CB&I has raised its prices and stated from what he has seen "their price has been consistent and has not changed . . . ." (Fan, Tr. 1006; *see also* FOF 5.185). In addition, Mr. Fan's analysis cannot be relied on as a basis to adjudge CB&I's budget price to be high because Mr. Fans' method does

not use reliable principles and methods. Prior to April 2002, the time of the New Mexico estimate, Fan had not updated his estimating spreadsheet for approximately two years. (Fan, Tr. 973; *see also* FOF 5.192). Mr. Fan testified that he uses the year 1998 as a baseline for his spreadsheet and the further away from his baseline year of 1998 he gets, the less accurate his estimating attempts become. (Fan, Tr. 1069). Mr. Fan also stated that his calculations do not account for price changes between the time the project is bid and the time it is awarded because that is not the purpose of his spreadsheet. (Fan, Tr. 1055-56; *see also* FOF 5.192). Mr. Fan admitted that he is attempting to compare the CB&I price, which was not the result of any negotiation, to a PDM price which was the result of significant negotiation. (Fan, Tr. 1069-70; *see also* FOF 5.193). All of the flaws in Mr. Fan's analysis can be found in Respondents' Findings of Fact 5.185-5.206. Since Mr. Fan attempted to compare a budget price from CB&I to a firm fixed price from PDM that was submitted three years earlier, his analysis was flawed. (Fan, Tr. 1069-70; *see also* RFOF 1069, FOF 5.193).

1069. Linde's pricing model accounts for multiple variables, including the weight of the metal, the dimensions of the tank, labor rates, field labor, engineering, insulation quality and profit margins. (Fan, Tr. 985-86).

Response to Finding No. 1069:

Complaint Counsel's proposed finding states what is included in Mr. Fan's analysis, however, it fails to describe the numerous variables that are not included within the analysis. As demonstrated above, Mr. Fan's analysis was not the product of reliable principles and methods. (*See* RFOF 1068; *see also* FOF 5.192-5.193, 5.197-5.204). Mr. Fan's spreadsheet does not contain any actual numbers or cost information but rather is his attempt to guess at specific cost information. Mr. Fan's chart is merely a collection of final lump-sum prices that have been provided to Linde. (Fan, Tr. 1071-72; *see also* FOF 5.196.) In order to perform his analysis, when a LIN/LOX tank supplier submits a drawing with its estimate, Mr. Fan must

calculate for himself the volume or quantity of Perlite (Fan, Tr. 1033), quantity of foamglass (Fan, Tr. 1033-34), and the quantity of concrete (Fan, Tr. 1035-36; *see also* FOF 5.198). Fan does not know the quantity of perlite used for any of the tanks in his spreadsheet. (Fan, Tr. 1045). In addition to calculating the actual amount, Fan also had to calculate the thickness of the perilite needed for the tanks. (Fan, Tr. 1045-47; *see also* FOF 5.199). Rather than investigating the actual cost of items required in the construction of a LIN/LOX tank, Fan made educated guesses at the prices. Fan did not call up any suppliers to determine the current rates for items involved in the construction of the tank. (Fan, Tr. 1049-50; *see also* FOF 5.202). Fan also did not know the thickness of the metal CB&I intended to use for the New Mexico project and attempted to calculate the metal thickness based upon drawings from other non-CB&I tanks. (Fan, Tr. 1047; *see also* FOF 5.203). Fan does not know what prices CB&I pays for steel. (Fan, Tr. 1051). In order to determine the price of steel, Fan called some "guy" whose name was given to him and asked about the current steel prices. (Fan, Tr. 1050-51; *see also* FOF 5.204). Since the spreadsheet created by Mr. Fan contains inaccurate and insufficient information, any opinion with respect to pricing changes based upon the spreadsheet is flawed.

1070. Using the Linde pricing model and past price information from PDM, Fan concluded "quite confidently" that the quote he received from CB&I was 8.7% higher than Linde would have paid to PDM. (Fan, Tr. 1009-10).

Response to Finding No. 1070:

Complaint Counsel's proposed finding is irrelevant and inaccurate. Mr. Fan testified that he does not believe that CB&I has raised its prices and stated from what he has seen "their price has been consistent and has not changed . . . ." (Fan, Tr. 1006; *see also* FOF 5.185). Additionally, as demonstrated above, any opinion derived from Mr. Fan's spreadsheet is fatally flawed. (*See* RFOF 1068-70; *see also* FOF 5.186-5.204).

2. *The Praxair-New Mexico Project 1: CB&I Raises Prices by 8.7%*

1071. It appears that Linde and Praxair were competing against each other for the same LIN/LOX project in Farmington, New Mexico. CCFF 1058.

Response to Finding No. 1071:

Complaint Counsel's finding is incorrect because Linde and Praxair were not competing for the same "LIN/LOX project," they were competing against each other for the same air separation facility. (Scorsone, Tr. 5020; *see also* FOF 5.179, 5.207). CB&I, Matrix and AT&V were the companies competing for the LIN/LOX project. (FOF 5.178).

1072. Respondents contend that Fan's conclusion that CB&I had increased prices to Linde is based on flawed data and methodology. As noted above, CB&I submitted a "budget price" to Linde of $814,000 for a 334,000 gallon LIN/LOX tank to be built in Farmington, New Mexico. CCFF 1065. $814,000 was the price that Fan used to conclude that CB&I had increased prices by 8.7% above PDM's pre-merger prices. CCFF 1070.

Response to Finding No. 1072:

Complaint Counsel's proposed finding inaccurately states an important piece of evidence. At the time CB&I submitted its budget price to Linde, it was unaware of the proposed location of the project. (Scorsone, Tr. 5020-21; *see also* FOF 5.178-5.179). Linde's pricing request stated that the proposed project was to be located somewhere in the state of New Mexico. (*See* RX 860 at CB&I 071847; *see also* FOF 5.178-5.179). Respondents refer the Court to its responses illustrating that the analysis performed by Mr. Fan is fatally flawed and hereby incorporate its responses to CCFF 1067-70. (*See* RFOF 1067-70).

1073. On June 15, 2002, CB&I submitted a bid to **[xxxxx]** for a **[xxxxxxxx]** gallon LIN/LOX tank to be built in **[xxxxxxxxxxxxxxxxxxxxxxxx]**. (CX 1508 at CB&I 059657, *in camera*).

Response to Finding No. 1073:

Complaint Counsel's proposed finding is inaccurate and misleading because Praxair re-negotiated a sole-source exclusive partnership agreement with CB&I shortly prior to

the Acquisition. (*See* Scorsone, Tr. 5018-19; *see also* FOF 5.165-5.166). As a result, CB&I does not submit "bid[s]" to Praxair, but rather pricing proposals. Under the agreement Praxair is obligated to contract with CB&I for its domestic non-union LIN/LOX tanks, and CB&I is required to provide open book pricing with a four percent margin. (Scorsone, Tr. 5019-20; *see also* FOF 5.165-5.166).

1074. CB&I's quote to **[xxxxxxx]** was **[xxxxxxxxxx]**. (CX 1508 at CB&I 059657, *in camera*).

Response to Finding No. 1074:

Respondents have no specific response.

1075. The difference in CB&I's price to Praxair and CB&I's price to Linde – for the virtually the same-sized tank and same location – is only **[xxxxxx]**, or less than **[xxxxx]**.

Response to Finding No. 1075:

Complaint Counsel's proposed finding is entirely inaccurate and misleading. As an initial matter, Compliant Counsel fails to provide any citation to support the assertion made in this finding. Nonetheless, record evidence demonstrates that comparing the budget price that CB&I submitted to Linde for its proposed New Mexico project to the firm fixed price that CB&I submitted to Praxair pursuant to a partnering agreement is comparing apples to oranges. (*See* Scorsone, Tr. 5020-22; *see also* FOF 5.207-5.211). While the proposed projects may have the same capacity and a similar price, the similarities between the projects ends there.

The tanks proposed by Linde and Praxair for the same location were drastically different in scope and design. Complaint Counsel attempts to mislead this Court by ignoring the undisputed record evidence. In contrast to the Linde tank, Praxair designed a more slender tank which resulted in an additional horizontal weld seam as well as required thicker steel throughout the tank. (Scorsone, Tr. 5021; *see also* FOF 5.209). The Praxair project scope also included a full-time welding supervisor, an increased 50 hour work week, additional subsistence in order to

attract field labor to the remote site, and a more complex nozzle structure. (Scorsone, Tr. 5021-22). Praxair specifically defined the complex nozzle structure they wanted for their tank, while Linde provided only basic information concerning its anticipated nozzle configuration. (Scorsone, Tr. 5022; *see also* FOF 5.210). The undisputed evidence illustrates that there are approximately $60,000 worth of additional cost items included in the Praxair pricing that were not included in the Linde budget price. (Scorsone, Tr. 5022; *see also* FOF 5.211). Complaint Counsel chose to simply ignore this evidence.

In addition to the numerous differences in scope between the Linde and Praxair tanks, Complaint Counsel also ignores the undisputed fact that Praxair and Linde were at different stages of pricing. Linde requested a budget price and provided minimal detail to CB&I, which included omitting the actual location of the project. (Scorsone, Tr. 5020-21; *see also* FOF 5.194-5.195, 5.208). Praxair on the other hand requested firm fixed pricing while providing CB&I with all of the detail necessary to arrive at a firm price. Due to the inherent differences between the tank specifications and the detail of the requested pricing, the Linde and Praxair prices cannot be accurately compared.

1076. CB&I implemented the same [8.7%] price increase to Praxair as it did to Linde.

Response to Finding No. 1076:

Complaint Counsel's proposed finding is false and unsupported by the record. CB&I has not increased prices and Respondents hereby incorporate its responses to CCFF 1053-75. (*See* RFOF 1053-75).

3. *The Praxair-New Mexico Project 2: CB&I Raises Prices by 8.7%*

1077. In late 2000, Praxair requested PDM to provide a budget price for a 500,000 gallon LOX tank in Colorado Springs, Colorado. (CX 448 at CB&I-E 007391; *see* RX 90 at PDM-CH 002717).

Response to Finding No. 1077:

Complaint Counsel proposed finding is irrelevant and assumes facts that are not in evidence. Complaint Counsel attempts to use two documents that, although admitted into evidence, were never used at trial with any witness. Complaint Counsel attempts to decipher technical information contained within these documents without using any deposition or trial testimony to support its assumptions. While emails contained within CX 448 appear to indicate that some type of pricing was provided to Praxair for a project in Colorado Springs, the document fails to provide Complaint Counsel with any of the project's technical specifications, including the proposed tank size. Complaint Counsel attempts to use a chart contained within RX 90 to speculate on the size of the proposed Colorado Springs project. Unfortunately, Complaint Counsel failed to ask any witness if its interpretation of the chart, corresponding assumptions made from the chart, or even if the contents of the chart itself were accurate. Since there is no testimony to verify that the assumptions Complaint Counsel is making are true, Complaint Counsel's proposed finding is irrelevant and not supported by the record evidence.

1078. On November 27, 2000, PDM quoted a price of $850,000. (CX 448 at CB&I-E 007392).

Response to Finding No. 1078:

Complaint Counsel's proposed finding attempts to interpret statements within a document which were not supported by any testimony at trial. (*See* RFOF 1077). The document cited by Complaint Counsel demonstrates that the price provided Praxair was a rough budget price because "there was no design done" on the proposed project. (CX 448 at CB&I-E 007392). As a result, the pricing can only be described as a rough budget price which was never refined. Since Complaint Counsel failed to use this document at trial, there is no support within the

record evidence to support the accuracy or inaccuracy of the statement made within the document. Thus, the details surrounding this price quotation are unknown.

1079. On November 6, 2001, after the PDM merger, Praxair asked CB&I to provide a budget price for an identical volume (LR-60) LIN tank in Farmington, New Mexico. (CX 448 at CB&I-E 007391). The tank was based on the standard Praxair design, which was the same design used by PDM in prior projects. (CX 448 at CB&I-E 007393).

Response to Finding No. 1079:

Complaint Counsel once again attempts to interpret documents and technical information which was never presented to any witness at trial. (*See* RFOF 1077). As an initial matter, this budget price submission is irrelevant because Praxair did not construct the tank according to these specifications. Praxair revised its designs for the New Mexico project and ultimately accepted a firm fixed price that CB&I submitted in 2002. (CX 1508). Nonetheless, Complaint Counsel assumes that Praxair requested pricing for a tank of "identical volume" without any support from trial testimony. Complaint Counsel also fails to note that the document indicates that "this will be a LIN tank vs a LOX. Please advise . . . of any impact this will have vs the past LOX estimate." (CX 448 at CB&I-E 007391). Since Complaint Counsel failed to ask any witness about this document, there is no possible way to determine what effect that change will have on the ultimate cost and price of the project.

Additionally, Complaint Counsel has no basis for the statement that both tanks were based upon a "standard Praxair design." The document cited by Complaint Counsel in support of this proposition fails to provide Complaint Counsel with any information regarding what a "standard Praxair design" is, what it was prior to the Acquisition, or if any changes were made to the designs since the Acquisition. As a result, Complaint Counsel's proposed finding lacks any support from the record.

1080. Praxair thought CB&I would, at a minimum, match the price if not reduce it in light of the presumed cost savings flowing from the merger. Praxair wrote to CB&I wondering

whether the $850,000 price would be "OK to win the business or are you better with the CB&I influence." (CX 448 at CB&I-E 007392).

Response to Finding No. 1080:

Complaint Counsel's proposed finding is erroneous and is not by record evidence. Rather than call a representative from Praxair at trial, Complaint Counsel has now elected to use its clairvoyant powers to discover what Praxair "thought" at the time it wrote an email. During the course of the trial, Complaint Counsel did not ask a single witness about a document which it now cites as a basis for a proposition that Praxair expected and in fact "presumed" a cost savings. Complaint Counsel has no basis for knowing what Praxair "thought," and as result its proposed finding fails to be supported by record evidence.

1081. CB&I formed a budget price for Praxair, based on the cost advantages and reduced cost structure that it had acquired from PDM. CB&I estimating staff were instructed to use PDM's price on the Colorado Springs tank as a basis for determining the price for the New Mexico project, if necessary. (CX 448 at CB&I-E 007393).

Response to Finding No. 1081:

Respondents have no specific response other than the documents cited by Respondents were never presented before any witness at trial and therefore lack support from the record. (*See* RFOF 1077).

1082. CB&I staff noted that the New Mexico LIN tank may cost less than the LOX tank for Colorado Springs because the New Mexico tank required less steel. "Since LIN is much lighter than LOX, we can reduce the shell plate thicknesses significantly." (CX 448 at CB&I-E 007391).

Response to Finding No. 1082:

Respondents do not dispute the contents of CX 448, however, since the documents cited by Complaint Counsel were never presented before any witness at trial, Complaint Counsel's assumptions as to what was intended by such statements is without support. (*See* RFOF 1077). Although the reduction in steel plate may be one difference between a LIN

and a LOX tank which may effect cost, we have no way of knowing what other changes are inherent when switching a design from a LIN tank to a LOX tank because Complaint Counsel failed to ask any witness about this sequence of events at trial. As a result, Complaint Counsel's proposed finding lacks support in the record.

1083. On April 30, 2002, despite CB&I's lower costs and Praxair's expectation of a lower price, CB&I submitted "tight budget pricing" of $924,000 for the New Mexico tank. (CX 449 at CB&I-E 007411).

Response to Finding No. 1083:

Complaint Counsel has no basis for making an assumption as to what Praxair thought or expected with respect to the price submitted by CB&I. (*See* RFOF 1080). Since Compliant Counsel elected not to call a representative from Praxair at trial, and neglected to ask any witness about the contents of the documents it now relies upon, Complaint Counsel has no basis for its conclusions regarding CB&I's costs and Praxair's "expectation." Respondents acknowledge that CB&I provided Praxair with the pricing cited by Complaint Counsel in CX 449, however, are unable to verify its truthfulness because it was never presented before any witness at trial.

1084. Although the New Mexico tank required less steel (CX 448 at CB&I-E 007391), CB&I explained the increase in price was due, in part, "to increasing stainless [steel] costs." (RX 92 at CB&I-E 007401). In fact, the cost of stainless steel fell by 13.58% between November 2000 and April 2002. (CX 1605 at 2).

Response to Finding No. 1084:

Complaint Counsel's proposed finding is inaccurate, incomplete and misleading. As an initial matter, over one year separated the time that CB&I provide a budget price to Praxair for the Colorado Springs tank and the time it provided a budget price for the New Mexico tank. Complaint Counsel ignores the changes in cost that occurred during that year time span. Complaint Counsel erroneously assumes that prices should remain the same from year to year.

Complaint Counsel also has no basis for the statement that the New Mexico tank "required less steel." Complaint Counsel relies on one sentence within an email that was never presented before any witness during trial or depositions. Complaint Counsel has not reviewed the actual project specifications to determine if the New Mexico tank in fact requires less steel, nor asked any witness on the stand if the statement made within the email is true. In fact, Complaint Counsel ignores the undisputed record evidence which shows that the tank Praxair awarded to CB&I had a slender tank design which resulted in an additional horizontal weld seam and thicker steel throughout the tank. (Scorsone, Tr. 5021; *see also* FOF 5.209).

Additionally, Complaint Counsel cites RX 92 as stating that CB&I explained that the price was a result of "increasing stainless [steel] costs." (CCFF 1084). Complaint Counsel failed to cite the remainder of the comments which indicate that the increased cost is also the result of "adjusting for the additional nozzles, earthquake zones, interior 5 psig pressure, use of 2002 labor rates, etc." (RX 92 at CB&I-E 007401). In fact, the letter to Praxair containing the pricing explicitly states that the additional cost is also the result of the fact that "[y]our group has requested many more nozzles that [sic] we typically see. I'm sure that some of them will be deleted during a more detailed review, but for now this pricing is probably more conservative and/or more costly than previous budgets." (RX 92 at CB&I-E 007401). This is further supported by evidence showing that Praxair in fact requested a complex nozzle structure for the tank that it awarded to CB&I. (Scorsone, Tr. 5022; *see also* FOF 5.210).

Finally, Complaint Counsel uses CX 1605 as evidence that the price of stainless steel fell during the time period in question. Such evidence is insufficient to support such a proposition because Complaint Counsel failed to demonstrate that CX 1605 has any relationship whatsoever to CB&I's steel pricing. Complaint Counsel failed to show this document to any

CB&I witness in an effort to determine if it corresponded to the steel pricing CB&I receives. Complaint Counsel's expert witness was the only witness who testified about CX 1605 and was unable to determine what types of products were included in the document, if it correlated to any steel products utilized by CB&I, or if it had any correlation to CB&I's pricing. (Simpson, Tr. 5399-409). In fact, Dr. Simpson stated that "it would be preferable to use the actual prices" as opposed to the PPI index. (Simpson, Tr. 5409). Since Complaint Counsel failed to ask any CB&I witness about the documents cited in this finding or its steel pricing during this period of time, it lacks any support from the record evidence.

1085. The increase in price from $850,000 to $924,000 is precisely 8.7%, the same price increase observed by Fan of Linde and Praxair on the Praxair-New Mexico Project 1.

Response to Finding No. 1085:

Complaint Counsel's proposed finding is wholly inaccurate, misleading and lacks any support from record evidence. As an initial matter, Complaint Counsel demonstrates its inability to provide support for such a statement by its lack of citations to any part of the record. Any alleged price differential of 8.7 percent is irrelevant due to the inability to compare two budget prices on two separate projects with different scopes. (*See* FOF 7.1-7.38). Respondents hereby incorporate their responses to CCFF 1053-1084. (*See* RFOF 1053-84).

1086. After years of intense head-to-head competition between CB&I and PDM, three separate instances of 8.7% price increases shortly after the merger cannot be coincidental.

Response to Finding No. 1086:

Complaint Counsel's proposed finding is inaccurate and lacks any support in the record. Although it is doubtful that Complaint Counsel's argumentative and accusatory statement above can even be classified as a finding, Respondents have demonstrated its inaccuracy. Neither Linde nor Praxair have experienced price increases since the Acquisition.

(*See* RFOF 1067-70, 1071-84; *see also* FOF 5.185-5.211). Respondents hereby incorporate their responses to CCFF 1053-1085. (*See* RFOF 1053-85).

4. *MG Industries: Without PDM, Customers Lose the Benefit of Competitive Bidding*

1087. The experience of MG Industries, a subsidiary of Messer, ("MG Industries") is an example of how the elimination of PDM has reduced the ability of customers to obtain lower prices from LIN/LOX tank suppliers.

<u>Response to Finding No. 1087:</u>

This finding is wholly unsupported by the evidence. Since the Acquisition, MG Industries has continued to use its skilled negotiation tactics in order to receive lower prices on LIN/LOX tanks. (FOF 5.151-5.153). For example, CB&I originally bid the New Johnsonville project at a four percent profit margin. (Scorsone, Tr. 5023; FOF 5.151). MG used its negotiation tactics to make CB&I believe its price was too high. (Scorsone, Tr. 5023; Patterson, Tr. 460; FOF 5.151; 5.153). CB&I reduced their margin in response to this pressure. (Scorsone, Tr. 5023). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx]** As a result of MG's negotiation tactics, CB&I lowered its price on the New Johnsonville project. (Scorsone, Tr. 5023-24; FOF 5.151). CB&I believed MG Industries when it was told that its price was high and subsequently lowered its price in response to this pressure. (Scorsone, Tr. 5024; FOF 5.152). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]**

1088. MG Industries, "a producer of industrial gas products," purchased 16 LIN/LOX tanks in the last nine years. (Patterson, Tr. 338, 341).

<u>Response to Finding No. 1088:</u>

Respondents have no specific response to this finding.

1089. Before the merger, the same three firms bid on most of MG Industries' LIN/LOX projects: CB&I, PDM and Graver. (Patterson, Tr. 351, 355, 363, 365). On each of MG Industries' LIN/LOX projects after 1997, Mr. Patterson used each of the other firms as bargaining chips to obtain lower prices on LIN/LOX tanks.

<u>Response to Finding No. 1089:</u>

Respondents have no specific response to this finding.

1090. There was vigorous competition between CB&I and PDM. CB&I and PDM would vigorously undercut each other's prices, to the extent that the firms sold LIN/LOX tanks at negative margins, *e.g.*, -23%, -12%, and -2 to -3%. (CX 136 at CB&I 014195-HOU; CX 193 at CB&I-PL020339; CX 600 at CB&I-PL012354). (*See* CX 455 at CB&I-E 007334 (**xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** *id.* at CB&I-E 007335 (**xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx**); *id.* at CB&I-E 007335 (**xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx**).

<u>Response to Finding No. 1090:</u>

This finding is misleading to the extent it implies that competition between CB&I and PDM caused those companies to bid at negative margins to compete against each other. The evidence shows that, during the 1990s, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Competition from Graver triggered this competition. Further, this finding is inaccurate to the extent it implies that MG cannot get competitive prices from LIN/LOX tank suppliers today. MG has only awarded one LIN/LOX project since the Acquisition; it awarded the a project to CB&I after negotiations forced CB&I to reduce its price on the project. (*See* RFOF 1087; FOF 5.151**). [xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** FOF 5.157).

1091. In most of the competitive bidding situations, PDM was either the lowest or second lowest priced bidder, followed by Graver, and finally CB&I.

Response to Finding No. 1091:

Complaint Counsel has failed to provide any record citations in support of its proposition. In fact, the evidence directly contradicts this finding. **[xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

1092. PDM played an important role in maintaining competition: **[xxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Patterson, Tr. 462, *in camera*).

Response to Finding No. 1092:

This finding is inaccurate to the extent it implies that MG actually contracted with PDM for a LIN/LOX tank. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxx]** This finding is misleading to the extent it implies that the presence of PDM is necessary to receive competitive prices on LIN/LOX tanks. Further, there is no evidence that any change in CB&I's margins is relate to anticompetitive effects, as opposed to CB&I's efforts to lower costs associated with building LIN/LOX tanks. MG's New Johnsonville project **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* RFOF 1087). MG received three bids from CB&I, Matrix and CB&T, and **[xxxxxxxxxxxxxxxxx xxxxxxxxxxxxx]** (Scorsone, Tr. 5023; **[xxxxxxxxxxxxxxxxxx]** FOF 5.150, 5.157).

1093. PDM reported that MG Industries was "very interested in having PDM quote," based upon its experience where PDM had been the low bidder on a project. (CX 113 at PDM-HOU014389).

Response to Finding No. 1093:

This finding is irrelevant to the extent it implies that PDM was the low bidder on any LIN/LOX project for MG Industries. As noted in RFOF 1091, **[xxxxxxxxxxxxxxxxxx**

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xxxxxxxxxxxxxxxxxxxxxx]

1094. In 1997 CB&I, PDM and Graver were competitors for the Rockport, Indiana project. According to Mr. Patterson, MG Industries' negotiating tactics "lowered the price." (Patterson, Tr. 352). Graver was the lowest bidder for the Rockport project, but after "verbal negotiations" using PDM's and CB&I's bids as leverage, Graver "knocked a few percent off [its] price." (Patterson, Tr. 351, 353).

Response to Finding No. 1094:

In response to this finding, Respondents incorporate herein their response to CCFF 1092. (*See* RFOF 1092).

1095. CB&I, PDM, and Graver also competed for the contract to the combined Chattanooga and Johnsonville, Tennessee projects in 1997. (Patterson, Tr. 355). PDM was the lowest bidder, with both Graver and CB&I bidding 15 percent higher than PDM. (Patterson, Tr. 356-57; *see* CX 194 at CB&I-PL023449)). Mr. Patterson informed the bidders that "they were way higher than what it would take to be awarded any of those type projects," and that "if they expected to receive any orders, they would have to significantly lower their price." (Patterson, Tr. 357-58). As a result of Mr. Patterson's negotiating, the firms "lowered their price." (Patterson, Tr. 358). CB&I lowered its price to a level that, instead of 15% higher than PDM's quote, was within 5% of PDM's quoted price. (CX 165 at CB&I-PL006839). The Johnsonville project was later "postponed," while the Chattanooga tanks were built. (Patterson, Tr. 356).

Response to Finding No. 1095:

Respondents have no specific response.

1096. MG Industries also combined the LIN/LOX tanks for the Albany, New York; Delisle, Mississippi; and Johnsonville, Tennessee projects for one bidding process. (Patterson, Tr. 361-62). PDM was the lowest bidder, Graver's bid was 4% above PDM's, and CB&I's bid was 7% above PDM' s bid. (Patterson, Tr. 362). Once again, Mr. Patterson used PDM as leverage, informing Graver that "somebody has a better price than they do." (Patterson, Tr. 363). The customer was again successful in promoting the most competitive environment he could, as "Graver dropped the price **substantially**." (Patterson, Tr. 364 (emphasis supplied)).

Response to Finding No. 1096:

In response to this finding, Respondents incorporate herein their responses to CCFF 1087-95. (*See* RFOF 1087-95).

1097. On the Waxahatchie LIN/LOX project, PDM, Graver, and "probably CB&I" bid for the LIN tank. MG Industries successfully used PDM, the "low bidder for the liquid nitrogen tank," as a point of leverage to get "good prices." (Patterson, Tr. 366).

Response to Finding No. 1097:

This finding is misleading to the extent that it suggests PDM was the low bidder on the project. Complaint Counsel fails to cite the remainder of the testimony which indicates that Graver, not PDM, was the low bidder and was awarded the project. (Patterson, Tr. 366-67). Otherwise, Respondents have no specific response and incorporate their responses to CCFF 1087-95. (*See* RFOF 1087-95).

1098. In April 2002, MG Industries sought pricing for a LIN/LOX tank project in **[xxxx xxxxxxxxxxxxxxxxxxxxx]**. (**xxxxxxxxxxxx**, Tr. 456-57, *in camera*).

Response to Finding No. 1098:

Respondents have no specific response. (*See* FOF 5.149-5.150).

1099. Because PDM had merged with CB&I and Graver went out of business, MG Industries had to look for alternative suppliers besides CB&I.

Response to Finding No. 1099:

This proposed finding is not supported by any citation to the record.

1100. Requests for prices were sent to **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**xxxxxxxxx**, Tr. 456-57, *in camera*). **[xxxxxxxxx]** was included in the bid because it had acquired personnel from **[xxxxxx]**. (**xxxxxxxxx**, Tr. 458, *in camera*).

Response to Finding No. 1100:

This finding is misleading to the extent it implies that Chattanooga Boiler & Tank actually "bid" on this project. While CB&T submitted budget pricing, it did not submit a formal bid. (Stetzler, Tr. 6351; FOF 5.70).

1101. **[xxxxx]** was the lowest bidder. (Patterson, Tr. 457, *in camera*). **[xxxxxxx]** price was **[xxx]** higher than **[xxxxxx]**. (**xxxxxxxxxx**, Tr. 457, *in camera*). **[xxxxxxxxxxxx]** price was **[xxxx]** higher than **[xxxxx]**. (**xxxxxxxxx**, Tr. 457, *in camera*).

Response to Finding No. 1101:

This finding is misleading for the reasons set forth in RFOF 1100. (*See* RFOF 1100).

1102. Because **[xxxxxxxxxx]** and **[xxxxxxxxxxxxxxx]**'s prices were substantially higher than [CB&I's], MG Industries was unable to use them to negotiate a lower price from **[xxxxxx]**. (**xxxxxxxxxxxxx**, Tr. 460-61, *in camera*).

Response to Finding No. 1102:

Complaint Counsel's finding is inaccurate and not supported by record evidence. Record evidence shows that MG *did* negotiate with CB&I in order to receive a lower price. (*See* RFOF 1087; FOF 5.151-5.153). CB&I originally bid the New Johnsonville project at a four percent profit margin and reduced its margin after MG told CB&I that its price was too high. (Scorsone, Tr. 5023; FOF 5.151). In addition, Mr. Patterson testified that **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** In short, Complaint Counsel's finding is contradicted by the evidence.

1103. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (**xxxxxxxxxxx**, Tr. 460-61, *in camera*). When MG Industries attempted to negotiate with **[xxxxxx]**, **[xxxxxxxxxxx xxxxxxxxxxxxxx]**, at which point Mr. Patterson abandoned his post-acquisition attempts to secure a lower price. (**xxxxxxxxxxxxxxx**, Tr. 461, *in camera*).

Response to Finding No. 1103:

Complaint Counsel's finding is inaccurate. CB&I lowered its price on MG's New Johnsonville project in response to negotiations with MG. (Scorsone, Tr. 5023-24; RFOF 1087; FOF 5.151-5.153). The evidence indicates that CB&I originally bid the New Johnsonville

project at a four percent profit margin but lowered its margin to approximately .5% in response to pressure applied from MG. (Scorsone, Tr. 5023; FOF 5.151).

1104. PDM's absence left MG Industries without means to negotiate with CB&I. **[xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. (**xxxxxxxxxxxxxxx**, Tr. 462, *in camera*).

<u>Response to Finding No. 1104:</u>

Complaint Counsel's proposed finding is incorrect and not supported by the evidence. MG was able to use the competitive pressure of the other bidders on the New Johnsonville project to receive a better price; CB&I felt this competitive pressure. (*See* RFOF 1087, 1095, 1102-03; FOF 5.151-5.153). In addition, **[xxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** FOF 5.157).

1105. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (**xxxxxxxxxxxxxx**, Tr. 462, *in camera*).

<u>Response to Finding No. 1105:</u>

This finding is unsupported by the evidence. There is no credible evidence to suggest that the removal of PDM "took away" a lower price to MG Industries. In fact, the evidence is to the contrary. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** FOF 5.157-5.158).

1106. The large price gap between CB&I and firms such as Matrix leave customers with only one option – CB&I– and CB&I does not get "involved in these bidding wars" like PDM did. (Patterson, Tr. 363). As a result, customers will be forced to pay the higher price set by CB&I.

Response to Finding No. 1106:

Complaint Counsel's finding is incorrect, misleading and not supported by the record. Evidence has shown that there are currently three viable alternatives to CB&I in the LIN/LOX market: AT&V, Matrix and CB&T. (*See* FOF 5.22-5.71). One of CB&I's competitors, AT&V, has defeated CB&I on every competitively bid LIN/LOX project since the Acquisition. (*See* FOF 5.76-5.78). Evidence has also shown that CB&I is concerned about these competitors and believes that it needs to lower its costs on LIN/LOX projects in order remain a viable competitor in the LIN/LOX market. (Scorsone, Tr. 5030-31; FOF 5.72-5.75, 5.212-5.218). The evidence has shown that companies such as MG Industries and Air Liquide have been successful in using the other competitors in order to force CB&I to lower its prices. (*See* FOF 5.128-5.130, 5.151-5.153). Respondents also hereby incorporate their responses to CCFF 1087-1104. (*See* RFOF 1087-1104).

1107. Prior to the acquisition, PDM was responsive to competitive pressures, giving customers the lowest price possible, even when it was originally the lowest bidder. Today, CB&I is the only option available to MG Industries. Graver is no longer in business, and **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**xxxxxxxxx**, Tr. 466-467, 471, *in camera*; Kamrath, Tr. 1988-1989). But because their prices are **[xxxxxxxx]** higher, CB&I will not leave money on the table in the next round of prices and will likely fill the gap by increasing its prices. (CX 278 at CB&I-H4004204). CCFF 231.

Response to Finding No. 1107:

Complaint Counsel's finding is incorrect, misleading and not supported by the record. MG solicited bids from three viable LIN/LOX suppliers **[xxxxxxxxxxxxxx [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** As a result, Complaint Counsel has no basis for asserting that "CB&I is the only option available to MG Industries" since MG Industries has admitted that it **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx of**

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xxxxxxxxxxxxxxxxxxxxxxxx] Further, there is no credible evidence to support a claim that Matrix or CB&T "have higher costs and are unreliable suppliers." For additional responses to Complaint Counsel's proposed finding, Respondents hereby incorporate their responses to CCFF 1087-1106. (*See* RFOF 1087-1106).

D. The Merger Has Had Actual Anticompetitive Effects in the TVC Market

1. *Spectrum Astro: Pre-Merger, Respondents Compete Vigorously Against Each Other*

1108. In the fall of 1999, Spectrum Astro required a thermal vacuum chamber in order to be considered for the Space Based Infrared System (SBIRS) Low Phase 2 Program, sponsored by the United States Air Force. (CX 969 at CB&I-PL014693).

Response to Finding No. 1108:

Respondents have no specific response.

1109. Spectrum Astro "tried to do a survey of everybody in the country that we thought would be a qualified bidder, and the two bidders that we found at that time were Chicago Bridge & Iron and PDM down in Texas." (Thompson, Tr. 2040-2041). Spectrum Astro "did not find any other contractors – U.S. contractors." (Thompson, Tr. 2040-2041).

Response to Finding No. 1109:

Respondents have no specific response.

1110. Spectrum Astro informed CB&I and PDM several times that they were competing against each other for the project. (Scully, Tr. 1169 (explaining how he knew that CB&I and PDM were the competitors for the Spectrum Astro project, Mr. Scully testified, "the customer readily stated that several times"); Higgins, Tr. 1270 (the Spectrum Astro job was "competitively bid" and the only company other than PDM that bid was CB&I)).

Response to Finding No. 1110:

Respondents have no specific response.

1111. Mr. Thompson, Spectrum Astro's president testified that he competitively bid the project, because "we wanted obviously to get the best price we could get." (Thompson, Tr. 2051). Additionally, Spectrum Astro used a competitive bidding process because "we were looking for technical innovation. We generally find that when we have contractors in competition, they will - it will tend to drive innovation into the system." (Thompson, Tr. 2051).

Response to Finding No. 1111:

Respondents have no specific response.

1112. On September 14, 1999, Spectrum Astro held an equipment briefing meeting to provide an overview of the bidding process. (CX 969 at CB&I-PL014692). Representatives from both CB&I and PDM/PSI attended the meeting. (CX 969 at CB&I-PL014692).

Response to Finding No. 1112:

Respondents have no specific response.

1113. Spectrum Astro retained both CB&I and PDM to develop specifications for a large field-erected thermal vacuum chamber; Spectrum Astro also entered into an engineering and design contract with each company in which Spectrum Astro paid each company **[xxxxxxxx]** for precontract design work. (CX 969 at CB&I-PL014693; CX 1162 at CB&I-ATL000941, *in camera*; Thompson, Tr. 2047-2048).

Response to Finding No. 1113:

Respondents have no specific response.

1114. The **xxxxxxx** payment from Spectrum Astro was for "trade and design effort sufficient to obtain a costed design with intent to award a firm fixed price contract." (CX 969 at CB&I-PL014693). This **xxxxxxx** "was paid on milestones," as work was completed. (Thompson, Tr. 2066)

Response to Finding No. 1114:

Respondents have no specific response.

1115. The contract was to be awarded according to a "rolling down-select between CB&I and PDM/PSI team." (CX 969 at CB&I-PL014693).

Response to Finding No. 1115:

Respondents have no specific response.

1116. On March 31, 2000, PDM valued the Spectrum Astro TVC contract at $8,500,000. (CX 1058 at PDM-HOU017464).

Response to Finding No. 1116:

This finding is incomplete, ambiguous, and lacks any basis in the record. Complaint Counsel accurately states that PDM estimated the "contract value" of the Spectrum Astro field-erected TVC at $8,500,000. (CX 1058 at PDM-HOU017464). However, the concept of "contract value" was never discussed by a single witness at trial, nor does this document explain the concept. In fact, the document does not discuss whether "contract value" is calculated to include or exclude profit or SG&A. (*See generally* CX 1058). Spectrum Astro's own document indicates that PDM's total costs for its field-erected TVC project totaled $9,929,990, suggesting that contract value does not include margin or "SG&A" since the "contract value" logically should be higher than the total costs. (CX 1570 at 22).

1117. In April 2000, six months after the equipment briefing meeting, CB&I's sales representative for this project, Mr. Rich Kooy, informed CB&I's CEO, Gerald Glenn, that PDM was CB&I's only competition for the Spectrum Astro project. (CX 1726 at CB&I-PL 4004590).

Response to Finding No. 1117:

Respondents have no specific response.

1118. Spectrum Astro received initial proposals from both CB&I and PDM in May 2000. CB&I and PDM's unadjusted proposed prices were $9,929,990 and $10,825,853 respectively. (CX 1570 at 22).

Response to Finding No. 1118:

This finding is misleading and inaccurate because it misstates the numbers found in the document. The document provides "total cost" amounts for CB&I and PDM's proposals instead of "unadjusted proposed prices." (CX 1570 at 22).

2. *Spectrum Astro: Respondents Collude to Raise Prices*

1119. CB&I and PDM engaged in collusive behavior while the acquisition was being negotiated. CCFF 1122, 1177.

Response to Finding No. 1119:

Respondents did not engage in collusive behavior. (FOF 6.138-6.153).

1120. On August 1, 2000, at a meeting between management from CB&I and PDM to discuss the acquisition, Bob Jordan, CB&I' s Chief Operating Officer, discussed the ongoing Spectrum Astro project with Luke Scorsone, the President of PDM EC. Mr. Jordan explained to Mr. Scorsone that he believed the Spectrum Astro project was "D.O.A." (Scorsone, Tr. 5111, 5114).

Response to Finding No. 1120:

This finding is misleading and inaccurate as set forth in RFOF 6.140. Complaint Counsel mischaracterizes a joke between Bob Jordan and the other attendees as something more nefarious. In fact, everyone in the room laughed at the joke, because Spectrum Astro's financial troubles were well-known. (*See* FOF 6.140)

1121. Mr. Scorsone relayed Mr. Jordan's statement that the Spectrum Astro project was "D.O.A." to Jeff Steimer, Spectrum Astro's main sales contact at PDM. (Scorsone, Tr. 5113; CX 617 at 6; Thompson, Tr. 2068).

Response to Finding No. 1121:

This finding is misleading. Complaint Counsel points to a handwritten internal note reflecting a conversation between a CB&I and PDM executive calling this project "D.O.A." Complaint Counsel argues that "[o]bviously, the meaning [of this document] was that Spectrum Astro wouldn't see the type of fractious competition [it] was expecting and was simply dead meat." (CC Br. at 31; *see also* CC Br. at 5) (citing CX 1705). This conclusion is not "obvious." In fact, it is flatly contradicted by the evidence. Luke Scorsone explained that this comment related to Spectrum Astro's financial condition, not to project pricing. In fact, Mr. Scorsone explained that issues of pricing, profit margins, costs or anything else related to the Spectrum Astro project were never discussed with anybody at CB&I, or more particularly, with the CB&I executive who made the "D.O.A." comment. (Scorsone, Tr. 4796-97, 5045-46) (FOF 6.141).

1122. Although Mr. Scorsone claimed that the discussion with Mr. Jordan was "a joke" (Scorsone, Tr. 4796), the conversation between Mr. Jordan and Mr. Scorsone, along with the commentary describing Spectrum Astro as "D.O.A" was noted in the contract file PDM kept on Spectrum Astro. (CX 1705 at PDM-HOU009169).

Response to Finding No. 1122:

As the previous rebuttal finding of fact explains, the comment regarding Spectrum Astro was a joke that referred to Spectrum Astro's financial condition, and contrary to Complaint Counsel's assertion that the joke was "kept in the contract file," the comment was handwritten on a letter which happened to be kept in a file. (RFOF 1121).

1123. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. (**xxxxx**, Tr. 4425, *in camera*).

Response to Finding No. 1123:

Respondents have no specific response.

1124. Additionally, Mr. Thompson of Spectrum Astro testified that "[i]t would be improper for the two competing bidders to discuss the price in a situation where price is a factor in the competition." (Thompson, Tr. 2057).

Response to Finding No. 1124:

Respondents have no specific response.

1125. In November of 2000, Spectrum Astro requested both CB&I and PDM to provide best and final offers to Spectrum Astro. (Thompson, Tr. 2049-2050). Thompson testified that the purpose of these bids was to "get competition." (Thompson, Tr. 2050). An e-mail discussing CB&I 's response to Spectrum Astro's request for a best and final offer shows that the rationale behind requesting a best and final offer is that the [**xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx]** (CX 242 at CB&I-PL 4003340, *in camera*).

Response to Finding No. 1125:

Complaint Counsel points to an internal CB&I memorandum from an low level line salesman (Dave Lacey) to support their argument (CC Br. at 31) (citing CX 242), the evidence establishes that no plan to coordinate bidding was ever created or executed. (Scorsone, Tr. 5045; Scully, Tr. 1217) (FOF 6.151-6.153). Mr. Scorsone testified that he was involved in

the bidding process from PDM's end, that he had approval power over any price submitted by PDM, that he did not have any discussions with Mr. Lacey prior to the Acquisition, and that he "did not in any way, shape or form" collude, coordinate or do anything improper with regard to PDM's pricing to Spectrum Astro. (Scorsone, Tr. 5045-46) (FOF 6.141).

1126. Mr. Dave Lacey, a CB&I sales representative labelled the competition between CB&I and PDM as a "tight race." In order to win the project, CB&I would have to "cut price to the bone ... (assume PDM **[xxxxxxxxxxxxxxxxx]** under CB&I)). (CX 242 at CB&I-PL 4003340, *in camera*).

<u>Response to Finding No. 1126:</u>

This finding is misleading as set forth in RFOF 1125.

1127. On November 17, 2000, prior to the submission of "best and final" prices to Spectrum Astro, Dave Lacey, the CB&I sales representative for thermal vacuum chambers, circulated "some thoughts" on the Spectrum Astro project. (Scorsone, Tr. 5115-16).

<u>Response to Finding No. 1127:</u>

Respondents have no specific response, except that Dave Lacey is a lower-level salesperson at CB&I and his ideas were ignored and never implemented. (*See* FOF 6.147-6.153; *see also* RFOF 1125).

1128. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx**." (CX 242 at CB&I-PL 4003339, *in camera*). Two approaches were listed. One approach was to have "[n]o bid by either company. Both advise **[xxxxxxxxxxxxxxx]** to negotiate directly **[xxxxxxxxxxx]**." (CX 242 at CB&I-PL4003340, *in camera*).

<u>Response to Finding No. 1128:</u>

This finding is misleading as set forth in RFOF 1125.

1129. The second approach was to have "CB&I & PDM bid high, [and] PDM offers **[xxxxxxxxxxxxxxxxxxxxxx]**, then owned by CB&I, in lieu of **[xxxxx]** as means of changing the offering." (CX 242 at CB&I-PL4003340, *in camera*). PDM could only have offered XL Technologies with the consent of CB&I.

<u>Response to Finding No. 1129:</u>

This finding is misleading as set forth in RFOF 1125.

1130. Unlike the competition for **[xxxxxxxxxxxxxxxxx]** where PDM had cut its price in order to prevent CB&I from winning the award (**xxxxxxxxx**, Tr. 1911, *in camera*), PDM did not did not lower its pricing for Spectrum Astro's thermal vacuum chamber. (Thompson, Tr. 2049, 2058, 2061; CX 565 at CB&I 007188-HOU).

Response to Finding No. 1130:

This finding is incorrect. First, PDM pursued this project bid vigorously, but failed to win it. (Scorsone, Tr. 4797, 5044, 5046; FOF 6.142-6.143). In fact, PDM bid this work at a zero percent profit margin, and PDM really wanted this work because its shops were operating under capacity at that time and they needed work to cover overhead costs. (Scorsone, Tr. 5044, 5046; FOF 6.144). PDM's total price was higher than CB&I's because of the price offered by its thermal technology partner, Chart Industries. (Scorsone, Tr. 5045; FOF 6.145). Second, CB&I competed for the project just as vigorously. CB&I lowered its price in order to win the job, and CB&I's price came in under Spectrum Astro's budget estimates. (Thompson, Tr. 2058 ("We were very pleased with this bid."), 2119-21; FOF 6.146). Third, Complaint Counsel's misquotes the testimony of Thompson and CX 565 in violation of this Court's Order. Specifically, the record evidence never indicates that PDM did not lower its pricing to compete for the Spectrum Astro job. The record evidence cited only indicates that PDM bid for the work. (Thompson, Tr. 2049, 2058, 2061; CX 565 at CB&I 007188-HOU).

1131. Although CB&I assumed PDM would price "**[xxxxxxxxxxxxxxxxxx]** lower than CB&I," Mr. Scorsone instead requested that PDM increase its cost estimate for the Spectrum Astro project. (CX 1570 at 37; CX 242 at CB&I-PL 4003340, *in camera*).

Response to Finding No. 1131:

Complaint Counsel's finding is flatly false. First, Mr. Scorsone never requested that PDM increase its cost estimate for the Spectrum Astro project. Complaint Counsel relies on a document that only shows PDM's "total cost" without showing any change in cost or any evidence that would demonstrate that a cost increase occurred that was not a result of Chart

Industries' portion of the bid. (CX 1570 at 37; CX 242 at CB&I-PL 4003340, *in camera*). Second, Complaint Counsel wrongly assumes that a lower-level salesperson speaks for CB&I. (FOF 6.147-6.153). Lacey's ideas do not represent the official view of CB&I management, and his ideas were ignored. (FOF 6.147-6.153). Thus, Complaint Counsel misappropriates Lacey's thought that "[$500K to $1,000K] lower than CB&I" to CB&I.

1132. In November 2000, both CB&I and PDM submitted best and final offers for the Spectrum Astro project. (Thompson, Tr. 2051).

Response to Finding No. 1132:

Respondents have no specific response.

1133. Instead of cutting their prices to the bone to win the job, both CB&I and PDM increased their prices above their earlier submissions to Spectrum Astro, which was in line with Lacey's proposal. (CX 1570 at 22, 37).

Response to Finding No. 1133:

This finding is misleading and inaccurate as set forth in FOF 6.169-6.202. PDM's price was higher because of problems with its technology partner, Chart Industries. (FOF 6.145). CB&I and PDM both competed vigorously for this job. (FOF 6.142-6.146). CB&I did not submit a best and final offer (BAFO) price until December 4, 2000, thus any price or cost changes documented prior to that date in CX 1570 are the result of changes in work scope and tend to increase over time as materials and labor rates change. (FOF 6.177). Complaint Counsel mischaracterizes pre-bid cost information as a "price" in a futile attempt to show a price increase in this finding. (*See generally* CX 1570).

1134. Of the two offers that were submitted, CB&I's final price was lower. (Thompson, Tr. 2051). CB&I bid $10,760,880, an increase of 8.4% above its previous price. (CX 1570 at 9). PDM bid $11,528,900, an increase of 6.5% above its previous price. (CX 1570 at 5, 37).

Response to Finding No. 1134:

This finding is incorrect, because neither CB&I nor PDM had submitted prices on the project prior to submitting their best and final prices on December 4, 2000. Complaint Counsel relies entirely on a document which only shows cost information as it changed over time to account for changes in work scope. (*See* CX 1570 at 1-37).

1135. Ronald Scully, President of XL Technology Systems, admitted that he did not *see* the same sort of fractious pricing behavior on the November 2000 Spectrum Astro bidding as he had seen on previous TVC projects for which CB&I and PDM had competed. (Scully, Tr. 1193-1194).

Response to Finding No. 1135:

This finding is misleading for two reasons. First, PDM pursued this project and bid vigorously, but failed to win it. (Scorsone, Tr. 4797, 5044, 5046; FOF 6.142-6.143). In fact, PDM bid this work at a zero percent profit margin, because PDM's shops were operating under capacity at that time and they needed work to cover overhead costs. (Scorsone, Tr. 5044, 5046; FOF 6.144). PDM's total price was higher than CB&I's because of the price offered by its thermal technology partner, Chart Industries. (Scorsone, Tr. 5045; FOF 6.145). Second, CB&I competed for the project just as vigorously. CB&I lowered its price in order to win the job, and CB&I's price came in under Spectrum Astro's budget estimates. (Thompson, Tr. 2058 ("We were very pleased with this bid."), 2119-21; FOF 6.146).

1136. CB&I's best and final offer included a margin of **xxxxxx**. (CX 1489 at CB&I 060015). Mr. Scully learned that PDM's margin was higher than CB&I's. (Scully, Tr. 1194).

Response to Finding No. 1136:

Respondents have no specific response.

1137. Spectrum Astro's procurement team rated the proposals from CB&I and PDM, based on each company's price, technology offerings, past performance, designed systems capability, and financing plan. (CX 294 at CB&I/PDM-H4014777; CX 318 at CB&I-ATL001091).

Response to Finding No. 1137:

Respondents have no specific response.

1138. Spectrum Astro gave CB&I a higher overall rating than PDM. (Scully, Tr. 1169; CX 1569 at 5). In a related proposal evaluation document, Mr. Thompson stated that "CB&I price was considerably lower, CB&I operating cost is estimated to be lower, CB&I presented many innovative engineering solutions, CB&I presented a more complete and acceptable financial/leasing proposal for negotiation." (CX 317 at CB&I-ATL000825).

Response to Finding No. 1138:

Respondents have specific response to this finding, except to note that the decision to award the source selection was based almost entirely on the technology solutions provided by XL Systems. (Scully, Tr. 1169, 1177-78; *see also* Thompson, Tr. 2083-84; FOF 6.48).

1139. After evaluating the proposals submitted by PDM and CB&I, Spectrum Astro elected to proceed with CB&I, in December 2000. (Thompson, Tr. 2061; CX 926 at CB&I 007212-HOU).

Response to Finding No. 1139:

Respondents have no specific response.

1140. After selecting CB&I for the project, Spectrum Astro proceeded "based upon the price we had in our hands," that is the firm fixed price of approximately $10.7 million. (Thompson, Tr. 2065; CX 1489 at CB&I 060015). Mr. Thompson anticipated the negotiation of contractual terms and conditions, but "we don't expect the price to change." (Thompson, Tr. 2065; *see* CX 926 at CB&I 007212-HOU).

Response to Finding No. 1140:

Respondents have no specific response, except to note that the price provided to Spectrum Astro in December, 2000 expired after 90 days, as is typical in the this industry, because costs are expected to escalate or fluctuate beyond the 90 day period. (FOF 6.176-6.177). Spectrum Astro did not request an updated price until nearly one year later in November, 2001. (Scorsone, Tr. 5048; FOF 6.176).

1141. Following the selection of CB&I in December 2000, Spectrum Astro did not immediately award the project because he was "working to get financing complete, so we [didn't] award." (Thompson, Tr. 2066).

Response to Finding No. 1141:

Respondents have no specific response, except to note that Spectrum Astro informed CB&I on more than one occasion that it had obtained financing, but financing was never secured. (Thompson, Tr. 2105; FOF 6.173).

1142. Although Spectrum Astro could not immediately award the entire chamber, Spectrum Astro wanted to pay CB&I to proceed with the engineering portion of the project. (Thompson, Tr. 2066).

Response to Finding No. 1142:

Respondents have no specific response.

1143. In the summer of 2001, after the acquisition of PDM, Spectrum Astro agreed to pay CB&I $200,000 for performing the engineering work on the thermal vacuum chamber so that the project could stay on schedule. (Thompson, Tr. 2067).

Response to Finding No. 1143:

Respondents have no specific response.

1144. CB&I insisted that Spectrum Astro pay the entire $200,000 up front, rather than in milestones as with the original **xxxxxxxx** payment. (Thompson, Tr. 2067-68). In an internal e-mail, CB&I staff threatened to "do no further work until **[xxxxxxxxxxxx]** agrees to pay us, and that we should require a down payment." (CX 1296 at CB&I 002930-HOU, *in camera*).

Response to Finding No. 1144:

Respondents have no specific response, except to note that Spectrum Astro informed CB&I on more than one occasion that it had obtained financing, but financing was never secured. (Thompson, Tr. 2105; FOF 6.173). As a result, CB&I was understandably leery about investing its own money on pre-contract work for a project that would likely never be built.

1145. Spectrum Astro complied with CB&I's demand for up front payment and CB&I continued with engineering (Thompson, Tr. 2069, 2071). Mr. Thompson testified that this type of demand is unheard of in the industry. (Thompson, Tr. 2068-2069, 2071).

Response to Finding No. 1145:

This finding is misleading. Mr. Thompson testified that this type of up front payment is unheard of in the satellite industry. However, he did not testify that such an up front payment is unheard of in the construction industry, of which CB&I is a member. (Thompson, Tr. 2116).

1146. Soon after, Spectrum Astro requested updated pricing for rates and factors, which would include updates in pricing for labor and material. (Thompson, Tr. 2069).

Response to Finding No. 1146:

Respondents have no specific response, except to note that CB&I was under no obligation to provide its cost information to Spectrum Astro during this negotiation. (Thompson, Tr. 2118-21; FOF 6.187).

1147. During the $200,000 engineering study, "there [we]re some items that were taken out of the design which should have caused the price to go down." (Thompson, Tr. 2071, 2073). Due to other "offsetting kinds of things" in the design, Mr. Thompson testified that on balance, he believed the price of the chamber "would have stayed about the same." (Thompson, Tr. 2073).

Response to Finding No. 1147:

Respondents have no specific response, except to note that CB&I and Spectrum Astro were still in a negotiation at this time and that the Acquisition had no impact on the increase in price. (Thompson, Tr. 2071; Scorsone, Tr. 5048-49; *see also* Scully, Tr. 1223-24; FOF 6.178, 6.188).

1148. According to a pricing analysis written by Scott O'Leary, Spectrum Astro's chief of facilities, Spectrum Astro was "expecting a decrease in cost due to the decrease in requirements." (CX 1570 at 5; Thompson, Tr. 2095).

Response to Finding No. 1148:

Respondents have no specific response, except to note that Spectrum Astro had no access to CB&I's costs. (Thompson, Tr. 2118-21; FOF 6.187). In fact, Spectrum Astro never had access to CB&I's estimated costs for the new additions to the work scope. (Thompson, Tr. 2122; FOF 6.182). Since Spectrum Astro was not provided with any cost information, their estimators had to guess at the results of the price increase. (Thompson, Tr. 2122-23; FOF 6.182).

1149. One year after submitting its "best and final offer," CB&I provided Spectrum Astro with updated pricing for the Spectrum Astro chamber. (Thompson, Tr. 2069-2070).

Response to Finding No. 1149:

Respondents have no specific response.

1150. CB&I's updated price for the Spectrum Astro thermal vacuum chamber was $12,019,000 – almost $1.2 million greater than its price 12 months prior. (Thompson, Tr. 2074; CX 567 at CB&I 007139-HOU; Glenn, Tr. 4356-57).

Response to Finding No. 1150:

Respondents have no specific response, except to note that the price provided to Spectrum Astro in December, 2000 expired after 90 days, as is typical in the this industry, because costs are expected to escalate or fluctuate beyond the 90 day period. (FOF 6.176-6.177).

1151. CB&I's updated price of $12,019,000 included a margin of **xxxxxx**. (CX 1489 at CB&I 060015). This represents an 11.7% increase in the price of the chamber.

Response to Finding No. 1151:

This finding is misleading for several reasons. First, extra profit was included in the November, 2001 re-pricing as a means of recovering some of the pre-contract costs, which was consistent with CB&I's policy at the time. (Scorsone, Tr. 5049; FOF 6.180). CB&I has not received compensation for all of the pre-contract work that it has done for Spectrum Astro. (Thompson, Tr. 2108-09; FOF 6.180). Only some of the pre-contract costs associated with the

Spectrum Astro job were included in the initial price, while others were not included. (Scorsone, Tr. 5117, 5235; FOF 6.181). Second, changes to the work scope also account for the price increase. After the original price expired, Spectrum Astro added some items to the work scope and deleted others. (Thompson, Tr. 2071, 2121-22; FOF 6.182). The costs on the project increased on this re-pricing, according to CB&I's documents. (Scorsone, Tr. 5116-17; FOF 6.182). Spectrum Astro never had access to CB&I's estimated costs for the new additions to the work scope. (Thompson, Tr. 2122; FOF 6.182). Third, another reason for the extra profit was the perceived need to mitigate some of the risks of moving forward with the project. (Scorsone, Tr. 5049; FOF 6.183). CB&I was trying to account for several risks including the risks associated with the relocation of the chamber site and any costs that would be associated with moving the vessel into the building. (Scorsone, Tr. 5049-50; FOF 6.183). Fourth, the risk of delay causes prices to increase. Satellite programs awarded by the Government are sometimes delayed. (Thompson, Tr. 2129; FOF 6.184). As a result, vendors of satellites must take account of the risk that these programs might be cancelled or delayed. (Thompson, Tr. 2129; FOF 6.184). Fifth, the November, 2001 price increase also reflected changes in material costs and labor rates. (Scully, Tr. 1222; FOF 6.185). Sixth, some of the extra profit was also the result of posturing in the negotiation with Spectrum Astro, because the final terms of the contract were never set. (Scorsone, Tr. 5049-51; FOF 6.186).

Spectrum Astro knew the price was going to go increase, but hoped it would only increase by less than $1.2 million. (Thompson, Tr. 2138-40; FOF 6.187). But Spectrum Astro admitted that it had no basis for that hope. (Thompson, Tr. 2123). Spectrum Astro does not have access to CB&I's labor rates, for example. (Thompson, Tr. 2118-19; FOF 6.187). Basically, the Acquisition had no influence on the decision to add profit into the new price,

because the project had already been awarded. (Scorsone, Tr. 5048-49; *see also* Scully, Tr. 1223-24; FOF 6.188).

1152. Mr. Thompson of Spectrum Astro testified that he was "surprised" at the price increase, which he considered substantial. (Thompson, Tr. 2074).

Response to Finding No. 1152:

Respondents have no specific response, except to note that Spectrum Astro and CB&I were still in a negotiation. (FOF 6.169-6.202).

1153. Dr. Simpson testified that the price increase did not result from an increase in the cost of raw materials used to build the chamber. (Simpson, Tr. 3508-09, citing (CX 1589). First, Mr. Thompson of Spectrum Astro "did not understand why the cost had increased ..." (Simpson, Tr. 3508-09, citing (CX 1589). Second, the Producers Price Index for steel did not show any cost increases from the time of CB&I's bid in November 2000 and its updated pricing in November 2001. (Simpson, Tr. 3508-09, citing (CX 1589).

Response to Finding No. 1153:

This finding is misleading and inaccurate as set forth in RFOF 1151. Additionally, the Producers Price Index for steel, by itself, does not account for CB&I's internal materials and labor costs, and Spectrum Astro never had access to these numbers. (FOF 6.182).

1154. CB&I's increase in the pricing for Spectrum Astro's thermal vacuum chamber included a four percentage point increase in the net profit margin before taxes. (CX 1492 at CB&I-060000; Scorsone, Tr. 5048, 5119-20; RX 385 at 064565; Scully, Tr. 1174). CB&I increased its margin on the project from **[xxxxxxx]** in November 2000, to **[xxxxxxxx]**, in November 2001, an increase of 66%. (CX 1489 at CB&I 060015). CB&I similarly increased XL's margin on the project, increasing CB&I's total margin on the project from **[xxxxxx]** to **[xxxxxx]**, an increase of 67%. (CX 1489 at CB&I 060015).

Response to Finding No. 1154:

Respondents do not have a specific response to this finding, except to note that the price increased for reasons set forth in RFOF 1151.

1155. This margin increase was directed by Mr. Scorsone, who told CB&I staff to "to insert the precontract costs incurred previously on the bid effort for this project *even though those costs had been incurred in the previous year and had been written off*." (CX 1492 at CB&I 060000 (emphasis added); *see* Scorsone, Tr. 5118, 5120-21; Scully, Tr. 1173-74).

Response to Finding No. 1155:

Respondents have no specific response, except to note that the price increased for many reasons as set forth in RFOF 1151.

1156. Mr. Scorsone had no basis to add precontract costs that had already been paid into the final price. Mr. Scorsone admitted that Spectrum Astro and CB&I had a contract addressing how pre-contract costs were to be handled, and that there was no additional agreement that Spectrum Astro should pay any more. (Scorsone, Tr. 5121, 5123).

Response to Finding No. 1156:

The first statement has no basis of support in the record. In fact, only some of the pre-contract costs associated with the Spectrum Astro job were included in the initial price, while others were not included. (Scorsone, Tr. 5117, 5235; FOF 6.181). The second statement is entirely false, since Mr. Scorsone testified that not all of the pre-contract costs were covered by the design study agreement. (Scorsone 5121, 5123).

1157. Mr. Scorsone's decision to have CB&I add precontract costs to its margins is inconsistent with industry practice. Pre-bid costs are typically absorbed "into the G&A costs of the [bidding] corporation." (Scully, Tr. 1174-75; Thompson, Tr. 2044, 2078-2079).

Response to Finding No. 1157:

Respondents have no specific response, except to note that this decision was consistent with CB&I corporate policy at the time. (Scorsone, Tr. 5049; FOF 6.180).

1158. Mr. Scorsone also testified that the margin was increased to account for the added risk of "erecting the "vessel outside the building and moving it in[to the building]" with the containment vessel. (Scorsone, Tr. 5122). However, this alternate method of erecting the chamber did not come up until after the November 2001 price increase. (Thompson, Tr. 2078-2079; CX 566 at 2; CX 1570 at 63 (alternate method was discussed in May 2002)). CB&I's "apples to apples" comparison of its November 2000 and November 2001 proposals specifically states that estimates did not include "the alternate plan of erecting the chamber outside and then moving it into position." (CX 1489 at CB&I 060013).

Response to Finding No. 1158:

Respondents have no specific response.

1159. In CB&I's November 13, 2001, updated price quote to Spectrum Astro, Mr. Jeff Steimer listed nine reasons for its increase in price. (CX 567 at CB&I 007136-HOU, CB&I 007137-HOU). None of Mr. Scorsone's reasons for the increase in price are listed in Mr. Steimer's November 13 price quote. (CX 567).

Response to Finding No. 1159:

Respondents have no specific response, except to note that the list of nine reasons contained in CX 567 does not purport to be exhaustive. (*See* CX 567).

1160. On December 19th, 2001, CB&I provided Spectrum Astro with a follow-up justification letter to explain the bases for CB&I's price increase. (CX 1570 at 57-59).

Response to Finding No. 1160:

Respondents have no specific response.

1161. At no time did CB&I tell Spectrum Astro that the price was increased because of pre-contract costs. (Thompson, Tr. 2078).

Response to Finding No. 1161:

Respondents have no specific response, except that CB&I was under no obligation to explain its pricing breakdown to Spectrum Astro, since the two companies were still attempting to negotiate the terms of a contract at the time. (FOF 6.170, 6.182, 6.191).

1162. Neither the November 13 nor the December 19 letter mentions any added risk of having to erect the chamber from outside the building as a factor that increased the price of the chamber. (CX 1570 at 46-59).

Response to Finding No. 1162:

Respondents have no specific response, except to note that Spectrum Astro does not have access to CB&I internal documents which relate to cost breakdowns. (FOF 6.182).

1163. At no time did CB&I inform Spectrum Astro that it had increased its margin on the thermal vacuum chamber project. (Thompson, Tr. 2137-38).

Response to Finding No. 1163:

Respondents have no specific response.

1164. The pricing changes for Spectrum Astro's TVC demonstrate that, after the acquisition, CB&I increased price and margin in this market. (Simpson, Tr. 3501-3508, citing CX 317, CX 1489).

Response to Finding No. 1164:

This finding is inaccurate and relies entirely on Complaint Counsel's own expert witness, Dr. Simpson. For the reasons set forth in RFOF 1151, CB&I did not increase its updated pricing on the Spectrum Astro project as a result of the Acquisition. (FOF 6.188).

3. *TRW: Post-Merger Coordination by CB&I Foreshadows Anticompetitive Effects*

1165. Having eliminated its only competitor in the TVC market, CB&I continued, following the acquisition, to attempt to coordinate on making a TVC bid or price quote with the next closest alternative available to TVC customers.

Response to Finding No. 1165:

Rather than cite evidence in the record, Complaint Counsel ignores the record and draws an unsupportable conclusion in this finding. (*See* FOF 6.127-6.137). Several pieces of record evidence show that this finding is inaccurate. First, CB&I never submitted an actual bid or price quote for the TRW project; rather CB&I only submitted a budget estimate. (FOF 6.130). Second, Complaint Counsel's accusation fly in the face of its own position. On one hand, it accuses CB&I of colluding with " the next closest available alternative" (CCFF 1165) or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways. Third, Complaint Counsel wrongly accuses CB&I of coordinating with Howard Fabrication on a bid to TRW. (CC Br. at 5, 32-33). CB&I and its employees did nothing unlawful. Mike Miles, a low-level CB&I salesman, met with John Gill of Howard Fabrication to

discuss the possibility of Howard serving as a subcontractor to CB&I on an undisclosed TVC project. (CC Br. at 32). Such an arrangement was nothing new. Pre-Acquisition, Howard had acted as a subcontractor to PDM on prior TVC projects. (Scorsone, Tr. 5060-61; FOF 6.136). In mid-meeting, Mr. Gill learned that Mr. Miles was discussing the TRW project. At that point, Mr. Gill told Mr. Miles that he had provided ROM pricing to TRW. (FOF 6.129-6.130). Contrary to Complaint Counsel's allegations (CC Br. at 5), CB&I and Howard did not know they had separately provided pricing to TRW until this meeting. (Gill, Tr. 274; FOF 6.130). Fourth, Mr. Miles' actions were not authorized by Luke Scorsone (who would be responsible for deciding whether to subcontract with Howard) or anyone else at CB&I. Further, Mr. Scorsone would approach TRW for permission to subcontract to Howard before actually doing so. (Scorsone, Tr. 5060) (FOF 6.137).

1166. In 1999, TRW decided to procure a TVC, and requested rough order of magnitude ("ROM") pricing from CB&I and PDM, the "two large field-erected manufacturers" in the market. (Neary, Tr. 1430-31).

Response to Finding No. 1166:

Respondents have no specific response.

1167. According to Mr. Neary, no other possible competitors existed in the TVC market prior to February 2001. (Neary, Tr. 1430).

Response to Finding No. 1167:

Respondents have no specific response.

1168. After the acquisition removed PDM from the market, TRW requested TVC pricing from Howard Fabrication, a small producer of shop-built thermal vacuum chambers, in order to obtain some check on the price it would have to pay to CB&I. (Neary, Tr. 1442-43).

Response to Finding No. 1168:

Complaint Counsel's positions are contradictory. On one hand, it accuses CB&I of colluding with "the next closest available alternative" (CCFF 1165), "a small producer of

shop-built thermal vacuum chambers" (CCFF 1168), or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways.

1169. TRW considers Howard Fabrication to be unqualified to compete in the TVC market. Mr. Neary testified that Howard Fabrication does not have "the technical competence nor the financial backing" necessary for TRW to award it a TVC project. (Neary, Tr. 1443).

Response to Finding No. 1169:

Complaint Counsel's positions are contradictory. On one hand, it accuses CB&I of colluding with "the next closest available alternative" (CCFF 1165), "a small producer of shop-built thermal vacuum chambers" (CCFF 1168), or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways.

1170. TRW nevertheless requested pricing from Howard Fabrication because it wanted to maximize competition for the TVC project. (Neary, Tr. 1444; *see* Simpson, Tr. 3523 ("In a case where you're confronted with a strong firm and you're negotiating to try to get a price ... you want to have some competition between that firm and some other firm simply to try to get as good a price as you possibly could under the circumstances.")).

Response to Finding No. 1170:

Complaint Counsel's positions are contradictory. On one hand, it accuses CB&I of colluding with "the next closest available alternative" (CCFF 1165), "a small producer of shop-built thermal vacuum chambers" (CCFF 1168), or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of

CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways.

1171. Patrick Neary, the manager of the environment test organization at TRW, testified that he requested a bid from Howard Fabrication for the TVC facility to attempt to "help [] maintain the competitiveness...within the marketplace." (Neary, Tr. 1442-1444). According to Mr. Neary, "if there was no Howard there we would really be hosed since there's nowhere for us to go to if there's no competition." (Neary, Tr. 1444).

Response to Finding No. 1171:

Complaint Counsel's positions are contradictory. On one hand, it accuses CB&I of colluding with "the next closest available alternative" (CCFF 1165), "a small producer of shop-built thermal vacuum chambers" (CCFF 1168), or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other hand, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways.

1172. Although "Howard does not have the capabilities to satisfy customers" in the market for TVCs, Dr. Simpson concluded that Howard "appears to be the next strongest competitor" in the post-acquisition competitive environment. (Simpson, Tr. 3517-8).

Response to Finding No. 1172:

Complaint Counsel's positions are contradictory. On one hand, it accuses CB&I of colluding with "the next closest available alternative" (CCFF 1165), "a small producer of shop-built thermal vacuum chambers" (CCFF 1168), "the next strongest competitor" (Simpson, Tr. 3517-8; CCFF 1172), or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways.

1173. In October of 2002, Mike Miles, the CB&I sales representative handling the TRW account, proposed to John Gill, the President of Howard Fabrication that they meet to discuss a potential opportunity for Howard and CB&I to work together. (Gill, Tr. 244).

Response to Finding No. 1173:

Respondents have no specific response, except that the alleged opportunity was not known to Miles or Gill until mid-way through the meeting. (FOF 6.127-6.129).

1174. Mr. Miles had no responsibility or authority regarding subcontracting. (Scorsone, Tr. 5059-61). According to Mr. Scorsone, if CB&I were seriously considering subcontracting to Howard any part of the work on a TVC project, CB&I would first approach the customer regarding the proposal before contacting Howard. (Scorsone, Tr. 5060).

Response to Finding No. 1174:

Respondents have no specific response.

1175. Neverthless, Mr. Miles visited Mr. Gill and asked him "would you like to possibly work together on giving TRW a price on this job?" (Gill, Tr. 245).

Response to Finding No. 1175:

Respondents have no specific response, except that the alleged opportunity as well as the fact that both CB&I and Howard had provided budget pricing to TRW were not known to Miles or Gill until mid-way through the meeting. (FOF 6.127-6.129).

1176. According to Mr. Gill, at the meeting Mr. Miles gave him a copy of design specifications that he recognized as the same specifications that he was given by TRW for their TVC project. (Gill, Tr. 245). Consequently, Mr. Gill "knew" that Mr. Miles had been at TRW. (Gill, Tr. 245). Mr. Gill told Mr. Miles that he knew the job was for TRW and that he had already presented a proposal to TRW for the job. (Gill, Tr. 245, 252-53, 274).

Response to Finding No. 1176:

Respondents have no specific response, except that the alleged opportunity was not known to Miles or Gill until mid-way through the meeting. (FOF 6.127-6.129).

1177. Mr. Gill testified that, nevertheless, Mr. Miles asked him whether Howard "could coordinate on making a bid or a price quote to TRW." (Gill, Tr. 247). Mr. Gill confirmed that Mr. Miles proposed coordinating on the TRW bid after Mr. Gill had told him that Howard was bidding on the project. (Gill, Tr. 274).

Response to Finding No. 1177:

Respondents do not dispute the information contained in this finding, except to note that Mr. Miles was not authorized by anyone at CB&I to act on CB&I's behalf. (FOF 6.131).

1178. TRW believes that CB&I's proposal to Howard to coordinate on the price and bid to TRW deprives TRW of any chance for relief from CB&I's monopoly price. At trial, Mr. Neary of TRW testified that "it's not right" for a bidder to ask a competing bidder to coordinate on making a bid or price quote to TRW. (Neary, Tr. 1451). Mr. Neary further testified that "[w]e're not going to get a fair and equitable price. It goes back to why do we even have two competitors. *We're at a disadvantage. We're going to get – we're basically hosed*, as I would say." (Neary, Tr. 1451, emphasis added). (*See* Simpson, Tr. 3522 (CB&I's actions may "cause Howard to no longer bid as an independent company.")).

Response to Finding No. 1178:

Complaint Counsel's positions are contradictory. On one hand, it accuses CB&I of colluding with "the next closest available alternative" (CCFF 1165), "a small producer of shop-built thermal vacuum chambers" (CCFF 1168), "the next strongest competitor" (Simpson, Tr. 3517-8; CCFF 1172), or a "potential competitor" (CC Br. at 32) -- Howard Fabrication. On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 182, 195). Complaint Counsel disingenuously tries to have it both ways.

Secondly, Complaint Counsel wrongly accuses CB&I of coordinating with Howard Fabrication on a bid to TRW. (CC Br. at 5, 32-33). CB&I and its employees did nothing unlawful. Mike Miles, a low-level CB&I salesman, met with John Gill of Howard Fabrication to discuss the possibility of Howard serving as a subcontractor to CB&I on an undisclosed TVC project. (CC Br. at 32). Such an arrangement was nothing new. Pre-Acquisition, Howard had acted as a subcontractor to PDM on prior TVC projects. (Scorsone, Tr. 5060-61; FOF 6.136). In

mid-meeting, Mr. Gill learned that Mr. Miles was discussing the TRW project. At that point, Mr. Gill told Mr. Miles that he had provided ROM pricing to TRW. (FOF 6.129-6.130). Contrary to Complaint Counsel's allegations (CC Br. at 5), CB&I and Howard did not know they had separately provided pricing to TRW until this meeting. (Gill, Tr. 274; FOF 6.130).

Third, Mr. Miles' actions were not authorized by Luke Scorsone (who would be responsible for deciding whether to subcontract with Howard) or anyone else at CB&I. Further, Mr. Scorsone would approach TRW for permission to subcontract to Howard before actually doing so. (Scorsone, Tr. 5060) (FOF 6.137).

1179. Based on his analysis of the TRW story, Dr. Simpson concluded that the coordination between CB&I and Howard would eliminate Howard's ability to bid independently and, consequently, "TRW would be hurt by this coordination." (Simpson, Tr. 3522). "If CB&I coordinates [pricing] with Howard, then that would remove Howard as a constraint and then the next constraint would be even higher." (Simpson, Tr. 3517-18).

Response to Finding No. 1179:

Dr. Simpson's conclusions ignore the testimony of the witnesses involved in this project acknowledging that such an arrangement could result in lower prices to TRW. (Gill, Tr. 254-55; Neary, Tr. 1480; FOF 6.134, 6.136). Mike Miles, a low-level CB&I line salesman, met with John Gill of Howard Fabrication to discuss the possibility of Howard serving as a subcontractor to CB&I on an undisclosed TVC project. (CC Br. at 32). Such an arrangement was nothing new. Pre-Acquisition, Howard had acted as a subcontractor to PDM on prior TVC projects. (Scorsone, Tr. 5060-61; FOF 6.136). Thus, Dr. Simpson's conclusion that "TRW would be hurt by this coordination" is incorrect. Further, Mr. Scorsone would approach TRW for permission to subcontract to Howard before actually doing so. (Scorsone, Tr. 5060) (FOF 6.137).

1180. In the post-acquisition competitive environment, CB&I, a large, unopposed firm with low costs and efficient practices is in a position of power over other, smaller firms. These smaller firms know that they cannot compete with CB&I and will instead acquiesce to "join"

CB&I. The acquisition has therefore increased the risk of collusion among suppliers of large, field-erected thermal vacuum chambers.

Response to Finding No. 1180:

Complaint Counsel submits this finding without any citations to the record or any evidence to support it. This finding is pure argument and should be treated accordingly. In fact, the Acquisition has had no anti-competitive effects on the market for field-erected TVC's. (*See* FOF 6.122-6.202).

4. *[xxxxxx]: Pre-Merger Competition Between Respondents Lowers Prices*

1181. Respondents' TVC pricing to **[xxxxxx]** demonstrates both how competition between CB&I and PDM drove TVC prices down prior to the acquisition and how, following the acquisition, CB&I has increased price.

Response to Finding No. 1181:

This finding is misleading and inaccurate because "competition" did not lower the prices. In fact, PDM engaged in anti-competitive behavior in order to keep CB&I out of the field-erected TVC market by bidding the C-1 project at below cost. (Scully, Tr. 1193-94, 1166; **[xxxxxx, Tr. 1916).]** Additionally, in direct contravention of this Court's Order, this finding does not rely on any evidence in the record.

1182. In [1997], **[xxxxxx]**, which is now owned by **[xxxxxx]**, procured a large, field-erected, mailbox-shaped thermal vacuum chamber that **[xxxxxx]** now calls the **[xxxxxxxxxx]**. (**[xxxx]** Tr. 1740, **[xxxx]**, *in camera*).

Response to Finding No. 1182:

Respondents have no specific response.

1183. **[xxxxxx]** used a competitive bidding process to procure the **[xxxxxxxxxx]**. (**[xxxxxx]**, Tr. 1889, *in camera*). **[xxxxxxxx]** testified that his responsibility was to complete the project below cost and that the competitive bidding process would provide **[xxxxxx]** with the lowest cost possible. (**[xxxxxx]**, Tr. 1890, *in camera*).

Response to Finding No. 1183:

Respondents have no specific response.

1184. Both PDM and CB&I each attempted to preempt the competitive bidding process and win the project on a sole-source basis. Bob Swinderman, PDM sales representative, told **[xxxxxx]** that sole-sourcing the chamber with PDM "would be the cheapest and fastest way" to get the chamber built. (**[xxxxx]**, Tr. 1889-90, *in camera*). CB&I echoed the same sentiment, giving similar assurances to **[xxxxxx]** if it sole-sourced the chamber with CB&I. *Id.*

<u>Response to Finding No. 1184:</u>

Respondents have no specific response.

1185. CB&I's initial sole-source estimate for the TVC was $7.5 million dollars higher than PDM's. PDM gave **[xxxxxx]** a price estimate "in the **[xxxxxx]** million range" and CB&I's budgetary pricing was "high-sided at" **[xxxx]** million. (**[xxxxx]**, Tr. 1891, 1906, *in camera*).

<u>Response to Finding No. 1185:</u>

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] Comparing a sole-source estimate with a competitively bid price or a budgetary price is misleading and unreliable. (*See* generally FOF 7.1-7.38).

1186. **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. (**[xxxxx]**, Tr. 1890, *in camera*).

<u>Response to Finding No. 1186:</u>

Respondents have no specific response.

1187. Rather than sole-source the project, **[xxxxxx]** made the specifications for the project available to "all the interested bidders." (**[xxxxx]**, Tr. 1892, *in camera*). **[xxxxxx] xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx]**" (**[xxxxxx]**, Tr. 1890-91, *in camera*).

<u>Response to Finding No. 1187:</u>

Respondents have no specific response.

1188. Four companies responded to **[xxxxxxx]**'s request for proposals: CB&I, PDM, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxx]**, Tr. 1899, *in camera*). These bidders presented "their conceptual design," cost estimate material, and other information required by **[xxxxxxx]**. (**[xxxxxx]**, Tr. 1892, *in camera*).

Response to Finding No. 1188:

Respondents have no specific response.

1189. Quality and timeliness of completion were of paramount importance to **[xxxxxx]**. [**xxxxxxxx**] project required the construction schedule to be expedited significantly. (Proulx, Tr. 1897-1898 , *in camera*). A project of this magnitude normally required a three-year construction; **[xxxxxx]** wanted the project completed in 18 months. (**[xxxxxx]**, Tr. 1897-1898, *in camera*). Therefore, **[xxxxxx]** was particularly concerned about "the credibility and integrity of the construction plan" of each of the suppliers bidding for the project. (**[xxxxxx]**, Tr. 1897-98, *in camera*).

Response to Finding No. 1189:

Respondents have no specific response.

1190. **[xxxxxxxxxxxxxxxxxx]** submitted the lowest bid in response to **[xxxxxx]**'s performance specifications. However, **[xxxxxxxxxxxxxxxxx]** did not meet **[xxxxxxx]** standards. **[xxxxxx]** eliminated **[xxxxxxxxxxxxxxxx]** from the bidding because "they did not show that they had a complete wherewithal as to the scope of the project in order to come in at cost," they "did not have clear solutions on some of the items delineated in ... **[xxxxxxxxx]** preliminary proposal review," and "...they lacked the demonstrated experience of building something of that size." (**xxxxxxx**, Tr. 1900, *in camera*).

Response to Finding No. 1190:

Respondents have no specific response.

1191. **[xxxxxx]** also eliminated **[xxxxxx]** as a possible competitor because "... their proposal couldn't meet the spec...they took exception to some of our specs." (**[xxxxx]**, Tr. 1901, *in camera*).

Response to Finding No. 1191:

Respondents have no specific response.

1192. In addition to the four original bidders, **[xxxxx]** also contacted two other suppliers, "**[xxxxxxxxxxxxxxxxxxxxxx]**, and requested that they submit proposals for the project. (**xxxxxx**, Tr. 1902-1903, *in camera*). **[xxxxxx]** refused to submit a bid because "they felt the size of the project was beyond their company's means." (**[xxxxxx]**, Tr. 1903, *in camera*).

Response to Finding No. 1192:

Respondents have no specific response.

1193. The elimination of **[xxxxxxxxxxxxxxxx]** and **[xxxxxx]** from the competition, and the refusal of **[xxxxxx]** to submit a bid, left PDM and CB&I as the two down-selected bidders for the **[xxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 1892, *in camera*).

<u>Response to Finding No. 1193:</u>

Respondents have no specific response.

1194. About the time CB&I and PDM became the two remaining bidders for the project, CB&I and PDM provided **[xxxxxx]** with initial pricing bids. According to **[xxxxxxxxx]**, CB&I provided **[xxxxxx]** with a "high-sided" bid of **[xxx]** million. (**[xxxxxx]**, Tr. 1906, *in camera*). PDM also submitted a bid of approximately **[xxx]** million to **[xxxxxx]** for the project. (**[xxxxxx]**, Tr. 1906-1907, *in camera*).

<u>Response to Finding No. 1194:</u>

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx] Comparing a sole-source estimate with a competitively bid price or a budgetary price is misleading and unreliable. (See generally FOF 7.1-7.38).

1195. At the end of this phase in **[xxxxx]**'s procurement process, **[xxxxxx]** asked for a "best and final" price from CB&I and PDM. (**[xxxxxx]**, Tr. 1908, *in camera*).

<u>Response to Finding No. 1195:</u>

Respondents have no specific response.

1196. **[xxxxx]** told CB&I and PDM that they were competing against each other for the **[xxxxxxxxxxx]**. (**[xxxxxx]**, Tr. 1909, *in camera*). Mr. **[xxxxxxxxxxx]** project manager, testified that he wanted CB&I and PDM to know that they were competing against each other because "when you have competitors bidding best and final, one number takes all, [that] is when we would receive the lowest price..." (**[xxxxxx]**, Tr. 1909, *in camera*).

<u>Response to Finding No. 1196:</u>

Respondents have no specific response.

1197. **[xxxxxx]** asked each company for "cost-saving initiatives, what could be done to reduce costs." (**[xxxxxx]**, Tr. 1907, *in camera*). **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** (**[xxxxxx]**, Tr. 1907-1908, *in camera*).

<u>Response to Finding No. 1197:</u>

Respondents have no specific response.

1198. After receiving the final pricing offers for the **[xxxxxxxxxxx]**, **[xxxxxxxx]** added some items to the TVC specifications. (**[xxxxxx]**, Tr. 1911, *in camera*). **[xxxxxx]** strategically added these items because it wanted an "all or none price." (**[xxxxxx]**, Tr. 1911-12, *in camera*). Even though **xxxxxxxxxxx** believed these additional items "would have increased the price," [**xxxxxxxx**] asked CB&I and PDM to "sharpen their pencils and give me their lowest price." (**[xxxxxx]**, Tr. 1911-12, *in camera*).

<u>Response to Finding No. 1198:</u>

Respondents have no specific response.

1199. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx x]**. (**[xxxxxxxxxxxx]**, Tr. 1911, *in camera*).

<u>Response to Finding No. 1199:</u>

Respondents have no specific response.

1200. Despite the increase in cost from the additional items, **xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** (**[xxxxxxx]**, Tr. 1910-11, *in camera*; *see* Scully, Tr. 1166 (after the bid was awarded, CB&I learned that, at the last opportunity in the bidding process, PDM had further lowered its price by "something in the order of as much as $2 million."); CX 261 at CB&I-H004029 (" ... in a last minute maneuver PDM changed their offer to a cost reimbursable open book contract with a 5% margin")).

<u>Response to Finding No. 1200:</u>

PDM bid the C-1 project in 1997 at below cost with the intention of keeping CB&I completely out of the market. (Scully, Tr. 1193-94, 1166; FOF 6.58). **[xxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]** (FOF 6.58).

1201. **[xxxxxxxx]** perceived, based on comments, that PDM lowered its pricing to demonstrate "technical prowess, boasting rights, so to speak, of having won or the desire to win for future business prospectives that **[xxxxxxxxxx]** contract ..." (**[xxxxxx]**, Tr. 1916, *in camera*).

<u>Response to Finding No. 1201:</u>

PDM bid the C-1 project in 1997 at below cost with the intention of keeping CB&I completely out of the market. (Scully, Tr. 1193-94, 1166; FOF 6.58). **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Proulx, Tr. 1916). (FOF 6.58).

1202. Sometime after **[xxxxxxx]** awarded the contract to PDM, **[xxxxxxxxx]** talked with Bob Swinderman, the PDM sales representative, about the competition for the **[xxxxxxx]** project:

> PDM felt that CB&I had been out of the market for several years and that if they allowed them to win that particular project, which was a very significant project, that they would be back in and become a significant competitor, and it was important to PDM management that they not win that, and so through telephone calls they developed a price, lowered the price and offered it to **[xxxxx]** at the last minute ...

(Scully, Tr. 1166; Scully, Tr. 1193 (PDM cut its price to try to keep CB&I out of the market)).

<u>Response to Finding No. 1202:</u>

Respondents do not dispute the evidence contained in this finding. (FOF 6.58).

1203. The lowest price was the deciding factor in who won the project. **[xxxxxx]** awarded the **[xxxxxxxxx]** contract to PDM and its subcontractor, Chart Industries, primarily because they offered a lower price than the CB&I/XL team. (**[xxxxxxx]**, Tr. 1891, *in camera*).

<u>Response to Finding No. 1203:</u>

Respondents have no specific response.

1204. PDM's final price was approximately **[xx]** million less than PDM's initial bid and approximately **[xxxxxx]** million less than CB&I's initial bid. (**[xxxxxxx]**, Tr. 1891, *in camera*). (*See* Higgins, Tr. 1266 (project value was about $10-12 million)).

<u>Response to Finding No. 1204:</u>

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxx] (Proulx, Tr. 1906-07). Comparing a sole-source estimate with a competitively bid price or a budgetary price is misleading and unreliable. (See generally FOF 7.1-7.38). Complaint Counsel is comparing apples and oranges when it compares budgetary prices with firm fixed bid prices. (FOF 7.1-7.38).

1205. **[xxxxxxxxx]** testified that his procurement strategy had saved **[xxxxx]** $4 million below what he had originally estimated as the likely cost of the **[xxxxxxxxxxxxx]**. (**[xxxxx]**, Tr. 1910, *in camera*).

Response to Finding No. 1205:

Respondents have no specific response.

1206. **[xxxxx]** made an effort to find alternative TVC companies to compete effectively against CB&I and PDM, but was unsuccessful. CCFF 1188-1193. **[xxxxxx]** was able to use the close competition between CB&I and PDM to lower the price of a TVC from a high bid of **[xxx]** million down to its final price of approximately **[xxxxxx]** million, to obtain additional items, and to benefit from CB&I and PDM's cost-saving, design innovations. CCFF 1194-1205. As the acquisition eliminated this competition between CB&I and PDM, these benefits are no longer available to **[xxxxxxx]**.

Response to Finding No. 1206:

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxx] (Proulx, Tr. 1906-07). Comparing a sole-source estimate with a competitively bid price or a budgetary price is misleading and unreliable. (*See generally* FOF 7.1-7.38). Complaint Counsel is comparing apples and oranges when it compares budgetary prices with firm fixed bid prices. (FOF 7.1-7.38).

5. *Following the Acquisition, CB&I Increased the Price for [xxxxxx]'s [xxxxxxxxxx] TVC Project by [xx]%*

1207. On June 30, 1999, PDM provided **[xxxxxxx]** with a firm fixed price proposal for a large, field-erected thermal vacuum chamber for **[xxxxxxxx]**'s Seal Beach facility. (CX 1573 at 5-6, *in camera*; **[xxxxxx]**, Tr. 1925-27, *in camera*).

<u>Response to Finding No. 1207:</u>

Respondents have no specific response, except to note that this firm fixed bid price was **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 6.155).

1208. Pre-acquisition, PDM quoted a price of **[xxxxxxxxxx]** in its proposal to **[xxxxxx]**, but the customer chose to postpone the project. (CX 1573 at 6, *in camera*; **[xxxxxx]**, Tr. 1926, *in camera*).

<u>Response to Finding No. 1208:</u>

Respondents have no specific response, except to note that this price **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxx]**

1209. In May 2001, **[xxxxxx]** undertook a study to determine whether it should procure the new large, field-erected thermal vacuum chamber for the **[xxxxxxxxxx]** facility or alternatively expand its **[xxxxxxxxx]** facility. (**[xxxxxx]**, Tr. 1927-28, *in camera*). **[xxxxxx]** also asked CB&I to provide it with updated pricing on the proposal previously submitted by PDM. (**[xxxxxx]**, Tr. 1928-29, *in camera*).

<u>Response to Finding No. 1209:</u>

Respondents have no specific response, except to note that CB&I **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**

1210. In order to analyze the costs of the two alternatives, **[xxxxxxxxx]** requested "cost verification from CB&I ... of the price ... **[xxxxxxxxxxxxxx]** based on PDM's earlier proposal." (**xxxxxx**, Tr. 1929, *in camera*). **[xxxxxxx]** contacted Dave Lacey of CB&I, asked him to review PDM's prior proposal and submit a renewed price based on the specifications and schedule of the prior bid. (**[xxxxxxx]**, Tr. 1930, *in camera*).

<u>Response to Finding No. 1210:</u>

Respondents have no specific response, except to note that CB&I **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**

1211. **[xxxxxxxx]**'s official request was for a firm fixed price renewal of PDM's earlier bid for the TVC. (**[xxxxxx]**, Tr. 1933, 1935, *in camera*).

<u>Response to Finding No. 1211:</u>

Respondents have no specific response, except to note that CB&I **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx).]**

1212. **[xxxxxxxxxx]** expected the price for the **[xxxxxxxxx]** thermal vacuum chamber project to increase marginally to cover "reasonable inflation." He anticipated the new pricing information to be **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (**[xxxxxxx]**, Tr. 1934, *in camera*).

<u>Response to Finding No. 1212:</u>

Respondents have no specific response.

1213. Instead of conforming to **[xxxxxxxx]** request for a "firm fixed price renewal," CB&I submitted Rough Order of Magnitude Pricing. (**[xxxxx]**, Tr. 1933, 1935-1936, *in camera*; CX 1573 at 3, *in camera*). On May 16, 2001, Mr. Lacey provided **[xxxxxx]** with a "ROM **[xxxx xxxxxxxxxxxxxxx]** of **[xxxxxxxxxxx]** for a fully commissioned thermal vacuum chamber." (**[xxxxxx]**, Tr. 1930-31, *in camera*; CX 1573 at 3, *in camera*).

<u>Response to Finding No. 1213:</u>

Respondents have no specific response.

1214. CB&I's new price represented an increase of 35%, or over **[xxxxxxxxx]**. (CX 1573 at 2, *in camera*; **[xxxxx]**, Tr. 1935, *in camera*; *see* Simpson, Tr. 3509-10 (the price quoted by CB&I after the acquisition is "much higher than the previous price" which was quoted by PDM).

<u>Response to Finding No. 1214:</u>

This finding is misleading and inaccurate because it compares a rough order of magnitude price with a firm fixed bid price, which are two completely different concepts. (*See* FOF 6.160-6.163, 7.1-7.38).

1215. **[xxxxxxxxxxx]** of **[xxxxxxxx]** accepted that the **[xxxxxxxxxxxx]** price quoted in **[xxx xxxxxxx]** letter as "the price **[xxxxxxxx]** would now have to pay to have that chamber built." (**[xxxxxx]** Tr. 1933, *in camera*).

<u>Response to Finding No. 1215:</u>

This finding is misleading and inaccurate as set forth in RFOF 1214.

1216. **[xxxxxxxxxx]** was "disappointed that the cost had gone up" and that Mr. Lacey had not presented the updated price quote as a firm fixed price in his letter. (**[xxxxx]** Tr. 1936, *in camera*).

<u>Response to Finding No. 1216:</u>

Respondents have no specific response, except to note that CB&I **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**

1217. Respondents realize that **[xxxxxxxx]** is unhappy with CB&I because of the price increase. (*See* **[xxxxxxx]**, Tr. 5333, *in camera* (When asked if he was aware that **[xxxxxx]** was displeased with CB&I for its unresponsiveness and price increase on the **[xxxxxxxxx]** project, Mr. Scorsone replied: "I've heard that, yes.").

<u>Response to Finding No. 1217:</u>

Respondents have no specific response, except to note that CB&I **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx]**

1218. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxxxxxxxxx]**, Tr. 5332, *in camera*).

<u>Response to Finding No. 1218:</u>

Respondents have no specific response, except to note that CB&I **[xxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

1219. The price quoted by Mr. Lacey "biased" the **[xxxxxxxxxxxx]** option "more negatively" and "favored the **[xxxxxxxxxxxx]** expansion." (**[xxxxxxxxx]**, Tr. 1936, *in camera*).

<u>Response to Finding No. 1219:</u>

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxx]

1220. In the absence of PDM, CB&I, the only existing competitor for large, field-erected thermal vacuum chambers uses its sole position as a TVC competitor to its advantage. CB&I now dictates its own bidding conditions and victimizes customers who have no other suppliers to turn to.

<u>Response to Finding No. 1220:</u>

This finding is false, and Complaint Counsel cannot cite any record evidence in support of this assertion. No anticompetitive effects have resulted from the Acquisition in the field-erected TVC market. (*See* FOF 6.122-6.202).

VIII.

CB&I'S "EXITING ASSETS" DEFENSE IS MERITLESS

A. Overview

1221. Respondents assert an "exiting assets" defense that has never been recognized by any court as an antitrust defense, and rejected by the few courts that have addressed it. In essence, Respondents claim that had the merger not occurred, PDM would have made a business decision to liquidate the firm, thereby eliminating PDM from the competitive landscape.

Response to Finding No. 1221:

This finding is unsupported by any record evidence and is completely argumentative. That fact that the Exiting Assets Defense has never been recognized by any court as an antitrust defense is not true because the Ninth Circuit in *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1307 (9th Cir. 1993) (citing J. Kwoka and F. Warren-Boulton, "Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis," 31 *Antitrust Bull.* 431 (1986)), did in fact recognize the defense, despite affirming the FTC Commissioners' decision on grounds that petitioner had not meet the elements of the Exiting Assets Defense. Respondents do not dispute this finding's assertion that regardless of the merger, the competitive landscape in the relevant markets would have been the same as it is now post-Acquisition because PDM was irrevocably committed to selling itself and exiting the industry. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907, 6952) (FOF 8.16, 8.20, 8.38, 8.115). This issue has been extensively briefed and need not be repeated here. (*See* Opening Br. at 152-55).

1222. Respondents' sole support for this proposed defense lies in a1986 article, J. Kwoka and F. Warren-Boulton, "Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis," 31 *Antitrust Bull*. 431, 445-46 (1986). However, Kwoka and Warren-Boulton require that the proponent of an exiting asset argument must show that the exiting asset was shopped unsuccessfully and that there is no alternative purchaser willing to pay more than scrap value to use the assets in the market. *Id.* at 446-49. Further, the proponent of the argument must show that the assets would no longer be used in the market, *i.e.*, liquidation of the assets through sale of the assets for use in the market does not constitute an exiting asset. *Id.* at 450 ("analysis should focus on the alternative uses of the assets").

Response to Finding No. 1222:

Respondents do not dispute the truth of most of this finding. In fact, Respondents have established that PDM EC and PDM Water were "shopped unsuccessfully" and that there "is no alternative purchaser" in the event that the Acquisition by CB&I fell through. For example, Mr. Scheman testified that an extensive marketing strategy was implemented and executed. (Scheman, Tr. 6943-45, 6910-11, 2921-22) (FOF 8.46-8.49, 8.53). Further, Mr. Byers and Tanner confirmed that no alternative purchasers existed. (Byers, Tr. 6776-78; RX 28 at 2) (FOF 8.55). This finding, however, is inaccurate because "the financial condition of a firm is neither necessary nor sufficient for a per se defense for merger. Rather, analysis should focus on the alternative uses of the assets and presume that preservation of the assets in the market, even by a leading firm, is preferable to exit from the market." Kwoka, 31 *Antitrust Bull.*, 431, 450. Moreover, Respondents also rely on the authority and arguments its cites in its brief. (*See* Opening Br. at 138-158).

1223. The defense recognized by courts and the *Merger Guidelines* which most closely resembles Respondent's asserted "exiting assets" defense is the failing firm defense.

Response to Finding No. 1223:

The failing firm defense is similar. However, as stated in RFOF 1221, the Exiting Assets Defense is distinct from the failing firm defense as indicated in *Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1307 (9th Cir. 1993), and is in fact not necessarily a "defense" but the logical application of the evidence. (*See* Opening Br. at 138-58).

1224. The *Merger Guidelines* provide that a merger is not likely to create or enhance market power or facilitate its exercise if the following circumstance are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the

acquisition, the assets of the failing firm would exit the relevant market. *Merger Guidelines* § 5.1.

Response to Finding No. 1224:

Respondents do not ever assert the failing firm defense. Further, the *Merger Guidelines* are not law and the applicable legal standards are set forth in Respondents Opening Brief at 152-55.

1225. Respondents failed to prove each element of the defense.

Response to Finding No. 1225:

Complaint Counsel seems to acknowledge this defense.

B. PDM Would Have Been Able to Meet its Financial Obligations

1226. Pitt-Des Moines's regular course of business documents reflect a strong and profitable firm.

Response to Finding No. 1226:

This finding is wholly unsupported by the record evidence for a number of reasons. This finding contains absolutely no cite to any record evidence. Further, to the extent this finding applies to the Exiting Assets Defense, this finding is completely inaccurate and contradicted by the record evidence. (*See* Opening Br. at 138-58) (FOF 8.1-8.133).

1227. Pitt-Des Moines was a "profitable" company. (Scheman, Tr. 2923; CX 520 at TAN 1003317). The company's EBITDA earnings increased from $20.5 million in 1994 to $49.3 million in 1999. (CX 520 at TAN 1003317).

Response to Finding No. 1227:

This finding is irrelevant because Complaint Counsel cites what PDM was before the year 2000 when it lost $30 million. (Scheman, Tr. 6917, 6921, 6926; Byers, Tr. 6789) (FOF 8.87).

1228. Pitt-Des Moines' E&C [Engineering & Construction] business unit was also profitable, increasing its margin each year from 1994 through 1999 and increasing its EBITDA

earnings at a 5-year combined annual growth rate ("CAGR") of 18.7% on 5-year sales CAGR of 9.5%. (CX 520 at TAN 1003317).

Response to Finding No. 1228:

Respondents do not dispute the truth of this finding from 1994 through 1999. However, this finding is not true in fiscal year 2000 because PDM EC reported substantial losses of $30 million. (Scheman, Tr. 6917, 6921; Byers, Tr. 6789) (FOF 8.87). As a result, this finding is irrelevant. (Byers, Tr. 6763-64; RX 163 at 4) (FOF 8.83).

1229. PDM EC was a profitable division of Pitt-Des Moines. The division's EBIT earnings increased from $5.4 million in 1995 to $9.5 million in 1999, a CAGR of 15.3%. (CX 522 at TAN 1003373; Scheman, Tr. 2950). Revenues increased from $121.7 million in 1995 to $185.7 million in 1999. (CX 522 at TAN 1003373).

Response to Finding No. 1229:

Respondents do not dispute that from 1995 to 1999 PDM EC was profitable. However, this finding as stated is false because in fiscal year 2000, PDM EC recorded a substantial loss as set forth in RFOF 1228. (Scheman, Tr. 6917, 6921; Byers, Tr. 6789) (FOF 8.87). Therefore, PDM EC's performance from 1995 to 1999 is irrelevant to this case based on the substantial loss in 2000 that negatively impacted the marketability of PDM EC. (Byers, Tr. 6763-64; RX 163 at 4) (FOF 8.83).

1230. PDM EC had its best year ever in 1999, the year before CB&I and Pitt-Des Moines signed the acquisition agreement. (Scorsone, Tr. 4823-24). As of July 2000, the month before CB&I and Pitt-Des Moines signed the acquisition letter of intent, PDM EC projected earnings before interest and taxes of $2 million in 2000. (CX 522 at TAN 1003373).

Response to Finding No. 1230:

CCFF 1230 is only partially true, and blatantly ignores the record evidence that is of greatest importance to this issue. From 1999 to 2000, PDM EC has the worst year of the company's history and recorded a $30 million loss as set forth in RFOF 1228. (Scheman, Tr. 6917, 6921; Byers, Tr. 6789) (FOF 8.87). To completely ignore this evidence is a gross mistake.

This ignored $30 million loss greatly impacted PDM and Tanner's ability to market the EC Division and negatively impacted potential purchaser's interest. (Byers, Tr. 6763-64; RX 163 at 4) (FOF 8.83). For example, AT&V wanted no part of the EC Division, stating that the EC Division was "consistently losing money" in the industrial tank business. (Cutts, Tr. 2458, 2534) (FOF 8.85). Shortly before the letter of intent was signed, it became clear that PDM EC was having a poor year. These losses wiped out Complaint Counsel's reliance on a projected profit of $2 million, leading to projected losses of $9 million by the end of the year. (Scheman, Tr. 6920-21; Byers, Tr. 6763-64) (FOF 8.83, 8.87).

1231. After Respondents announced the acquisition, PDM EC's earnings for 2000 declined, resulting in a loss for the year of $8 million. (Scorsone, Tr. 4825). After the acquisition was consummated, CB&I and Pitt-Des Moines adjusted PDM EC's loss upward to $18 million for 2000. (CX 1023). A short-term reduction in capital expenditures in the petroleum and petrochemical industries in 1999 negatively impacted all tank suppliers in 2000, including CB&I. (CX 522 at TAN 1003372; CX 529 at TAN 1000596 ("1999 - Down - Mergers in Oil + Gas * Market Driver (Oil + Gas)")).

Response to Finding No. 1231:

Respondents do not dispute the truth of this finding to the extent that after closing, it was determined that the EC Division lost approximately $30 million in fiscal year 2000 on a revenue base of $180 million. (Scheman, Tr. 6917, 6921) (FOF 8.87). Respondents agree that all tank suppliers were negatively impacted in 2000 as well as tightened credit markets, thus making the ability to borrow funds more difficult. These factors affected the salability of PDM's divisions. (Byers, Tr. 6763-64; RX 163 at 4).

1232. The loss in 2000 did not, however, impact PDM EC's ability to meet its financial obligations. As of June 30, 2000, PDM EC had cash of $2.6 million, total assets of $79.2 million, no outstanding debt and shareholder' equity of $56.8 million. (CX 385 at 30).

Response to Finding No. 1232:

As stated, CCFF 1232 is misleading because PDM EC's substantial losses did not become apparent until shortly after the letter of intent was signed on August 29, 2000. (Byers,

Tr. 6763-66; Scheman, Tr. 6920-21) (FOF 8.83, 8.87, 8.105). Second, Complaint Counsel's assertion that PDM EC's loss in 2000 did not impact its ability to meet its financial obligations is wholly unsupported by any cite to the record evidence. Moreover, it is not certain whether or not PDM EC was able to meet its financial obligations as a result of these substantial losses in 2000 because the transaction closed on February 7, 2001. (Byers, Tr. 6764-66) (FOF 8.105).

1233. Dr. Simpson testified that, in his opinion, PDM EC's negative earnings in 2000 did not imply that PDM EC would have exited the market but for this acquisition. (Simpson Tr., 3575).

Response to Finding No. 1233:

Dr. Simpson's opinion on this subject matter lacks foundation and is really irrelevant. Dr. Simpson stated that he was not an investment banker and has no experience in this field or in buying or selling a business. (Simpson, Tr. 5678-5686). Consequently, his testimony on this subject is unreliable, speculative and solely self-serving. Moreover, his opinion is directly contradicted by the PDM Board's Resolutions in May and June in which the company was put up for sale. (Byers, Tr. 6742, 6757-63, 6948; Scheman, Tr. 2919) (FOF 8.20, 8.23-8.25, 8.38).

1234. Mr. Scorsone, PDM EC's President, Mr. Byers, Pitt-Des Moines's Vice President of Finance, and PDM's investment banker all believed that PDM EC's poor performance in 2000 would be short-lived, and if PDM EC had remained independent, PDM EC would have returned to profitability the very next year and continued to grow. (Scorsone, Tr. 4838; Byers, Tr. 6899; CX 529 at TAN 1000596 ("2001 – will be good year [for PDM] – the bookings are higher"); *see also* CX 522 at TAN 1003372 ("This decline is expected to be short lived" PDM EC projects 2001 revenue and EBIT of $168.0 million and $6.1 million, respectively)).

Response to Finding No. 1234:

Regardless of the truth of this finding, CCFF 1234 is irrelevant because no matter what the projected profitability of PDM EC was for the future, the fact remained that PDM's Board was irrevocably committed to selling the EC Division and closing down its business as stated in RFOF 1221. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907,

6952) (FOF 8.16, 8.20, 8.38, 8.115). In addition, as stated this finding is not true because Mr. Byers testified that Mr. Scorsone's projections for a return to profitability for PDM EC in 2001 was overstated and optimistic. In fact, Mr. Byers altered this projection to a break even year at best in 2001 for the EC Division. (Byers, Tr. 6752-54, 6876) (FOF 8.99). Even Mr. Scorsone testified at trial that his projection was proven inaccurate. (Scorsone, Tr. 5242-45) (FOF 8.97). Mr. Scheman testified that buyers in the market would not believe the profitability projections because PDM had been wrong so many times before. (Scheman, Tr. 6926-27, 6951). Finally, these projections were made prior to the realization of PDM EC's substantial losses for 2000. For instance, CX 522 was made as part of a presentation in July 2000, well before the EC's discovery of such losses in the fall of 2000. (CX 522 at 1003365).

1235. In September of 2000, Mr. Scorsone made a presentation to CB&I and its advisors about PDM' EC's future prospects, "assuming that the company was not acquired [by CB&I]." (Scorsone, Tr. 5201; CX 1695 at CB&I/PDM-H 4005659). Mr. Scorsone projected PDM EC's earned revenues to be $151 million for 2000, and $168 million for 2001. (CX 1695 at CB&I/PDM-H 4005701; CX 529 at TAN 1000596; *see also* CX 1713 at CB&I/PDM-H 4015086-89 (income from operations increase each year from $6.4 million to $9.1 million, between the years 2001 and 2004)).

Response to Finding No. 1235:

There is no relevance to this finding because PDM EC was going to be sold as stated in RFOF 1221 and 1234. But, as to Complaint Counsel's reliance on Mr. Scorsone's projections in September 2000, Mr. Scorsone testified that these forecasts have not been proven to be accurate. Further, Mr. Scorsone does not regard his projection for PDM EC sales from 2000 to 2002 to be accurate either. (Scorsone, Tr. 5242-45) (FOF 8.97). Mr. Byers adjusted these projections to a break even year for 2001, consistent with Mr. Scorsone's tendency to overstate the projected performance and profitability of his division. (Byers, Tr. 6752-54, 6876) (FOF 8.99). Finally, the very projection Complaint Counsel touts in CCFF 1235 turned out to be false as CB&I's total revenue in 2001 and 2002 in the PDM EC business lines was the same as

Mr. Scorsone projected for PDM alone, and Mr. Scorsone was not projecting CB&I would capture zero dollars. (Scorsone, Tr. 5242-45). Scorsone's projections for 2001 and 2002 were way off. (Scorsone, Tr. 5242-45).

1236. As late as February 7, 2001, the date CB&I consummated the acquisition, Pitt-Des Moines' management projected that PDM EC would make a profit of $4.8 million in 2001. (Scheman, Tr. 2961-2962; RX 163 at TAN 1000385).

Response to Finding No. 1236:

Respondents do not dispute that as of February 7, 2001, Pitt-Des Moines' management projected that the best case scenario for PDM EC in 2001 was a $4.8 million profit. However, Mr. Scheman testified that based on his years of investment banking experience, he had reason to doubt that any purchaser would have given PDM credit for $4.8 million in earnings with such substantial losses the year before. (Scheman, Tr. 2961-62). Further, the very projection Complaint Counsel touts in CCFF 1235 turned out to be false as CB&I's total revenue in 2001 and 2002 in the PDM EC business lines was the same as Mr. Scorsone projected for PDM alone, and Mr. Scorsone was not projecting CB&I would capture zero dollars. (Scorsone, Tr. 5242-45). Scorsone's projections for 2001 and 2002 were way off. (Scorsone, Tr. 5242-45).

1237. Mr. Glenn of CB&I considered PDM to be a "well-run company." (Glenn, Tr. 4249). He considered PDM a good competitor against CB&I for a long period of time and a successful company in the engineering and construction business. (Glenn, Tr. 4249). PDM made money and was attractive to its investors. (*Id.*) It is doubtful that CB&I would have been willing to pay a premium price if PDM's future prospects looked bleak or if it was on the verge of bankruptcy. CCFF 1255-1256, 1261.

Response to Finding No. 1237:

Complaint Counsel sets forth no support from the record for its assertion that it was doubtful CB&I would pay a premium price. Respondents refer this Court to its RFOF 1255-56, 1261. In fact, Mr. Byers testified that CB&I did not pay a premium price for PDM EC, especially in light of the reduction in purchase of over $22 million due to EC's poor performance.

(Byers, Tr. 6775-77, 6789-91, 6793-94; Scheman, Tr. 6929-31) (FOF 8.61, 8.88, 8.103, 8.110, 8.112, 8.113). Finally, Mr. Glenn's statements are belied by the record evidence concerning PDM's actual financial performance.

1238. Respondents presented no evidence that PDM EC would be unable to meet its financial obligations.

Response to Finding No. 1238:

Complaint Counsel offers no evidentiary support for this assertion. Further, this finding is irrelevant because PDM EC's ability to meet its financial obligations did not and would not have changed the fact that PDM's Board had irrevocably committed to closing down and selling off PDM EC. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907, 6952) (FOF 8.16, 8.20, 8.38, 8.115). Further, Complaint Counsel offers no evidence that this finding is even required under the elements of the Exiting Assets Defense.

C. Respondents Have Not Shown that PDM Would Not Be Able to Reorganize Successfully Under Chapter 11

1239. Respondents presented no evidence (1) that PDM was going to file under Chapter 11 of the Bankruptcy Act, or (2) that PDM would not be able to reorganize under Chapter 11.

Response to Finding No. 1239:

Respondent do not dispute the truth of this finding. It is irrelevant for the reasons set forth in Respondents Opening Brief at 138-58.

D. PDM Did Not Make Good-Faith Efforts to Elicit Reasonable Alternative Offers

1240. In May 2000, Pitt Des-Moines decided to sell the company. (Byers, Tr. 6742). In June, PDM interviewed Goldman Sachs and Tanner to advise on the sale. (Byers, Tr. 6742-6743).

Response to Finding No. 1240:

Respondents do not dispute the truth of this finding. (FOF 8.20).

1241. Goldman Sachs recommended that PDM pursue "five to ten strategic buyers and 10 to 20 LBO buyers." (Byers, Tr. 6838; *see also* CX 380 at PDM-C 1004026).

Response to Finding No. 1241:

Respondents do not dispute the truth of this finding, except to note that the PDM Board decided not to pursue that option. (Byers, Tr. 6838-39, 6755, 6757-58; Scheman, Tr. 2914-15, 2919, 7911-12, 6907-08; RX 25 at 2) (FOF 8.26-8.29, 8.30, 8.38). Further, Mr. Scheman explained in detail why strategic and LBO buyers would not have been interested. (Scheman, Tr. 6913-16) (FOF 8.60).

1242. Pitt-Des Moines's investment banker, Tanner & Company, assembled a preliminary list of potential buyers, in June 200, including 18 steel companies, 15 engineering and construction companies, and four financial buyers. (CX 520 at TAN 1003258).

Response to Finding No. 1242:

Respondents do not dispute the truth of this finding to the extent that this list was presented to the PDM Board on June 1, 2000. (CX 520 at TAN 1003256; Scheman, Tr. 6929-31, 6914) (FOF 8.60, 8.61).

1243. Financial buyers, who would have maintained PDM as an independent on-going entity, were available and had been recommended by Goldman Sachs and Tanner as alternative buyers. (Byers, Tr. 6744; *see also* CX 520 at TAN 1003258; CX 380 at PDM-C 1004026).

Response to Finding No. 1243:

This finding is false. Mr. Scheman testified that financial buyers were not an option. (Scheman, Tr. 6929-31) (FOF 8.61).

1244. Tanner was chosen as the investment banker over Goldman Sachs because Tanner believed that breaking up the company and selling it in parts would result in a higher total value. (Byers, Tr. 6745, 6755).

Response to Finding No. 1244:

Respondents do not dispute the fact that Tanner was chosen because PDM was concerned that Goldman's estimate per share was too low. (Byers, Tr. 6743-45; RX 23 at 13) (FOF 8.26). Therefore, PDM selected Tanner and its recommendation to sell off the divisions in

pieces rather than in a single transaction to a single purchaser. (Byers, Tr. 6755, 6757-58; Scheman, Tr. 2919) (FOF 8.30, 8.38).

1245. In July of 2000, Pitt Des-Moines announced that it would sell the company. Peter Scheman, Tanner's representative to Pitt Des-Moines, had the responsibility to "coordinate and lead everything." (Scheman, Tr. 2921).

Response to Finding No. 1245:

Respondents do not dispute the truth of this finding. (FOF 8.49).

1246. Pitt Des-Moines offered PDM to CB&I in a telephone call to Mr. Glenn of CB&I: "I received a call from Bill McKee, who was the chief executive officer of Pitt-Des Moines ... He said that the Jackson family, who had controlling interest in PDM, had made a decision that they wanted to sell the company in total for cash." (Glenn, Tr. 4077-4078). Mr. McKee offered PDM to CB&I during that telephone call. (Glenn, Tr. 4078).

Response to Finding No. 1246:

Respondents do not dispute the truth of this finding to the extent that as stated, Complaint Counsel omitted the complete quote where Mr. Glenn actually stated that: "I received a call from Bill McKee, who was the chief executive officer of Pitt-Des Moines or PDM. He said that the Jackson family, who had controlling interest in PDM, had made a decision that they wanted to sell the company in total for cash *and go out of that business and concentrate on some of the company's other investments."* (Glenn, Tr. 4077-78) (emphasis added) (FOF 8.102).

1247. PDM did not make efforts to contact any buyers other than CB&I and Enron: "I don't know of anybody that PDM contacted, anybody other than CB&I and Enron." (Byers, Tr. 6812).

Response to Finding No. 1247:

This finding is misleading because Mr. Byers testified that he was not aware of any buyers other than CB&I and Enron that PDM contacted, not that PDM did not make efforts to contact any others. (Byers, Tr. 6764, 6812) (FOF 8.62). Further, this finding is irrelevant because this responsibility was delegated to Tanner. (Byers, Tr. 6758-59) (FOF 8.40).

1248. Tanner & Company was given the responsibility to contact potential purchasers. (Byers, Tr. 6758). Pitt-Des Moines management was instructed to direct all inquiries to Tanner & Company. (Byers, Tr. 6758). However, Tanner & Company never contacted any prospective buyer other than CB&I and was never instructed to do so.

Response to Finding No. 1248:

Respondents do not dispute that Tanner was given the responsibility to contact potential purchasers and that PDM management was instructed to direct all inquiries to Tanner. (Byers, Tr. 6758-59) (FOF 8.40). However, Complaint Counsel's statement that Tanner never contacted any prospective buyer other CB&I is false, misleading, and wholly unsupported by any cite to the record evidence. First, this last statement in CCFF 1248 contains no cite to the record evidence. Second, this last statement is false because after initiating a mass marketing and dissemination campaign, Tanner fielded numerous inquiries and contacts regarding its press release announcing the sale of PDM and ruled out other potential purchasers as not being viable. (Scheman, Tr. 6910-13, 6944-46, 2921-22; Byers, Tr. 6884-85) (FOF 8.49-8.55).

1249. By August 4, 2000, Tanner was communicating with CB&I via e-mail about whether "there is a deal to be made between PDM and CB&I or if [Tanner] should be contacting other parties who have similarly expressed interest." (CX 70 at PDM-C 1002706).

Response to Finding No. 1249:

Respondents do not dispute the truth of this finding. (*See, e.g.*, FOF 8.102)

1250. Tanner & Company prepared an offering memorandum for the sale of the PDM EC Division (Scheman, Tr. 2930-31). Tanner & Company started with the PDM EC division planned to prepare a similar offering memorandum for each Pitt-Des Moines division. (Scheman, Tr. 2934 ("The plan was to have an EC book and a water book. ... EC was the one we started on first. If we had continued down a different path and had not moved forward with CB&I, there would also be a water book")).

Response to Finding No. 1250:

Again, Respondents do not dispute the truth of this finding.

1251. Mr. Scheman recalled sending the PDM EC offering memorandum to only one company – CB&I – because by the time the offering memorandum was completed, negotiations

between CB&I and PDM were at a point "that it didn't make sense to send it out to other people." (Scheman, Tr. 2931).

Response to Finding No. 1251:

Respondents do not dispute the truth of this finding to the extent that it is partially incomplete. Mr. Scheman also stated that investment bankers agree that it is a bad decision to send such marketing materials when you know that you will not be able to speak with potential suitors because of entering negotiations and a quiet period with another purchaser. (Scheman, Tr. 6912-13) (FOF 8.54). Such offering memorandum take time to compile, and by the time this particular book was completed, the letter of intent was entered with CB&I. (Scheman, Tr. 2931).

1252. In contrast, Pitt Des-Moines actively sought buyers for its other divisions. As of August 18, 2000, "over ten parties had received the Confidential Memorandum for Steel Distribution and six groups had received Bridge Division books." (CX 521 at TAN 1000339).

Response to Finding No. 1252:

This finding is irrelevant. The evidence is clear that Tanner spoke with nearly 25 potential purchasers for the EC and Water Divisions, although it was determined that non of these purchasers were available. (Scheman, Tr. 6911, 2922; RX 164-166) (FOF 8.53).

1253. On August 20, Tanner presented to Pitt-Des Moines's president additional lists of prospective acquirers for the various Pitt-Des Moines divisions, including fourteen parties who initiated contact expressing interest in possible acquisition of the various divisions and 32 prospective financial buyers. (CX 527 at TAN 1002453-2455).

Response to Finding No. 1253:

Respondents do not dispute the truth of this finding. However, the fact that some companies expressed interest does not mean that they were appropriate or viable buyers. (Scheman, Tr. 6916) (FOF 8.56). (*See, e.g.*, FOF 8.61-8.82).

1254. On August 29, 2000, Respondents announced that they had signed a letter of intent for the acquisition of PDM by CB&I. (CX 285; CX 1565; *see* Glenn, Tr. 4377).

Response to Finding No. 1254:

Respondents do not dispute the truth of this finding. (FOF 8.105).

1255. CB&I initially agreed to pay $93.5 million for PDM, which was at the "high end" of Tanner's estimates of PDM's sales value. (CX 521 at TAN 1000328). Tanner believed "it is doubtful that PDM could achieve a value exceeding $93.5 million in an alternative transaction." (CX 521 at TAN 1000329).

Response to Finding No. 1255:

This finding is partially false as CB&I first agreed to pay $93.5 million for PDM EC and Water, not for "PDM." (FOF 8.105-8.106, 8.114). Further, the actual purchase price was ultimately reduced by $22 million based on PDM EC's poor performance and substantial losses from PDM's foreign subsidiary in Venezuela. (Byers, Tr. 6793-94, 6873-75) (FOF 8.112-8.114).

1256. Alternative buyers would unlikely pay a premium price for PDM because they would face continued tough competition from CB&I. (Scheman, Tr. 2966-67). Handwritten notes of PDM's investment banker state "Need informed buyer willing to fund war wCB&I - unlikely to pay premium." (CX 534 at TAN 1001619). Mr. Glenn of CB&I conceded that he thought PDM was worth more to CB&I than it was to other firms. (Glenn, Tr. 4261-62).

Response to Finding No. 1256:

This finding is misleading because alternative buyers were unlikely to pay a premium given PDM EC's substantial losses in 2000. Relying on his years of experience in the industry as an investment banker, Mr. Scheman believed that it would have been very difficult to convince a buyer that EC would be profitable after losing a substantial amount of money the year before under the market conditions that existed at the time. (Scheman, Tr. 6924-25, 6926-27, 2961-63; Byers, Tr. 6794) (FOF 8.100, 8.113, 8.116). Moreover, Mr. Glenn's complete testimony on this issue is that PDM was worth more to CB&I than it was to other firms because of CB&I's ability to utilize PDM's resources and compete on a global basis, not in the domestic market. (Glenn, Tr. 4261-62). This explains why financial buyers were not interested.

1257. Mr. Scheman considered CB&I to be a "preemptive buyer" and this meant "that we never went out to other people. Their status as a preemptive buyer made it so we didn't go down the route of calling other people." (Scheman, Tr. 2938-39; *see also Id.* at 2939-40 (Tanner did not believe it was "prudent" to "go out and contact people"), 2938 (Tanner and Pitt-Des Moines had "reached a point with CB&I where we thought we had a good deal, and we, ultimately, I believe, entered into a letter of intent, and, therefore, did not show it to other people")).

Response to Finding No. 1257:

Respondents do not dispute the truth of this finding, to the extent that locating a "preemptive buyer" did not mean that Tanner ceased communications with other potential purchasers. (FOF 8.53). Mr. Scheman testified that Tanner continued to receive inquiries in response to the issued press release, and evaluated each offer. Based on Tanner's combined years of experience in the investment banking industry and participating in hundreds of such deals, continuing to contact potential purchasers under those conditions is damaging to a firm's salability. (Scheman, Tr. 6911-13, 2922) (FOF 8.53-8.54).

1258. PDM turned away prospective buyers who might have made reasonable alternative offers. Matrix, then the third-largest United States tank constructor made efforts to buy PDM EC. (Vetal, Tr. 418-19).

Response to Finding No. 1258:

As stated, this finding is inaccurate and wholly unsupported by the record evidence for a number of reasons. First, in the EC industry, just because a substantial number of companies existed does not mean that they were appropriate buyers. (Scheman, Tr. 6916) (FOF 8.56). Further, Tanner evaluated numerous potential purchasers and concluded that none of these "prospective buyers" were viable purchasers, especially in light of the lending conditions at the time. (FOF 8.61-8.84) (Opening Br. at 140-42). Third, Matrix at no time "made efforts to buy PDM EC." In fact, the record evidence is directly to the contrary. The record is clear that PDM was selling EC and Water together. (Scheman, Tr. 6922-23, 2959-60; Scorsone, Tr. 4779; Byers, Tr. 6731) (FOF 8.5, 8.37) (Opening Br. at 141). Matrix had absolutely no interest in

PDM Water, and had recently exited the water market because it was not a good fit for Matrix. (Vetal, Tr. 419, 442) (FOF 8.64). Further, Matrix wished to purchase the assets of the Water Division, and the personnel of the EC Division (a combination that was never discussed nor a realistic alternative). (Vetal, Tr. 441-42; Byers, 6780-82) (FOF 8.69-8.70). More importantly, Matrix could not finance such a transaction. Mr. Scheman testified that Matrix did not have the earnings or balance sheet to finance a transaction for PDM, and Matrix's stock was illiquid. (Scheman, Tr. 6931-33, 6934-38) (FOF 8.67, 8.68, 8.71, 8.72). Specifically, Matrix never discussed possible financing for a PDM acquisition. (Vetal, Tr. 441) (FOF 8.74). Mr. Vetal did not even know PDM's asking price. (Vetal, Tr. 423, 440) (FOF 8.75). In addition, Mr. Vetal never even saw the consolidated balance sheet, revealing the substantial losses for PDM EC. (Vetal, Tr. 420) (8.78). However, Mr. Vetal did state that if due diligence revealed a $10 million loss for the following fiscal year, such a projection would have been a factor in whether Matrix would have pursued PDM EC. (Vetal, Tr. 421-22, 439) (FOF 8.65) (Opening Br. at 148-51).

1259. Matrix's President, Brad Vetal, called Pitt Des Moines's President, William McKee, and informed him of Matrix's interest in purchasing PDM EC. (Vetal, Tr. 422). Mr. McKee told Mr. Vetal that Pitt Des Moines could not talk with Mr. Vetal about a sale of the business because Pitt Des Moines already had a buyer, but Mr. McKee would call him if that deal fell through. (Vetal, Tr. 422-23; *see also* RX 168 at TAN 1000654 (handwritten notes of Peter Scheman indicating Mr. Vetal had contacted Mr. McKee)).

Response to Finding No. 1259:

Respondents have no specific response to this finding. To the extent that Matrix was really interested in purchasing PDM EC, Respondents refer this Court to RFOF 1258.

1260. Pitt Des-Moines' Board of Directors meeting minutes illustrate that PDM had viable alternatives to liquidation. On November 28, 2000, PDM's President, William McKee stated that if the CB&I transaction fell through, PDM would continue to seek other purchasers:

> Mrs. Townsend inquired what effect would a failure to consummate the PDM/CB&I transaction have on the proposed transaction with Russell Metals. Mr. McKee responded that he believed the transaction should still proceed since *the Company*

> *would continue its efforts to sell as PDM EC and PDM Water divisions by seeking other purchasers.*

(CX 1590 at PDM-C 1006065) (emphasis added).

Response to Finding No. 1260:

As stated, this finding is irrelevant and inaccurate because subsequent to the November 28, 2000 Board meeting, Mr. McKee reported to the Board on December 19, 2000 that in fact "there is a thin market and *no other serious potential purchaser was identified.*" (Byers, Tr. 6872-73; RX 28 at 2) (emphasis added) (FOF 8.122). Therefore, the record evidence directly contradicts Complaint Counsel's position and renders CCFF 1260 irrelevant as it is later superceded by the record evidence surrounding the December 19, 2000 Board meeting. (FOF 8.122).

1261. Tanner & Company's report supporting its fairness opinion for the sale of PDM to CB&I identified various alternative strategies for the sale of PDM. (RX 163). As one alternative to the sale of PDM, Tanner wrote that "[w]hile it would likely be costly and difficult to separate the two Divisions, PDM's EC and Water Divisions could be marketed independently in stand-alone transactions... However, due to the historical connection between the Divisions and their sharing of facilities, the cost of separating the two businesses may be as high $5 to $10 million." (RX 163 at TAN 1000406). Other alternatives included a leveraged buyout for about $65 million. (RX 163 at 1000404).

Response to Finding No. 1261:

This finding is grossly misleading because the referenced LBO was for the Water Division only. (Byers, Tr. 6769-70, 6773) (FOF 8.118). There were no interested buyers for PDM EC and it would have been liquidated. (FOF 8.115-8.126).

1262. Respondents presented no evidence that Pitt Des Moines made good-faith efforts to elicit reasonable alternative offers other than from CB&I.

Response to Finding No. 1262:

This finding wholly ignores the record evidence and is easily contradicted. For instance, Mr. Scheman testified as to the strategy and marketing plan implemented to sell PDM.

(Scheman, Tr. 6944-45) (FOF 8.47). This marketing strategy and plan was the product of the combined years of experience of Mr. Scheman (14 years as an investment banker and over 100 such deals himself), his partners, and associates. (Scheman, Tr. 2912-13, 6906, 6908-09, 6941-43, 6945) (FOF 8.18, 8.31, 8.48). For instance, Tanner released a mass dissemination campaign that included a press release throughout the industry. This release was then published in major trade journals and periodicals, such as the Wall Street Journal. (Scheman, Tr. 6910-11, 6944-46, 2921-22) (FOF 8.49-8.52). Tanner fielded inquiries from potential purchasers as well as contacted various potential sources of interest. (Scheman, Tr. 6911l RX 164-66) (FOF 8.53). At the end of the day, Mr. Scheman and Tanner conducted themselves consistent with a similarly situated investment banker and in accordance with its fiduciary duty in representing PDM EC and Water. (Scheman, Tr. 6943-44, 6947; Byers, Tr. 6881-82) (FOF 8.44, 8.46).

E. Absent the Acquisition, PDM EC's Assets Would Not Have Exited

1263. Dr. Simpson testified that, in his opinion, if CB&I had not bought PDM as a going concern, someone else would. (Simpson, Tr. 5674). Dr. Simpson testified that if PDM were acquired by a large international firm, similar to how Skanska acquired Whessoe, then PDM would have the backing of a large international engineering company. (Simpson, Tr. 3583-4). Dr. Simpson noted that PDM EC had a stronger reputation than Whessoe. (Simpson, Tr. 3584).

Response to Finding No. 1263:

Dr. Simpson lacks any foundation to assert such opinions, which are contrary to the record evidence. Dr. Simpson stated that he was not an investment banker and has no experience in this field or in buying or selling a business. (Simpson, Tr. 5678-5686). Consequently, his testimony on this subject is unreliable and solely self-serving. In fact, Dr. Simpson offers no support for this opinion and fails to identify one single alternative purchaser. (Simpson, Tr. 5674). Contrary to Dr. Simpson's assertions, no large international firm was interested in entering the U.S. EC industry. (*See, e.g,* Jolly, Tr. 4683-84, 4701-02) (FOF 8.82).

Finally, Dr. Simpson's opinion that PDM EC has a stronger reputation than Whessoe is irrelevant to PDM's decision to exit the market.

1264. Dr. Simpson testified that in his opinion PDM EC and PDM Water were strong divisions. Dr. Simpson noted:

> ...CB&I made Luke Scorsone, who had been president of PDM EC, president of CB&I Industrial. They had made, I believe, Mr. Brady, who had been in charge of PDM Water, they made him in charge of the CB&I's water tank unit. So, PDM's management seemed solid.
>
> CB&I has kept PDM's fabrication plants, so the fabrication plants seemed to be solid and competitively significant. CB&I has adopted some of PDM EC's and PDM Water's construction techniques, so the skill of PDM EC seemed to be solid. The testimony in this case indicates that PDM EC had a good reputation and PDM EC had been commercially successful as far as getting jobs. So that - all of that suggests that PDM EC was a strong competitor in this marketplace."

(Simpson, Tr. 3578).

Response to Finding No. 1264:

Dr. Simpson lacks any foundation to testify as to the Exiting Assets defense as set forth in RFOF 1233 and 1263. This lack of foundation is amplified by Dr. Simpson's blatant disregard for the impact of PDM EC's substantial losses in fiscal year 2000. (*See, e.g.*, Scheman, Tr. 6916-18, 6921-23, 6926, 2950-51) (FOF 8.83-8.88) Consequently, this finding is misleading and irrelevant to the Exiting Assets Defense. This finding as to PDM EC and PDM Water's strength is irrelevant to this case because PDM's Board was irrevocably committed to selling these divisions and exiting the industry. (*See* RFOF 1221) (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907, 6952) (FOF 8.16, 8.20, 8.38, 8.115).

1265. Dr. Simpson testified that, as a stand-alone firm, PDM would have been about the same size as Matrix Services and would have been bigger than companies such as ATV or Chattanooga Boiler & Tank. (Simpson, Tr. 3583). Dr. Simpson testified that a stand-alone PDM could compete for projects in partnerships with another firm and that a stand alone PDM would be a stronger partner than AT&V. (Simpson, Tr. 3584).

Response to Finding No. 1265:

Dr. Simpson's opinions in this finding are unsupported by any evidence in the record and therefore are unreliable. Moreover, this finding is irrelevant due to PDM's commitment to exit the market and sell its assets. (*See* RFOF 1221) (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907, 6952) (FOF 8.16, 8.20, 8.38, 8.115). Even so, PDM EC benefited from being part of an aggregate division structure much larger than Matrix because PDM EC could use the aggregate revenues of all operating units to obtain larger insurance values and bonding capabilities. (Byers, Tr. 6734-38) (FOF 8.7). Finally, Dr. Simpson's assumption regarding partnering with another firm is unsupported by the record, and Complaint Counsel cites no instance where another firm was even interested in partnering with PDM as a stand-alone company. The bottom line is a Matrix sized company would not have been large enough to qualify for LNG work. (Newmeister, Tr. 2163).

1266. PDM could not sell the EC Division without the Water Division because of their shared services. (Byers, Tr. 6800 ("We could not sell EC without Water because of the shared services)). Moreover, Pitt Des-Moines' Board wanted to sell the EC and Water division as a going concern because that would get Pitt Des-Moines more money. (Byers, Tr. 6801-02).

Response to Finding No. 1266:

This finding is misleading because, as of December 2000, PDM would have separated the Division by selling PDM Water in an LBO and liquidating PDM EC. (Byers, Tr. 6769-70, 6773) (8.118).

1267. Pitt-Des Moines would not have had difficulty finding an alternative buyer for PDM. It simply would have had to settle for a buyer not willing to pay the premium CB&I offered for the market power the acquisition afforded it. Dr. Harris observed in his expert report that capital markets generally function well, and that companies that have profitable opportunities to expand generally can find the financial resources to do so. (Harris, Tr. 7793). The PDM EC Division was a successful and profitable business and was projected to sustain earnings growth. (CX 1695 at CB&I/PDM-H 4005701; CX 529 at TAN 1000596; *see also* CX 1713 at CB&I/PDM-H 4015086-89). Under these circumstances it must be assumed that the assets of PDM's EC Division would have remained in the market.

Response to Finding No. 1267:

This finding is conclusory and unsupported by any record evidence. Complaint Counsel fails to provide any record cites for its assertion that Pitt-Des Moines would not have had difficulty finding an alternative buyer for PDM. In actuality, Pitt-Des Moines did have difficulty as evidenced in the December 19, 2000 Board meeting minutes (…"no other serious potential purchaser was identified") as well as PDM management's decision to have Tanner run liquidation scenarios. (RX 28 at 2; Byers, Tr. 6872-73, 6769-70, 6773) (FOF 8.118, 8.122). These scenarios established a liquidation value that no identified alternative purchaser could afford. (Scheman, Tr. 6924-26) (FOF 8.116). Further, Complaint Counsel also assumes that Pitt-Des Moines "would have to settle for a buyer not willing to pay the premium CB&I offered for the market power . . . ." Again, no record cite is offered for this assertion. To the contrary, CB&I hardly paid a premium given that its initial offering of $93.5 million was negotiated downward to $83 million and ultimately to $72 million based entirely on the EC Division's poor performance. (Byers, Tr. 6788-91, 6793-94; RX 28 at 4; CX 388 at 2) (FOF 8.110, 8.112-8.114). CB&I never sought an adjustment based on the Water Division's performance. (Byers, Tr. 6873-75) (FOF 8.114). Therefore, CB&I ended up purchasing PDM EC within the liquidation value and did not pay a premium for the EC Division. (Byers, Tr. 6794) (FOF 8.113). As to Complaint Counsel's statements regarding PDM EC's projected earnings growth, Respondents reassert their responses in RFOF 1221 and 1226-1228 that this fact is irrelevant given the Board's resolution to sell the Division and the failure to account for the subsequent substantial losses sustained in 2000. (*See, e.g.,* FOF 8.83-8.100).

1268. Dr. Harris believes that if CB&I had acquired only PDM's Water Division, PDM's EC Division would have been liquidated. (Harris, Tr. 7975-76).

Response to Finding No. 1268:

Respondents do not dispute the truth of this finding. (*See, e.g.*, 8.115-8.133).

1269. Dr. Harris did not undertake an independent financial analysis of whether PDM EC qualified as an exiting asset. (Harris, Tr. 7333). Instead, he relied on the testimony of Mr. Byers and Mr. Scheman. (Harris, Tr. 7333).

Response to Finding No. 1269:

This finding is irrelevant because Mr. Scheman and Mr. Byers are the only two witnesses with foundation and experience in such transactions. Mr. Scheman has been in the industry for 14 years and handled over 100 such deals. (Scheman, Tr. 2910, 6906, 6941-43) (FOF 8.18). Mr. Byers, similarly, has been actively involved in the purchase or sale of business units while at PDM at least 12 times, and has worked extensively with investment bankers over his career. (Byers, Tr. 6730-31) (FOF 8.10).

1270. Although Tanner & Company supplied to Mr. McKee extensive lists of prospective purchasers, Mr. McKee never identified any potential purchaser, other than CB&I and Enron, called by him, by Tanner & Company, or by anyone else. (Byers, Tr. 6903).

Response to Finding No. 1270:

This finding as stated is confusing and misleading. Mr. Byers testified that to his knowledge -- Mr. Byer's knowledge, Mr. McKee never identified any potential purchaser called before or after December 19, 2000. (Byers, Tr. 6902-03). That is not to say that none existed, nor does it mean that Tanner was not in contact with potential purchasers. (Scheman, Tr. 6911, 2922) (FOF 8.53). Mr. McKee never testified in this proceeding so the record is unsupported as to what Mr. McKee actually identified. Finally, it was not Mr. McKee's job to identify other purchasers, it was Tanner's, and he relied on his investment banker to do so. (Byers, Tr. 6758-59) (FOF 8.40).

1271. Dr. Harris did not recall that Mr. McKee, PDM's president, informed PDM's Board in November 2000 that in the event the sale to CB&I were not consummated PDM would continue its efforts to sell its EC and Water Divisions. (Harris, Tr. 7966-68; CX 1590 at PDM-C

1006065). Further, Dr. Harris said that even if PDM's president had made such a statement to the PDM Board, Dr. Harris would not change in, any way, his exiting asset conclusion. (Harris, Tr. 7968).

Response to Finding No. 1271:

Respondents do not dispute the truth of this finding because it is irrelevant. At the December 19, 2000 PDM Board Meeting, Mr. McKee reported that in fact "there is a thin market and *no other serious potential purchaser was identified.*" (Byers, Tr. 6872-73; RX 28 at 2) (emphasis added) (FOF 8.122). Further, such a statement by Mr. McKee in November 2000 would not have an impact on the Exiting Assets defense because Pitt Des-Moines' Board of Directors was irrevocably committed to selling its assets and its business as set forth in RFOF 1221. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907, 6952) (FOF 8.16, 8.20, 8.38, 8.115).

1272. Before recommending any disposition of the EC Division, Mr. Byers would have checked to *see* if there were any alternative purchasers. (Byers, Tr. 6799-6800). Mr. Byers never got to that point. (Byers, Tr. 6800). Tanner would have done the same. (JX 34 at 83 (Scheman, IHT)).

Response to Finding No. 1272:

Respondents do not dispute the truth of this finding to the extent that PDM management did in fact begin looking for alternatives for the sale of PDM EC and Water. In fact, PDM management instructed Tanner to run liquidation scenarios in December 2000. (Byers, Tr. 6769-70, 6877-78) (FOF 8.118, 8.123). While not presented to the Board, Mr. McKee and Mr. Byers were prepared to present the liquidation of PDM EC to the Board. (Byers, Tr. 6769-70, 6773) (8.118).

1273. Mr. Byers further testified that before making any recommendation to liquidate the PDM EC Division, his fiduciary duties would have required him to investigate to assure himself that there was no alternative purchaser for either for PDM or for PDM EC willing to pay more than liquidation value of the business. (Byers, Tr. 6799-800, 6893, 6895). Mr. Byers never got to that point. (Byers, Tr. 6800). Mr. Byers never investigated whether there was a possibility of another purchaser. (Byers, Tr. 6895).

Response to Finding No. 1273:

This finding is contrary to the weight of the record evidence because Mr. Byers also testified that he was acting within his fiduciary duty by recommending the liquidation of PDM EC to the Board had the CB&I deal fallen through. (Byers, Tr. 6774-75) (FOF 8.126). Mr. Byers properly relied on Tanner to present the options in terms of alternative purchasers for PDM EC and Water. (Byers, Tr. 6758-59, 6880-81) (FOF 8.40). Tanner also was acting in its fiduciary duty by recommending liquidation. (Scheman, Tr. 6947; Byers, Tr. 6881-82) (FOF 8.44).

1274. Pitt Des-Moines' Board of Directors never took up the issue of liquidating the PDM EC Division. (Byers, Tr. 6891).

Response to Finding No. 1274:

This finding is misleading to the extent that the Pitt-Des Moines Board did not vote on the liquidation of PDM EC because the contingency never arose. (Byers, Tr. 6891). However, Pitt-Des Moines management did in fact consider the liquidation of PDM EC as demonstrated by its directions to Tanner to run liquidation scenarios in December 2000. (Byers, Tr. 6769-70, 6773) (FOF 8.118). Moreover, Mr. Byers and Mr. McKee were prepared, if need be, to present such a liquidation recommendation to the PDM Board. (Byers, Tr. 6770, 6773) (FOF 8.118).

1275. Dr. Harris acknowledged that exiting asset essentially means the assets must leave the market. (Harris, Tr. 7956; Harris, Tr. 7332 ("if you knew for a fact that the assets were going to exit and no one else was going to buy them and be a low-cost producer, if you knew that as a fact")). However, Dr. Harris's characterization of PDM EC as an exiting asset does not withstand this test. Dr. Harris uses the term "exiting asset" despite evidence that, even if PDM EC were liquidated, the assets would remain in the market.

Response to Finding No. 1275:

As stated, this finding is not accurate. Dr. Harris testified that Complaint Counsel's interpretation of the exiting asset defense misstates the theory and how it applies to

this case. (Harris, Tr. 7956). Moreover, the record evidence reveals that other than CB&I, no other firm in the industry was an alternative purchaser. (Byers, Tr. 6872-73; RX 28 at 2) (FOF 8.122). Finally, Complaint Counsel's attack on Dr. Harris' testimony fails to include any cite, let alone support, to the record evidence. In particular, Complaint Counsel's assertion that the PDM assets would have remained in the market is contrary to the record evidence. (*See, e.g.,* FOF 8.115-8.126).

1276. If PDM EC were liquidated, its tangible and intangible assets would have become available for purchase by foreign and United States firms attempting to compete against CB&I. According to Dr. Harris, "Graver is instructive. When they left, their assets were auctioned, auctioned off, and you know, the same sort of thing could have happened here." (Harris, Tr. 7335).

Response to Finding No. 1276:

Respondents do not dispute the truth of this finding, and specifically agree that Graver is instructive as a natural market experiment because the Graver assets left the market when made available to purchase. (FOF 8.127-8.133).

1277. According to Dr. Harris, Chattanooga Boiler and Tank purchased many of Graver's assets at auction and has employed people who had been employed by Graver. (Harris, Tr. 7312). "Apparently these competitors have hired expertise that used to work for Brown Minneapolis Tank" (RX 208; Harris, Tr. 7320-1). "Graver used to be very competitive in these LIN/LOX tanks and it sounds like their know-how moved on to another company." (RX 208; Harris, Tr. 7321).

Response to Finding No. 1277:

This finding is misleading and contrary to its own assertions: Complaint Counsel simply cannot have it both ways. In these findings, Complaint Counsel argues that CB&T lacks sufficient personnel and sophistication to compete in the relevant product markets. (*See, e.g.*, CCFF 320, 342, 409, 411). Now here, in CCFF 1277, Complaint Counsel is asserting that CB&T has competitively benefited in the product markets by purchasing Graver assets and employing former Graver personnel. Complaint Counsel cannot shift its position depending on

the point it wishes to prove at any given time. As a result, Complaint Counsel's Findings of Fact relating to Graver are misleading and unreliable.

1278. Dr. Harris demonstrated repeatedly in his testimony his misapplication of the exiting asset argument in this case. Dr. Harris acknowledges that he would continue to characterize PDM EC as an exiting asset although the fabrication facilities continued to be used by another tank company. (Harris, Tr. 7956). Dr. Harris asserted that his characterization of PDM EC as an exiting asset would be unaffected even if PDM EC had continued to complete projects, including construction of the Cove Point LNG tank, which is now under construction. (Harris, Tr. 7956-58).

Response to Finding No. 1278:

Complaint Counsel fails to provide a single cite to the record for its assertion that Dr. Harris "repeatedly" demonstrated his misapplication of the exiting asset argument, namely what constitutes proper application of the defense. As to the remainder of this finding, Respondents do not dispute the truth of this finding. (*See* Cutts, Tr. 2425) (FOF 8.131) (*See also* FOF 8.127-8.133).

1279. Dr. Harris acknowledged that PDM EC's intellectual property could be valuable to competitors of CB&I. (Harris, Tr. 7974). However, Dr. Harris asserted that his exiting asset conclusion would be unaffected even if PDM EC's intellectual property were acquired and used by another company to compete in the relevant markets (Harris, Tr. 7958) and even if PDM EC's customer records and files were acquired and used by another company to compete in the markets. (Harris, Tr. 7959).

Response to Finding No. 1279:

Respondents do not dispute the truth of this finding. (FOF 8.127-8.133).

1280. Mr. Byers testified that in the event of liquidation, PDM would have sought customer consent to sell its backlog of unfinished contracts to other companies to complete. (Byers, Tr. 6802-05). Mr. Byers testified that for existing contracts, PDM was prepared to get consents from customers to transfer those contracts to other companies. These contracts included one for the Cove Point project. (Byers, Tr. 6802, 6804-5).

Response to Finding No. 1280:

Respondents do not dispute the truth of this finding. (*See, e.g.*, FOF 8.127-8.133).

1281. Respondents have failed to show that PDM EC would have been an exiting asset if PDM were not acquired by CB&I.

Response to Finding No. 1281:

As stated, this finding is wholly unsupported by the record evidence. Complaint Counsel fails to include a single cite in support of this assertion. Moreover, this finding is contradicted by the record. For instance, PDM's Board was irrevocably committed to selling PDM EC's assets and exiting the industry, as set forth in RFOF 1221. (Byers, Tr. 6741-42, 6755, 6757-58; Scheman, Tr. 2911, 2919, 6907, 6952) (FOF 8.16, 8.20, 8.38, 8.115). Further, there were no other serious potential purchasers for PDM EC. Finally, this finding is simply false. (*See, e.g.,* RFOF 1221-1281; FOF 8.1-8.133).

IX.

DIVESTITURE IS THE PROPER REMEDY FOR THIS ILLEGAL MERGER

A. CB&I Must Be Ordered to Divest and Restore PDM

1282. Complaint Counsel's Opposition to Respondents' Motion for Directed Verdict on the Issue of Remedy sets forth the legal principles, statute and caselaw establishing that divestiture is the required remedy if the Tribunal determines that the CB&I/PDM merger violates Section 7 of the Clayton Act and Section 5 of the FTC Act.

Response to Finding No. 1282:

Complaint Counsel is correct that its Opposition to Respondents' Motion for Directed Verdict on the Issue of Remedy sets forth its view of the legal principles regarding remedy. However, Complaint Counsel's view is incorrect as explained in Respondents' Opening Brief at 158-172 and Respondents' Findings of Fact at 9.1-9.39. Respondents have further demonstrated that the record evidence fails to support Complaint Counsel's proposed remedy and as a result divestiture cannot be imposed. (*See* Respondents' Motion for Directed Verdict on the Issue of Remedy). In addition, Respondents' post-trial filings have sufficiently demonstrated that contrary to Complaint Counsel's assertions, if this Court should find a violation of Section 7, a breakup of CB&I through divestiture is not the only available or even appropriate remedy. (*See*

Opening Br. at section IX, p. 158-172; Reply Br. at section V). Precedent from Commission opinions as well as Federal law demonstrate that although breakup through divestiture is an option, it should only be imposed after full consideration of lesser alternative remedies. *Id*. Finally, any remedy imposed by this Court must be supported by the record evidence. *Id.*

1283. Divestiture to an appropriate acquirer of the reconstituted assets of PDM EC and PDM Water as an ongoing, viable business would effectively restore competition and remedy any lessening of competition that resulted from the acquisition of PDM. (Simpson, Tr. 3608-09). (*See* Robert Rogowsky, "The Economic Effectiveness of Section 7 Relief," 31 Antitrust Bull. 187, 194, 199 (1986) (When two firms have combined, "the highest probability of restoring competition comes from full divestiture of the combined entity" that creates a "viable, independent effective entity within a reasonable time, *e.g.* spin-off.")).

Response to Finding No. 1283:

Complaint Counsel's proposed finding is incorrect and unsupported by the record evidence. Initially, Respondents have demonstrated that there has been no lessening of competition as a result of CB&I's Acquisition of PDM. (*See* Harris, Tr. 7375-76; Scorsone, Tr. 4881-82 (state of mind); *see also* FOF 9.6-9.7). It is telling that Complaint Counsel cites to Dr. Simpson and a law review article instead of presenting evidence from the extensive record in this case showing that there exists an "appropriate acquirer" or that its remedy would be effective in this case. Respondents have demonstrated that Dr. Simpson's opinions regarding remedy are flawed because he failed to cite any customers who supported his opinion of remedy and failed to rely on any record evidence when arriving at his opinion that the acquisition resulted in a lessening of competition. (*See* Simpson, Tr. 3611, 5715, 5718; *see also* FOF 9.3-9.5). In addition, Respondents have illustrated that if a violation is found, divestiture is not always the best remedy where lesser alternatives are available. (*See* Opening Br. at section IX, p. 158-172; Reply Br. at section V).

1284. An effective remedy requires the divestiture of intangible as well as tangible assets. (Simpson, Tr. 3608). CCFF 1297-1373.

Response to Finding No. 1284:

Complaint Counsel's proposed finding is inaccurate, incomplete, misleading and not supported by the record evidence. First, Respondents have demonstrated that there is no need for a remedy. (*See* RFOF 1283). Additionally, Complaint Counsel fails to cite any fact testimony in support of its proposition but rather relies on the testimony provided by its expert witness, Dr. Simpson. (*See* FOF 9.3-9.5). Complaint Counsel has failed to present any evidence that a breakup by divestiture would be an "effective remedy" or that other alternative remedies would not be as effective or more effective in addressing any violations that this Court may find. Not a shred of fact evidence has been presented to support Complaint Counsel's proposed remedy.

1285. There is substantial evidence in the record that shows what assets would be included in an effective divestiture. The record provides information as to 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* CX 385, 25 (listing PDM EC's salaried and hourly employee headcount); CX 385 at 21-23 (listing PDM EC's facilities and equipment); CX 134 (organization chart for PDM EC); CX 133 (organization chart for PDM Water); and CX 328-339 (asset purchase agreement, listing all assets of the PDM EC and Water Divisions purchased by CB&I, including all owned real property, tangible personal property, inventories, contract rights, accounts receivables, and intellectual property); CX 1033 at 32 (number of employees terminated).

Response to Finding No. 1285:

Respondents do not dispute that the documents cited by Complaint Counsel detail many of the physical assets acquired from PDM. However, Complaint Counsel incorrectly states, and without any support, that all of these assets are required to be divested in order to have "effective relief." Complaint Counsel has failed to present any evidence, other than the unsubstantiated opinions of Dr. Simpson, that their proposed remedy would be "effective" in restoring the competition that was allegedly lost as a result of the Acquisition. (*See* FOF 9.3-9.5).

1286. Customers would benefit from the increased competition resulting from an effective divestiture. (Neary, Tr. 1502 (TVC; competition would be restored if PDM EC were returned to the marketplace); CX 370, 89 (Britton, Dep.) (LNG; prefers to have more than one competitor, CB&I, for a project); **[xxxxxxxxx]**, Tr. 462, *in camera* (**[xxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxx]**); Simpson, Tr. 3606-07, 3611 (customers would benefit by reconstituting PDM EC)).

<u>Response to Finding No. 1286:</u>

Complaint Counsel's finding presupposes its own result: an "effective divestiture" would be effective. That is an ideal not supported by record evidence. Further, Complaint Counsel attempts to mislead this Court by citing irrelevant, unsubstantiated, and inadmissible testimony in support of its proposition that customers would benefit from a divestiture. First, Complaint Counsel cites CX 370, a document which was not admitted into evidence. Even if it was in evidence, the statement Complaint Counsel cites does not support their proposition because the witness stated: "it's always nice when you have more than one company to get quotes from. I don't have an opinion specific to this case." (CX 370 at 89)(not admitted into evidence). Respondents have demonstrated that there are numerous competitors in the LNG market. (*See* FOF 3.56-3.459). Complaint Counsel also misleadingly cites a witness from the LIN/LOX market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx]** *see also* FOF 5.157-5.158). Despite Complaint Counsels assertions, **[xx xxxxxxxxxx]** has not been harmed by the Acquisition. Complaint Counsel also cites a witness from the TVC market. Respondents have demonstrated that demand in the TVC market is virtually non-existent and have provided this Court with an alternative remedy proposal should a violation be found. (*See* FOF 6.11-6.64, 6.91-6.121). The final person cited by Complaint

Counsel is their expert witness, Dr. Simpson. When Dr. Simpson was asked to identify any customers that favor a breakup, he stated "[n]one come to mind." (Simpson, Tr. 5718; *see also* FOF 9.3-9.5).

Complaint Counsel's proposed finding also runs contrary to the manifest weight of the evidence that customers do not support Complaint Counsel's proposed remedy. For example, CB&I's acquisition of PDM has given LNG customers additional "comfort" in the bidding process because CB&I is now a larger company with more financial assets. (Bryngelson, Tr. 6154). LNG customers testified that they have "some real concerns" about Complaint Counsel's proposed remedy and believe it would be a disadvantage to breakup CB&I. (Sawchuck, Tr. 6077; J. Kelly, Tr. 6265; Bryngelson, Tr. 6155; *see also* FOF 9.9). LIN/LOX customers also believe that there is benefit to CB&I's Acquisition of PDM. LIN/LOX customers believe a breakup would harm the industrial gas industry. (Hilgar, Tr. 1540; *see also* FOF 9.10).

1287. [**xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxx]**, Tr. 4758, *in camera*).

<u>Response to Finding No. 1287:</u>

Complaint Counsel attempts to mislead this Court and misconstrue the testimony of Mr. Jolly by citing the words of Complaint Counsel and attributing them to Mr. Jolly. (Jolly, Tr. 4758). An accurate reading of the testimony demonstrates that Mr. Jolly simply agreed that if CB&I were broken up by the FTC there would be two companies as opposed to one. In addition, Respondents have demonstrated that there is already robust competition in the LNG market, including Technigaz. (*See* FOF 3.56-3.255).

1288. Howard Fabrication believes that it "could make more money ... if CB&I and PDM were to emerge again as two competitors for thermal vacuum chambers." (Gill, Tr. 271-72). According to Mr. Gill, the re-emergence of PDM would increase the likelihood that Howard Fabrication is chosen as a subcontractor for TVC projects. (Gill, Tr. 271-72).

Response to Finding No. 1288:

Complaint Counsel's proposed finding is irrelevant and misleading. As is demonstrated by the citations provided above, Mr. Gill's opinions are biased because he stands to benefit monetarily if Complaint Counsel's proposed remedy is imposed. Additionally, Respondents have demonstrated that due to the lack of demand in the TVC market there is no need to impose a remedy. (*See* FOF 6.11-6.56). In the event that this Court should see the need for a remedy, Respondents' offer is sufficient to address any problems the Court may find. (*See* FOF 6.91-6.121).

B. Divestiture Must Be Complete and Must Include Full Restoration of Both the PDM EC and Water Divisions

1289. As the viability of PDM EC depended upon the viability of the PDM Water division, both must be included in an order for complete divestiture.

Response to Finding No. 1289:

Complaint Counsel cites no evidence to support this finding. Further, the link between EC and Water was strong when it was owned by PDM. (Byers, Tr. 6731). There is no evidence of a strong interdependence between the Water and Industrial Divisions as CB&I is managing the business. Finally, Complaint Counsel has it backwards: it is not that the EC Division depended on the Water Division for viability, but rather the use of shared resources made it difficult to separate them. (Byers, Tr. 6780). There is no evidence to support the same assumption with respect to CB&I today.

1290. PDM EC and PDM Water were inextricably intertwined. Mr. Richard Byers, a former PDM Board director, testified that it is "impossible to split [PDM EC and PDM Water]" in two because "they shared many services. They shared human resources, they shared physical plant." (Byers, Tr. 6780). PDM's investment banker, Tanner & Company, testified that "there was not a bright line that separated the two businesses but in certain places they kind of meshed together." (JX 34 at 33-34 (Scheman, Dep.)).

Response to Finding No. 1290:

Respondents incorporate the response to CCFF 1289 and note that CCFF 1290 is misleading to the extent it claims that "it is" difficult to split EC and Water as Mr. Byers testimony merely referred to the interdependence that existed in the way that the divisions were organized at PDM. (*See* RFOF 1289).

1291. Evidence, including testimony by Mr. Scorsone, suggests that PDM EC and PDM Water routinely shared field erection personnel, fabrication facilities, and field erection equipment. (Scorsone, Tr. 4779-80; CX 552 at 45-48 (Braden, Dep.); (Scorsone, Tr. 2852 (PDM EC and PDM Water shared field personnel and field construction equipment); *see* Rano, Tr. 5894, 5898 (same engineering processes are used for a flat-bottom tank as is used for an LNG tank)).

Response to Finding No. 1291:

Respondents agree with Complaint Counsel's finding as related to PDM's management of EC and Water. (*See* RFOF 1289-90). Further, Complaint Counsel's finding supports Respondents' continuing position that entry into each of the relevant product markets is easy because each of the relevant products uses the "same engineering processes [that] are used for a flat-bottom tank." (Rano, Tr. 5894, 5898). Any company capable of constructing a flat-bottom tank or a water tank has the ability to construct one of the relevant products through the use of "shared field erection personnel, fabrication facilities, and field erected equipment." (*See* CCFF 1291; *see also* Scorsone, Tr. 4779-80, 2852; Rano, Tr. 5894, 5898; CX 552 at 45-48) (*See also* RFOF 1289; FOF 8.4-8.7, 8.34-8.37, 9.11-9.31).

1292. PDM EC and Water maintained "at least one shared facility ... or multiple shared facilities." (JX 34 at 133 (Scheman, Dep.); *see* CX 552 at 43-44 (Braden, Dep.) ("PDM Water shared fabrication facilities with PDM EC at that time. We shared construction resources.")).

Response to Finding No. 1292:

Respondents do not dispute Complaint Counsel's proposed finding except as set forth in RFOF 1289-90, and to note for the benefit of the Court that Respondents are not aware of any document labeled JX 34. (*See also* FOF 8.4-8.7, 8.34-8.37, 9.11-9.31).

1293. Additionally, both divisions shared skilled personnel. (CX 552 at 45, 46-47 (Braden, Dep.) (construction crews and project managers would seamlessly transfer from a PDM Water job to a PDM EC job with their tools and equipment); CX 442 at 210 (Knight, Dep.) (tank field-erection crews are switched from cryogenic tanks to flat-bottom tanks)).

Response to Finding No. 1293:

Respondents do not dispute Complaint Counsel's proposed finding as long as it is limited to PDM's management of EC and Water. (*See* RFOF 1289-1291; *see also* FOF 8.4-8.7, 8.34-8.37, 9.11-9.31).

1294. As PDM EC and PDM Water were so interdependent prior to the acquisition, PDM did not consider it feasible to sell them as separate entities. A Tanner & Company analysis, based on conversations with PDM executives, concluded that "due to the historical connection between the Divisions and their sharing of facilities, the cost of separating the two businesses may be as high as $5 to $10 million." (CX 525, TAN-1000406; Scheman, Tr. 6922-23; *see* Byers, Tr. 6781 ("It was not practical to split [PDM EC and PDM Water] and sell them separately.")).

Response to Finding No. 1294:

Respondents do not dispute Complaint Counsel's proposed finding as it relates to PDM's management of EC and Water. (*See* RFOF 1289-1291; *see also* FOF 8.4-8.7, 8.34-8.37, 9.11-9.31). There is no evidence that the cost of splitting EC and Water is that high today given the greater independence of the divisions. Further, Complaint Counsel ignores the likely large cost of cracking CB&I's current Industrial Division in two because that division is clearly using all the resources that Complaint Counsel claims are required to be split apart.

1295. PDM EC and PDM Water's sharing of resources provided the two divisions with a cost advantage. James Braden, formerly the President of PDM's Water Division, testified that splitting PDM Water from PDM EC "would have lessened our ability to stand alone, and

certainly would have diminished the profitability of the operation." (CX 552 at 44 (Braden, Dep.)).

Response to Finding No. 1295:

Respondents do not dispute Complaint Counsel's proposed finding as it relates to PDM's management of EC and Water. (*See* RFOF 1289-1291; *see also* FOF 8.4-8.7, 8.34-8.37, 9.11-9.31).

1296. Because PDM EC and Water acted as one cohesive division, divestiture must be complete and include the Water division of PDM. In order to restore both the tangible and intangible assets that the divisions shared, the proposed Order mandates that CB&I divest what it acquired from PDM, plus any additions or improvements that have been made to the assets. (Order, ¶ II.A; *see* Order, ¶ I.U. (definition of "PDM Assets")).

Response to Finding No. 1296:

Complaint Counsel's proposed finding is irrelevant and incomplete. As has been demonstrated by Respondents, there is no need for a remedy because no competitive harm has occurred. (*See* FOF 9.6-9.7). Respondents do not dispute that the PDM EC and PDM Water divisions were intertwined, but there is no evidence that the existing CB&I Industrial Tank Division and the CB&I Water Divisions are still inseparably joined. Further, as has been expressed above, an attempt to breakup CB&I will cause more competitive harm than good because it will create two weak and competitively vulnerable companies. (*See* RFOF 1289-1291; *see also* FOF 8.4-8.7, 8.34-8.37, 9.11-9.31).

C. In Order to Create a Viable, Effective Competitor, the Tribunal Must Provide the Divested Entity ("New PDM") with Certain Tangible and Intangible Assets

1. *A Revenue Base Comparable to PDM's and CB&I's Pre-Acquisition*

1297. In order to be a viable and effective competitor, the new company must have a sufficiently large revenue base to compete for work. CCFF 310-321, 1298-1309. Customers prefer suppliers with a substantial revenue base so that they can be satisfied that constructors will not default on contracts and so that suppliers may more easily secure bonding and other financial guarantees.

Response to Finding No. 1297:

Complaint Counsel's proposed finding is incomplete. Respondents agree with Complaint Counsel that that financial size of a company is vital to its survival and ability to compete for certain large projects in the LNG and TVC markets. However, customer testimony has demonstrated that a breakup of CB&I would result in two companies with insufficient financial resources to qualify for large projects. (*See* **[xxxxxxxxxxxxxxxxxxx]**; Izzo, Tr. 6511-12; Bryngelson, Tr. 6155-56; Sawchuck, Tr. 6077-78; *see also* FOF 9.21-9.22). Since CB&I in its current state is often too small to compete for projects, a divested company even with EC and Water would certainly fail for its inability to provide financial backing for its projects. (*See* Glenn, Tr. 4080, 4168; Izzo, Tr. 6511-12; Bryngelson, Tr. 6155-56; Sawchuck, Tr. 6077-78; *see also* FOF 9.21-9. 24). As a result, any divestiture order that would result in a breakup of CB&I would in fact make both resulting companies less competitively viable. (*See* FOF 9.11-9.31).

1298. In order to secure a bond for a project, a company generally needs "either security or liquid assets equal to about three times of that bond to guarantee the bond." (Gill, Tr. 200).

Response to Finding No. 1298:

Respondents have no specific response. (*See* FOF 9.21-9.26).

1299. Howard Fabrication's annual revenues, of $2.5 to $3 million (Gill, Tr. 181), are too small to enable it to compete against CB&I for larger thermal vacuum projects. (Gill, Tr. 199-200; *see id.* at 201 (Although Mr. Gill is in the thermal vacuum chamber business, "financial ability dealt me out.")).

Response to Finding No. 1299:

Respondents have no specific response.

1300. Also, **[xxxxxxxxxxxxxx]**, who had annual revenues of **[xxxxxxx]** million in 2001 testified that he would need "a little more financial strength and bonding capacity" to compete for larger low temperature and cryogenic tank projects. (**[xxxxx]**, Tr. 2374, *in camera*; JX 23a at 49 (**[xxxxx]**, Dep.)).

Response to Finding No. 1300:

Complaint Counsel's proposed finding is inaccurate, misleading and not supported by the record evidence. As an initial matter, respondents are unaware of any exhibit with the designation "JX 23a" being admitted into evidence. Contrary to Complaint Counsel's assertions, AT&V has in fact become a strong competitor in the low temperature and cryogenic tanks markets. AT&V has on its own emerged as the strongest competitor in the LIN/LOX market winning three projects since the Acquisition. CB&I has attempted to compete against AT&V on three competitively bid LIN/LOX projects and has lost to AT&V every time. CB&I has yet to win a LIN/LOX project when AT&V was a competitor bidding on the project. (Scorsone, Tr. 5018; *see also* FOF 5.76). AT&V has also become a competitor in the LNG tank market as a result of its partnership with TKK which has allowed it to make financial guarantees. (*See* FOF 3.99-3.140). AT&V has also entered the LPG market and has become a strong competitor. (*See* FOF 4.16-4.22).

1301. Daniel Knight, a sales representative for CB&I does not believe that a company with $20 million in revenue, such as Chattanooga Boiler & Tank, "would be able to stay in business" if "a problem occurred with one of their projects that cost them $10 million in legal damages." (CX 442 at 152 (Knight, Dep.)).

Response to Finding No. 1301:

Complaint Counsel's proposed finding is misleading. Respondents have previously acknowledged that financial size is an important factor in the competitive viability of a company. (*See* RFOF 1297, FOF 9.21-9.26). However, Complaint Counsel once again attempts to use words spoken by an attorney for Complaint Counsel and attribute them to a CB&I witness. Consistent with what Respondents have previously acknowledged, Mr. Knight, a low level salesperson at CB&I, testified that a company with larger revenue will be able to provide more security than a company with less financial assets. (CX 442 at 152). There is no

foundation for Mr. Knight's testimony, and it is contradicted by Mr. Stetzler of Chattanooga Boiler and Tank who testified that they are pursuing LIN/LOX and LPG projects. (FOF 4.43 (LPG), 5.68-5.71 (LIN/LOX)).

1302. Because Matrix has annual revenues of approximately $190 million, and lacks a larger company to financially back its operations, Matrix has difficulty convincing LNG customers that they are qualified suppliers. (CX 460 at CB&I-E 007235).

Response to Finding No. 1302:

Respondents have no specific response.

1303. Without a revenue base comparable to PDM's, New PDM will be unable to secure the bonding and financial guarantees required by customers. (Scorsone, Tr. 4939-40 (admitting that a company's size affects a customer's willingness to accept a financial guarantee from a company)).

Response to Finding No. 1303:

Complaint Counsel is incorrect because New PDM will not have the same size as old PDM because old PDM was a five division company with over $600 million in revenue. Although two of those divisions were acquired by CB&I, the assets of the three remaining divisions were sold to other companies. (Scheman, Tr. 6909, 6950; FOF 8.2).

1304. LNG customers have testified that they would not purchase from a divested entity unless it was able to financially guarantee its work. (Izzo, Tr. 6508 ("[T]he first thing I'd be concerned about with a NewCo is whether I'd put them on my bid list because of ability to bond."); Bryngelson, Tr. 6157 (Q... So is it beneficial to El Paso to have a company that has size, even if a lot of that size doesn't necessarily come from the revenue generated by building tanks? / A. Yes."); Carling, Tr. 4467-4468 ("We expected the lead contractor to stand behind his work, so the bonds and the guarantees would have to come from [a divested entity's] parent company.")).

Response to Finding No. 1304:

Complaint Counsel's proposed finding is incomplete. LNG customers testified that they would not purchase from *either* company remaining after a divestiture. (*See* FOF 9.21-9.26). Contrary to Complaint Counsel's assertions, LNG customers are concerned about the financial stability of *both* companies resulting from a divestiture, the divested entity and CB&I.

For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxx]** *see also* FOF 9.21). Complaint Counsel cannot dispute that any type of divestiture will inevitably create two parts that are smaller than the whole. LNG customers have stated that they are "concerned about whether *either* of the two residual companies would have the bonding or guarantee ability to make [their] bid list," and "seriously doubt" that both portions of a broken-up company would be large enough to qualify for LNG projects. (Izzo, Tr. 6511-12 (emphasis added); *see also* Bryngelson, Tr. 6155-56; Sawchuck, Tr. 6077-78; FOF 9.23-9.24).

Contrary to Complaint Counsel's assertions, record evidence has demonstrated that customers do not support a divestiture of CB&I. CB&I's acquisition of PDM has given LNG customers additional "comfort" in the bidding process because CB&I is now a larger company with more financial assets. (Bryngelson, Tr. 6154). LNG customers have "some real concerns" about Complaint Counsel's proposed remedy and believe it would be a disadvantage to breakup CB&I. (Sawchuck, Tr. 6077; J. Kelly, Tr. 6265; Bryngelson, Tr. 6155; *see also* FOF 9.09). LIN/LOX customers also believe that there is benefit to CB&I's acquisition of PDM. LIN/LOX customers believe a breakup would harm the industrial gas industry. (Hilgar, Tr. 1540; *see also* FOF 9.10).

1305. In order to be an effective competitor, New PDM will need a revenue base comparable to CB&I and the former PDM' s prior to the acquisition. As of June 30, 2000, PDM's 6-month revenues were approximately $355 million. (CX 1567 at 3). This base of revenues was sufficient to provide the financial guarantees necessary to compete for LNG projects. (Carling, Tr. 4529 (PDM able to provide sufficient financial guarantees to Enron to be employed for an LNG tank built in Penuelas, Venezuela); **[xxxxx]**, Tr. 1895-96, *in camera* (**[xxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**)).

Response to Finding No. 1305:

Complaint Counsel's proposed finding is inaccurate, misleading and unsupported by record evidence. Complaint Counsel asserts that "New PDM will need a revenue base comparable to CB&I and the former PDM's prior to the acquisition" without providing any evidentiary support for its proposition. Complaint Counsel failed to present any evidence at trial to determine what size a divested company would need to be in order to be competitively viable. However, Respondents have demonstrated that LNG customers do not believe that anyone smaller than CB&I would be capable of providing financial backing for LNG projects.. (**[xx xxxxxxxxxxxxxxx]** *see also* RFOF 1304, FOF 9.21-9.26).

Complaint Counsel also ignores the fact that its revenue figure cited above is for all five divisions of the former PDM. The revenue of the EC and Water divisions constituted approximately one third of PDM's total revenues for that time period. (FOF 8.2-8.7). Finally, Complaint Counsel attempts to mislead this Court by citing Mr. Carling for the proposition that PDM's former size was sufficient to provide financial backing for LNG projects. (Carling, Tr. 4529). Complaint Counsel ignores the rest of Mr. Carling's testimony which illustrated that while PDM was able to win the Venezuela project, its size was insufficient to win a project in Dabhol, India. (Carling, Tr. 4529-30).

1306. Part of these revenues will have to be based upon work outside the United States. In the 3 years between 1997 and 1999, 50% of PDM EC's revenue was derived from the U.S., 47% of PDM EC 's revenue was derived from the Western Hemisphere outside of the U.S. and 3% of PDM's revenue was derived from other areas. (CX 522 at 18; *see* CX 1731 at 18 (CB&I's revenues from LNG projects are split 50/50 between North America and the rest of the world); CX 1730 at 5-6 (Western Hemisphere business accounted for 72% of new business taken); CX 1729 at 13 (the proportion of new business awarded in the U.S. versus the rest of the world is shifting from 75/25 to 60/40); CX 32 at 3 (international operations provide approximately 20-30% of the revenues for PDM EC and PDM Water on a combined basis)).

Response to Finding No. 1306:

Most of the revenues outside of the United States were from PDM's Venezuela operation which has been dismantled. There is no evidence that the new PDM which Complaint Counsel seeks to create can capture overseas work. In addition, this Court and the Commission lack the authority to order divestiture of overseas assets of CB&I, much of which is owned by CB&I subsidiaries that do not do business within the United States. Critically, there has been no trial testimony to test any of these hypothesis. Complaint Counsel admits that a new company would need overseas revenue to be viable, however, no evidence has been presented that the divested entity could compete or gain overseas revenue.

1307. CB&I had annual revenues of between $600 to $800 million in the years between 1997 and 2001. (CX 891 at 40-41 (Glenn, Dep.); CX 892; CX 310 at CB&I 049068). These revenues made CB&I large enough to win large LNG projects between the time it was spun off from Praxair and the time it acquired PDM. (CX 891 at 47-48 (Glenn, Dep.).

Response to Finding No. 1307:

Respondents have no specific response. (*See* RFOF 1304-05).

1308. This base of revenues provided CB&I with the financial backing to compete for projects. Gerald Glenn testified that he could not recall any LNG bid contests or thermal vacuum chamber bid contests lost by CB&I prior to the acquisition because it could not provide sufficient financial guarantees to the customer to ensure timely completion of the project. (CX 891 at 48-49, 70 (Glenn, Dep.)).

Response to Finding No. 1308:

Complaint Counsel's finding is misleading, inaccurate and unsupported by the record evidence. Complaint Counsel failed to cite for this Court the entirety of the question and answer that it relied upon for the proposition within this finding. Although Mr. Glenn initially responded to Complaint Counsel's question by stating "I don't recall," during the question and answer immediately following the one relied upon by Complaint Counsel, Mr. Glenn corrected he previous answer and stated "[a]ctually, I can recall a project where CB&I is regarded by the

owner as not being large enough to compete for an LNG project. It was for Marathon and it's in Baha, Mexico." (CX 891 at 49-50). As a result, Complaint Counsel's proposed finding is directly contradicted by the record evidence.

1309. By providing New PDM with comparable revenues, it will address customer concerns that a divestiture will create two small companies incapable of handling LNG projects. (Bryngelson, Tr. 6155-56).

Response to Finding No. 1309:

Complaint Counsel's proposed finding is inaccurate, misleading and unsupported by the record evidence. Respondents have previously demonstrated that customers would not purchase from *either* company remaining after a divestiture. (*See* RFOF 1304-05, FOF 9.21-9.26). Regardless of how Compliant Counsel attempts to formulate a breakup divestiture, it will still result in two companies that are smaller than the current CB&I. The math is revealing: one-half of $800 million equals $400 million, which would result in two companies that are even smaller than PDM was before the acquisition. In addition, to even achieve two $400 million companies this Court would have to breakup CB&I's Howe-Baker and its international subsidiaries, all of which contributed hundreds of millions to CB&I's bottom line. There is no record evidence as to the impact of breaking up all of these unrelated businesses, and it is grotesque and desperate overreaching by Complaint Counsel to even suggest such a result. To split part CB&I's U.S. Industrial Tank and Water Divisions would result in an entity a fraction the size of pre-acquisition PDM. Complaint Counsel has recognized its problem: it must come up with two large companies to even have a prayer of effectiveness. However, it has uncovered no solutions. Any way this Court slices CB&I, New PDM will not be able to compete on LNG and TVC projects. Further, and contrary to Complaint Counsel's assertions, record evidence has demonstrated that its remedy will not "address customer concerns" since customers are concerned about the financial stability of *both* companies resulting from a divestiture. (Izzo, Tr.

6511-12 (emphasis added); *see also* Bryngelson, Tr. 6155-56; Sawchuck, Tr. 6077-78; **[xxxxxx xxxxxxx];** FOF 9.21-9.26).

Prior to the Acquisition, the combined revenues of CB&I and PDM totaled approximately 1.5 billion dollars in revenue. However, since CB&I only acquired two of PDM's five divisions, over two thirds of that 1.5 billion dollars is now beyond the control of CB&I, PDM, Complaint Counsel, this Court or the Commission. Complaint Counsel refuses to come to grips with the consequences of the loss of financial size caused by PDM's sale of its three other divisions.

2. ***Assets and Equipment Used to Manufacture the Relevant Products***

1310. In order to successfully compete in the relevant markets, New PDM will need the assets and equipment necessary to manufacture the relevant products. CCFF 321-385, 1311-1326.

Response to Finding No. 1310:

Complaint Counsel's proposed finding is not supported by the record. New PDM could compete successfully by subcontracting and does not need to own the assets. (FOF 3.541-3.546, 5.219-5.220). Further, Complaint Counsel failed to present any evidence on what a divested entity would need to obtain in order to be a viable entity. (*See* RFOF 1282-1374; FOF 9.1-9.39). Additionally, Complaint Counsel failed to present any evidence to determine if it was even possible for CB&I to divest the assets that Complaint Counsel suggests. *Id.*

1311. CB&I purchased "tangible personal property" from PDM, which included "[a]ll design, manufacturing, construction, erection, maintenance, research and development, testing and other machinery equipment, vehicles, tools, dies, molds, furniture, fixture, office equipment, field equipment,...supplies and other tangible personal property (together with all spare and maintenance parts, operating manuals, equipment specifications and diagrams) used by PDM's EC and Water divisions." (CX 328 at CB&I 001264-CHI). This equipment must be divested, in order to replace PDM.

Response to Finding No. 1311:

Respondents agree that CB&I purchased the assets listed in Complaint Counsel's proposed finding and as contained in the Asset Purchase Agreement dated February 7, 2001. (*See* CX 328). Complaint Counsel has failed to present any evidence that it would be necessary to divest all of the referenced "tangible personal property," that it is possible for CB&I to divest the assets or that the assets will be effective in resurrecting PDM. (*See* RFOF 1282-1374; FOF 9.1-9.39). As a result, Complaint Counsel's proposed finding is not supported by record evidence.

1312. Tank suppliers benefit from having many field crews and a substantial inventory of equipment because these resources give them "more flexibility in scheduling the work." (CX 615 at 46 (Knight, IHT)). Renting construction equipment from a third party "is traditionally more expensive" than owning the equipment. (CX 615 at 47 (Knight, IHT)).

Response to Finding No. 1312:

Contrary to Complaint Counsel's assertions, record evidence has demonstrated owning and maintaining too many field crews and too much equipment can increase costs. Soon after the Acquisition, CB&I auctioned off a substantial amount of the equipment that it purchased from PDM in an effort to reduce costs. (Scorsone, Tr. 2888). Additionally, subcontracting certain portions of the construction process can in fact lower the costs of a particular job. (Bryngelson, Tr. 6143). In some cases, subcontracting actually lowers costs because subcontractors with an expertise in a particular area are able to use a standardized approach and may be better at certain job functions than a general contractor. (Bryngelson, Tr. 6143-44; Cutts, Tr. 2472; Hilgar, Tr. 1537-38; *see also* FOF 3.543, 5.219-5.220). There is ample evidence that CB&I itself does not own much of its construction equipment. (Scorsone, Tr. 4902-11). Finally, Complaint Counsel's only evidentiary support are comments from a low level

CB&I salesperson, Dan Knight, who is not involved in construction or finance and has no foundation for the views expressed. (FOF 5.224-5.225, 5.233-5.234).

1313. A complete divestiture will include equipment that is used for constructing low temperature and cryogenic tanks, as well as TVCs. For example, CB&I will have to divest automatic welding equipment which "provides a consistent weld, which is typically smoother," and improves the efficiency of field erection work. (CX 442 at 154 (Knight, Dep.); CX 624 at 131 (Crain, IHT)). According to Mr. Gill, the newly divested competitor will also need cranes in order to efficiently construct TVC's. (Gill, Tr. 268; see Cutts, Tr. 2388. (Mr. Cutts described the potential equipment that would make AT&V more competitive with CB&I: "[T]hose four crews I talked about would be fully equipped and a fully equipped crew has a crane with them, has air compressors, welding machines, all sorts of general rigging equipment and other incidentals. You can figure a standard crew, it's about a half a million dollars worth of equipment that goes with the crew.")).

Response to Finding No. 1313:

Complaint Counsel's finding is unsupported by the record because it has failed to show that the divestiture of such equipment will create a competitive entity or that such a divestiture is actually possible. (*See* RFOF 1282-1374; FOF 9.1-9.39). Record evidence also demonstrates that new market entrants have become competitively viable without owning or acquiring all of the assets suggested by Complaint Counsel. Record evidence demonstrates that tank suppliers are capable of subcontracting or renting all types of equipment for any stage of a project and continue to offer competitive pricing. (Bryngelson, Tr. 6143-44; Cutts, Tr. 2472; Hilgar, Tr. 1537-38; *see also* FOF 3.543, 5.219-5.220).

1314. Because CB&I owns equipment that gives it a competitive advantage over other firms, Respondents must divest its specialized equipment to the newly created entity. For example, CB&I's automatic welding equipment includes "some self-contained automatic girth welders" which have an advantage over other types of automatic welding equipment. (CX 706 at 99 (Newmeister, IHT)). Mr. Newmeister of Matrix testified that automatic welding equipment is needed to be cost competitive in the construction of LNG tanks. (CX 706 at 98 (Newmeister, IHT); see CX 706 at 98-99 (Newmeister, IHT). (CB&I has patented welding equipment that is useful for welding large tanks); *see also* Cutts, Tr. 2379 ("Well, these tanks are built out of fairly sophisticated materials. You don't just weld them up any old way. And it's actually automated equipment that you weld them up with. The equipment is quite expensive to develop.")).

Response to Finding No. 1314:

Record evidence has demonstrated that CB&I does not have a competitive advantage over other firms in the relevant product markets. (*See* FOF 3.53-3.255, 4.16-4.54, 5.22-5.78). Complaint Counsel has not demonstrated that acquiring such equipment will create a competitively viable entity, that CB&I has such equipment available to be divested, or that it is possible to be divested from CB&I. (*See* RFOF 1282-1374; FOF 9.1-9.39). Record evidence has demonstrated that both Matrix and AT&V, the testimony relied upon by Complaint Counsel in support of this finding, have become successful competitors in the cryogenic market without acquiring the equipment and assets cited by Complaint Counsel. (*See* FOF 5.22-5.78). Further, most of CCFF relies on Mr. Newmeister for views regarding LNG requirements, views he lacks foundation to express because neither he nor his company has been involved in LNG projects.

1315. The newly divested firm will need additional equipment that will allow it to have blasting, painting, and pressing capabilities. As this equipment is multi-functional for LIN/LOX tanks, LPG tanks, and LNG tanks, the new firm will need these capabilities in order to compete against CB&I. (*See* CX 706 at 64-66 (Newmeister, IHT)) (A large press and a large number of dyes for pressing the dome roofs used for LIN/LOX tanks costs roughly $2 million. Additionally the automated blast and paint system used to paint the outer tank on a LIN/LOX tank costs roughly $2-3 million. John Newmeister of Matrix testified that his firm can not justify an investment in this equipment based solely on the LIN/LOX business. However, this equipment can be used for other products, including pressure spheres, LNG tanks and LPG tanks); *see also* Cutts, Tr. 2388 (Mr. Cutts testified that additional field crews would require an additional $2 million in equipment.)).

Response to Finding No. 1315:

Blasting and painting is frequently subcontracted and therefore not required in order to become a viable competitor. (FOF 3.541-3.546, 5.219-5.220). Additionally, a press is not required to effectively compete, and in any event a new press is certainly unnecessary when used presses are substantially less expensive. (Harris, Tr. 7309). Complaint Counsel's proposed finding is also not supported by record evidence because Complaint Counsel has not demonstrated that acquiring such equipment will create a competitively viable entity, that CB&I

has such equipment available to be divested, or that it is possible to be divested from CB&I. (*See* RFOF 1282-1374; FOF 9.1-9.39). Record evidence has also demonstrated that both Matrix and AT&V, the testimony relied upon by Complaint Counsel in support of this finding, have become successful competitors in the cryogenic market without acquiring the equipment and assets cited by Complaint Counsel. (*See* FOF 5.22-5.78).

1316. In order for New PDM to compete with CB&I, it needs to enjoy the same advantages and have the same capabilities as Respondents. A full restoration of the equipment that PDM EC and Water possessed before the acquisition is therefore warranted.

<u>Response to Finding No. 1316:</u>

Initially, Complaint Counsel failed to provide any citations to support its finding. There is no evidence that a new PDM would need exactly the same capabilities as CB&I to act as a constraint on CB&I's alleged ability to raise prices. Nonetheless, record evidence has demonstrated that CB&I does not have a competitive advantage over other firms in the relevant product markets. (*See* FOF 3.53-3.255, 4.16-4.54, 5.22-5.78). Complaint Counsel has not demonstrated that acquiring such equipment will create a competitively viable entity, that CB&I has such equipment available to be divested, or that it is possible to be divested from CB&I. (*See* RFOF 1282-1374; FOF 9.1-9.39).

1317. In order to be as efficient and as cost-competitive as CB&I and the former PDM, New PDM will need fabrication facilities within the United States. CCFF 307-308. **[x xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxx]**, Tr. 1635-37, *in camera* (**[xxxxxxxx]** lack of a U.S. fabrication facility is cost disadvantage versus CB&I.)).

<u>Response to Finding No. 1317:</u>

Record evidence has demonstrated that this finding is inaccurate because access to fabrication facilities does not provide a cost advantage in the LNG markets since the fabrication for LNG tanks takes place overseas, rendering a U.S. fabrication facility useless. (*See* FOF 3.560-3.564). Additionally, Complaint Counsel has not demonstrated that acquiring a

fabrication facility is necessary to create a competitively viable entity or that it is possible for a fabrication facility to be divested from CB&I. (*See* RFOF 1282-1374; FOF 9.1-9.39). Record evidence presented by Respondents has illustrated that CB&I does not have a cost advantage over other firms in the relevant product markets. (*See* FOF 3.53-3.255, 4.16-4.54, 5.22-5.78).

1318. A U.S. fabrication facility also provides New PDM with control over schedule and quality, two key factors that customers consider when selecting a tank supplier. (Newmeister, Tr. 1569-1570 (If the divested entity must subcontract fabrication work, it will "lose control of schedule and quality, and those are two key important things the customers are looking for.")).

Response to Finding No. 1318:

Mr. Newmeister was not talking about a divested entity and Complaint Counsel's attempts to make it appear as if he was are misleading. Further, all of CB&I's current competitors have access to fabrication facilities. (*See* 5.22-5.78). Additionally, record evidence shows subcontracting certain portions of the construction process, such as fabrication, can in fact lower the costs of a particular job. (Bryngelson, Tr. 6143). In some cases, subcontracting actually lowers costs because subcontractors with an expertise in a particular area are able to use a standardized approach and may be better at certain job functions than a general contractor. (Bryngelson, Tr. 6143-44; Cutts, Tr. 2472; Hilgar, Tr. 1537-38; *see also* FOF 3.543, 5.219-5.220).

1319. Possessing multiple fabrication facilities is advantageous because it allows a competitor to rationalize its freight costs. (Vetal, Tr. 428, 432-33; *see* CX 615 at 45 (Knight, IHT) (In competitive situations, a tank supplier benefits from having a fabrication facility located close to a job so that its freight costs are minimal.); CX 849 at 214 (Steimer, IHT) (having a fabrication facility in the Gulf region would have made PDM more competitive by lowering its freight costs)).

Response to Finding No. 1319:

Possessing multiple fabrication facilities does not provide a cost advantage because freight costs are a minimal portion of the entire cost of a project. (Maw, Tr. 6564-65;

see also FOF 4.111). CB&I itself had only one fabrication facility -- in Houston, Texas -- prior to Acquiring PDM. Complaint Counsel's proposition is proven incorrect because CB&I's local fabrication shop does not provide it with any cost advantage in comparison to AT&V.

1320. Multiple facilities not only promote a geographic competitive advantage but also flexibility in fabrication. Daniel Knight, a salesman for CB&I, testified that tank suppliers with multiple fabrication shops and many field crews can "be more flexible in order to meet [changes in customers' schedules]," including needing "the project faster or at a different time period..." (CX 442 at 152 (Knight, Dep.); *see id.* at 156).

Response to Finding No. 1320:

Complaint Counsels' finding is incorrect and not supported in the record because the evidence has shown that fabrication costs account for less than five percent of the total cost of a project. (Glenn, Tr. 4119; FOF 3.560). With respect to the LNG market, maintaining the overhead on multiple fabrication shops would constitute a cost disadvantage since the fabrication of nine percent nickel steel is generally done by the steel supplier located overseas. (Bryngelson, Tr. 6153). The steel mills in Europe and Japan, which provide nine percent nickel steel, typically provide a fabrication service in which the steel plates are squared, beveled, cut, rolled, and then exported to the job site. (Scorsone, Tr. 4891-92; FOF 3.561). Since nine percent nickel steel is internationally sourced, it can be cheaper to fabricate the steel overseas, rather than importing the steel and fabricating it locally. (Izzo, Tr. 6503; FOF 3.562).

Complaint Counsel's finding is also flawed because it relies on the statements of Mr. Knight, a low level salesmen with no experience with fabrication facilities sufficient to have the foundation to render opinions about them. (*See* FOF 5.225). Mr. Knight does not manage or supervise anyone at CB&I and did not have any supervision or management authority at PDM. (Scorsone, Tr. 4809). As a result, Mr. Knight does not have the requisite basis of knowledge to issue opinions on the benefits of fabrication facilities. (Scorsone, Tr. 4809-10; FOF 5.225).

1321. CB&I has procurement offices and fabrication facilities located throughout the world, which enables CB&I to supply materials to its various job sites effectively. (CX 258, CB&I-H001794; Scorsone, Tr. 4894).

Response to Finding No. 1321:

Complaint Counsel's proposed finding is incorrect and not supported by the record. Complaint Counsel has cited no evidence to support its proposition that CB&I has fabrication facilities located "throughout the world." There is no record evidence that shows CB&I owns, maintains or operates any fabrication facilities outside of the United States.

1322. CB&I's facilities include those facilities that it acquired from the former PDM EC and Water Divisions, located in Provo, Utah; Clive, Iowa; and Warren, Pennsylvania. (CX 332 at CB&I 001350-CHI).

Response to Finding No. 1322:

Respondents have no specific response.

1323. Each of these former PDM facilities have different fabrication capabilities. *See* CX 535 at 182-3 (Scorsone, Dep.) ("the Provo plant does not have a very large capacity press, whereas the Clive plant and the Houston plant do. The Houston plant is very efficient at rolling and beveling shell plates where the Provo plant and Warren plant and Clive plant for that matter probably aren't that efficient. The Provo plant has a little bit more floor space for weldment and their assemblies, and Houston doesn't have as much."); CX 615 at 46 (Knight, IHT) (Some fabrication plants cannot fully fabricate storage tanks in the manner required by PDM because they do not support "[c]ertain types of rolling and pressing operations" for thick steel plate)).

Response to Finding No. 1323:

Respondents have no specific response.

1324. Absent the divestiture of a fabrication facility, it will take the divested company approximately nine months and about $9 million to build another fabrication facility in order to compete effectively. (*See* CX 922; Simpson, Tr. 3166).

Response to Finding No. 1324:

Respondents have no specific response.

1325. In order to transfer the former PDM facilities to New PDM, CB&I will need to divest the leases for what were PDM's fabrication facilities to the newly created entity. According to Peter Scheman, the investment banker from Tanner, Iron Bridge Holdings owns the

Warren, Pennsylvania and Clive, Iowa fabrication plants and leases these plants to CB&I under a ten year agreement. (JX 34 at 12-13 (Scheman, Dep.)).

Response to Finding No. 1325:

Complaint Counsel's finding is unsupported by the record evidence. As an initial matter, Complaint Counsel is unaware of any document with the designation JX 34 being admitted into evidence. Complaint Counsel has also failed to show that divesting the former PDM fabrication facilities will be effective in creating a competitive entity or that it is possible for CB&I to divest those assets. (*See* RFOF 1282-1374; FOF 9.1-9.39).

1326. Complaint Counsel's proposed Order requires that CB&I divest its interest in all three of PDM's former fabrication facilities, the tangible assets necessary to manufacture the relevant products, and all additions and improvements thereto. (Order, ¶ II.D.) The divestiture of these assets are necessary to effectively restore competition. (*See* Simpson, Tr. 3155-56)

Response to Finding No. 1326:

Complaint Counsel's proposition is not supported by any record evidence other than the economic opinions of Dr. Simpson. Notably, Dr. Simpson did not rely on anything within the record when rendering his opinions. (*See* Simpson, tr. 3155-56). Complaint Counsel has failed to show that divesting the former PDM fabrication facilities will be effective in creating a competitive entity or that it is possible for CB&I to divest those assets. (*See* RFOF 1282-1374; FOF 9.1-9.39). There is no evidence a new PDM could fill or manage three fabrication facilities, or that it would need to have all three in order to be competitive.

3. *Assets, Equipment And Operational Resources Used to Manufacture More Than the Relevant Products*

1327. An effective divestiture would need to include resources necessary to make flat bottom tanks, gravel tanks, and other tanks outside of the relevant market.

Response to Finding No. 1327:

Complaint Counsel failed to provide any record citations for its proposition. Additionally, Complaint Counsel failed to present any evidence during trial regarding what

impact a divestiture would have on other non-relevant markets. As a result, Complaint Counsel's proposed remedy cannot be imposed because significant harm may be caused to products outside of the relevant markets. (*See* FOF 9.14-9.15).

1328. There is not enough business in the relevant markets to sustain a divested entity. Projects within the relevant markets are awarded infrequently. (CX 1212 at 6, *in camera* (CB&I has won **[xxxx]** LNG projects and **[xxxx]** LPG projects since 1990)).

Response to Finding No. 1328:

Respondents have no specific response, except to note that this finding concedes the case of supply side substitution, which is a basis not to challenge an acquisition under the Merger Guidelines § 1.3, 3. (*See* RFOF 1327; FOF 9.1-9.39).

1329. CB&I and, prior to the acquisition, PDM, use their resources to manufacture both the relevant products, as well as other products.

Response to Finding No. 1329:

Respondents have no specific response, except to note that this finding concedes the case of supply side substitution, which is a basis not to challenge an acquisition under the Merger Guidelines § 1.3, 3. (*See* RFOF 1327; FOF 9.1-9.39).

1330. Engineers can be utilized for both low temperature and cryogenic tank construction and the construction of other types of tanks. Mr. Samuel Leventry testified that CB&I's policy in the engineering department is to "move people from area to area. We move people from flat bottom tanks to cryogenic tanks. We move people from pressure vessel tanks depending on our workload." CX 497 at 365 (Leventry, Dep.)).

Response to Finding No. 1330:

Respondents have no specific response, except to note that this finding concedes the case of supply side substitution, which is a basis not to challenge an acquisition under the Merger Guidelines § 1.3, 3. (*See* RFOF 1327; FOF 9.1-9.39).

1331. Sales representatives also service both the low temperature and cryogenic tank market and the industrial tank market. CB&I 's sales staff, such as Daniel Knight, sell industrial tanks, cryogenic tanks and pressure spheres. (CX 615 at 12, 14 (Knight, IHT) (also sold both industrial tanks and cryogenic tanks for PDM)).

Response to Finding No. 1331:

Respondents have no specific response, except to note that this finding concedes the case of supply side substitution, which is a basis not to challenge an acquisition under the Merger Guidelines § 1.3, 3. (*See* RFOF 1327; FOF 9.1-9.39).

1332. Mr. Scorsone testified that, prior to the acquisition, PDM's "water division and the EC division routinely swapped field labor." (Scorsone, Tr. 2842). "The field labor that builds a water tank one day can go and build a flat-bottom tank and go build LOX/LIN, can go build an LNG... [M]ost of the people that do our LNG work and the low-temp work, they work most of the time on flat-bottom tanks." (CX 535 at 96 (Scorsone, Dep.)). At CB&I, field construction employees are shared among the CB&I's water tank, industrial tank, and cryogenic/low temperature tank businesses. (CX 535 at 140 (Scorsone, Dep.)).

Response to Finding No. 1332:

Respondents have no specific response, except to note that this finding concedes the case of supply side substitution, which is a basis not to challenge an acquisition under the Merger Guidelines § 1.3, 3. (*See* RFOF 1327; FOF 9.1-9.39).

1333. PDM Water and PDM EC shared fabrication facilities, tool houses, and field erection equipment. (CX 552 at 47-48 (Braden, Dep.)). PDM's Water and EC divisions also swapped equipment stored in tool houses, including "off-the-shelf items [such as] welding machines, air compressors, generators." (CX 535 at 95 (Scorsone, Dep.)).

Response to Finding No. 1333:

Respondents have no specific response. (*See* RFOF 1327; FOF 9.1-9.39).

1334. Sharing resources benefitted both PDM EC and PDM Water because it **"facilitated a more steady flow of work, a more consistent flow of work through ... [xxx] warehouses [xxx] fabricating plants."** (CX 552 at 52-53 (Braden, Dep.) (emphasis added); Scorsone, Tr. 4779-80).

Response to Finding No. 1334:

Respondents have no specific response, except to note that while this was true for the way PDM managed the two divisions, there is no evidence that this sharing would be needed for a newly created entity. (*See* RFOF 1327; FOF 9.1-9.39).

1335. Currently, CB&I's Water and Industrial divisions share field erection personnel, project managers, field erection equipment, and fabrication facilities. (CX 552 at 49-50 (Braden Dep.); CX 535 at 141 (CB&I Water and CB&I Industrial share equipment.)).

Response to Finding No. 1335:

Respondents have no specific response, except to note that while this was true for the way PDM managed the two divisions, there is no evidence that this sharing would be needed for a newly created entity. (*See* RFOF 1327; FOF 9.1-9.39).

1336. The sharing of resources between PDM EC and PDM Water was beneficial to the company because, among other things, it allowed for a more consistent flow of work through the company's fabrication facilities. (Scorsone, Tr. 4779-80; CX 552 at 52-53 (Braden, Dep.)).

Response to Finding No. 1336:

Respondents have no specific response, except to note that while this was true for the way PDM managed the two divisions, there is no evidence that this sharing would be needed for a newly created entity. (*See* RFOF 1327; FOF 9.1-9.39).

1337. Mr. Glenn testified that a firm that supplies both standard industrial tanks and the specialized products in the relevant markets will be more financially stable, and can even result in a competitive advantage over other firms:

> Certainly, if you're in a number of different businesses making a number of different products, different product offerings, your sales force is probably more efficient, your revenues are probably going to be higher than if you were just in one smaller segment, allowing you to spread overheads, probably can have higher utilization in construction equipment, in fabrication plants, et. cetera. We at least believe that the higher revenues that we can achieve over various markets is advantageous to us. I would just add there that in spreading those overheads, we're better able to bid at a lower cost which allows us to win more work and we're able to spread – the customer gets the benefit of that lower cost and the company gets some benefit of that.

(CX 431 at 23 (Glenn, Dep.)).

Response to Finding No. 1337:

Respondents have no specific response, except to note that while this was true for the way PDM managed the two divisions, there is no evidence that this sharing would be needed for a newly created entity. (*See* RFOF 1327; FOF 9.1-9.39).

1338. In order to replace the competition that was eliminated by the acquisition, New PDM would need the economies of scope that PDM obtained from the shared operations of its EC and Water divisions. (Simpson, Tr. 3607). To provide New PDM with the same advantages PDM obtained from its shared operation of its Water and EC divisions, the Order requires CB&I to divest whatever intangible and tangible assets it acquired from both PDM EC and PDM Water. (Order, ¶ II.D.; *see* Order, ¶I.T. (assets to be divested are defined as "all rights, title and interest in and to all assets, tangible or intangible, acquired by CB&I from PDM in the Acquisition.").

Response to Finding No. 1338:

Complaint Counsel's proposed finding is inaccurate and unsupported by record evidence. (*See* RFOF 1327; FOF 9.1-9.39). As an initial matter, while PDM managed the water and EC division closely together, there is no evidence that this sharing would be needed for a newly created entity. (*See* RFOF 1327; FOF 9.1-9.39). CB&I's acquisition of PDM did not harm competition therefore there is no need to impose a remedy. (*See* FOF 9.6-9.7). Complaint Counsel cites its expert, Dr. Simpson, in support of its finding despite the fact that Dr. Simpson testified that he does not know how the remedy proposed by Complaint Counsel would be implemented and that he is not qualified to oversee a breakup of CB&I. (Simpson, Tr. 5715; FOF 9.4). Complaint Counsel failed to present any evidence that the divestiture contained within its proposed order is supported by the record evidence. (*See* FOF 9.1-9.5).

4. *A Track Record of Building Tanks Successfully in the United States*

1339. A divested entity will require a backlog of work, both in the relevant markets and in general industrial and water tanks, to sustain it while it regains customer recognition.

Response to Finding No. 1339:

Respondents have no specific response.

1340. There is a disincentive to purchase from a company that has not constructed a tank within the United States because of the business risks involved. With no track record, New PDM would be unable to compete "short of ... taking a big dive on the price." (CX 1731 at 44).

Response to Finding No. 1340:

Complaint Counsel's finding is not supported by the record because the evidence shows that a company's lack of experience has not been a barrier in the LPG and LIN/LOX markets, as companies have successfully entered the market without prior corporate experience. (*See* FOF 4.9, 4.121, 4.123 (LPG); FOF 5.22-5.71(LIN/LOX)). The citation Complaint Counsel relies upon for this finding also demonstrates that experience is not as crucial as Complaint Counsel suggests because "you're really only as good as your last job." (CX 1731 at 44).

1341. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxx]**, Tr. 2385, *in camera*). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (**[xxxxx]**, Tr. 2385, *in camera*; CX 258 at CB&I-H001816-832; CX 1731 at 44 (LNG tank owners do not want to purchase from a second-rate company without a track record because the work is "very specialized, very sophisticated.")).

Response to Finding No. 1341:

There is no evidence that CB&I has a current backlog of LPG, LIN/LOX or TVC projects to give to a new PDM now or at some future time when divestiture is ordered. Complaint Counsel asserts that experience in the relevant markets is a prerequisite to getting work in the relevant markets, however if CB&I has no backlog in these markets to divest, Complaint Counsels' theory requiring divestiture of the backlog will accomplish nothing. New PDM establishes nothing in the relevant markets by building other types of tanks. Complaint Counsel's assertion that "CB&I has successfully built most of the relevant products" not supported in the record. Evidence from the LNG market demonstrates that **[xxxxxxxx]** has for more experience in LNG tanks than CB&I. (**[xxxxxxxxxxxxxx]** *see also* FOF 3.151-3.152).

Complaint Counsel also states that "customers are more willing to purchase from CB&I" but failed to cite the testimony of any customer.

1342. It takes time to build a track record from scratch. (CX 167 at CB&I-PL007052; Cutts, Tr. 2372, 2385).

Response to Finding No. 1342:

Respondents have no specific response. (See RFOF 1440-41).

1343. New PDM must be given sufficient projects that are currently in progress or are about to begin construction, in order to provide it with a track record at the time of divestiture. As of December 31, 2001, CB&I had a backlog of contract work worth $835.3 million. (CX 1033 at 7).

Response to Finding No. 1343:

First, much of the cited backlog of work relates to work being performed overseas. Second, there is no evidence that CB&I has a current backlog of LPG, LIN/LOX or TVC projects to give to new PDM now or at some future time when divestiture is ordered. Complaint Counsel asserts that experience in the relevant markets is a prerequisite to getting work in the relevant markets; however, if CB&I has no backlog in these markets to divest, Complaint Counsels' theory requiring divestiture of the backlog will accomplish nothing. Complaint Counsel has failed to show that providing a divested company with a "backlog" of work will allow it to create a successful track record. (*See* RFOF 1282-1374; FOF 9.1-9.39). Complaint Counsel continues to ignore undisputed evidence that many of CB&I's contracts have non-assignability clauses which require CB&I to maintain control of the contract and prohibit it from assigning it to any other company or entity. (Glenn, Tr. 4168-69).

1344. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (Cutts, Tr. 2385, *in camera* (track record and reputation are important); Blaumueller, Tr. 300-02 (experience is important); Vetal, Tr. 427-28 (experienced personnel is important to a company's reputation because "[y]ou have to convince the customers that you're qualified, and you need to have the resumes and the experienced people to do so.")). By providing New PDM with a backlog of work and the

experienced personnel to successfully complete the work, a divestiture would address customers' concerns that personnel may be pulled off current projects. (Kelly, Tr. 6156).

Response to Finding No. 1344:

This contradicts Complaint Counsel's claim that you need to give new PDM a backlog of work. Complaint Counsel's own citations illustrate that hiring experienced people is enough to impress a customer. However, Complaint Counsel has failed to show that providing a divested company with experienced personnel will create an entity capable or replacing PDM. (*See* RFOF 1282-1374; FOF 9.1-9.39). Most importantly, Complaint Counsel failed to present any evidence that CB&I currently employs sufficient "experienced" people such that it could divest enough employees to establish two competitive companies. It is one thing to theorize, it is another to try and implement this breakup plan in the real world. Finally, Complaint Counsel ignores the undisputed testimony establishing that many of CB&I's contracts contain key personnel clauses which require CB&I to maintain the same personnel for the duration of a project. Removing or replacing those employees would create numerous contractual issues. (Glenn, Tr. 4168-69; FOF 9.17).

1345. As companies in the relevant products learn by trial and error, CB&I would need to divest some of its experienced employees. A divested entity would benefit from the wisdom of experienced people from CB&I and former PDM by obtaining "the history, the successful history, knowing the technology and all of the issues that have caused problems in the past that people know and won't make mistakes – make the same mistakes again. Conversely, if people were starting from scratch, they would have to make the mistakes that we've experienced over the years and correct them and thus know not to make them again." (Scully, Tr. 1240). (*See* Newmeister, Tr. 1582-83 (There are special welding procedures and construction skills related to LIN/LOX tanks that Matrix learned and developed from former PDM employees with experience building LIN/LOX tanks.)).

Response to Finding No. 1345:

Complaint Counsel's finding is unsupported by record evidence because it grossly mischaracterizes the testimony of Mr. Scully. Contrary to Complaint Counsel's assertions, Mr. Scully did not indicate that a divested entity would benefit from the combination of knowledge,

but rather that one of the *benefits* to CB&I's Acquisition of PDM was the merging of knowledge and experience. (Scully, Tr. 1240). When asked his opinion of a potential divestiture, Mr. Scully was concerned about such a possibility and responded "I think you would end up with two entities that are substantially weaker than what exists today and as CB&I-PDM." (Scully, Tr. 1240).

1346. To make sure that the new entity has the reputation, experience and sufficient business base to be a viable competitor, CB&I must contribute a portion of its existing backlog of work, for work within, as well as outside, the relevant product markets, to New PDM. (*See* Order, ¶ II.C.).

Response to Finding No. 1346:

Complaint Counsel's proposed finding is not support by any record citations. Respondents have no specific responses other than the incorporation of its responses to CCFF 1339-1345. (*See* RFOF 1339-1345; *see also* FOF 9.1-9.39).

5. *Customer Approval to Transfer Projects to the Divested Company*

1347. In order to provide New PDM with a backlog of work, CB&I will have to obtain its customers' approvals to transfer the work to the acquirer of New PDM.

Response to Finding No. 1347:

Complaint Counsel's finding fails to cite to any record evidence for support. Complaint Counsel states that "CB&I will have to obtain its customers' approvals" without providing any indication of how CB&I is supposed to force its customers to consent to a transfer of their contracts to a company that currently does not exist, does not have a successful history of tank construction and may have a questionable ability to actually complete the assigned work. Neither CB&I nor Complaint Counsel have a magic wand. There is absolutely no evidence in the record to indicate that customers would agree to such an assignment. In fact, customers have testified to the exact opposite in expressing their concern about the viability of a divested entity. (J. Kelly, Tr. 6265; Izzo, Tr. 6511-12; FOF 9.21-9.31). As a result, the undisputed record

evidence demonstrates that customers will not agree to a transfer of their existing contracts to a newly divested entity.

1348. Many of the company's contracts have non-assignability clauses and key employee provisions that require the customer to approve the assignment of the contract or the replacement of key employees on a project. (Glenn, Tr. 4168-69; Izzo, Tr. 6508).

Response to Finding No. 1348:

Respondents agree with Complaint Counsel's finding. (*See* FOF 9.16-9.17).

1349. Obtaining customer approvals is feasible. Prior to its acquisition, PDM received approvals from its customers to transfer its contracts to CB&I. (Byers, Tr. 6804). Should PDM have decided to liquidate the EC division, Mr. Byers testified that PDM was fully prepared to go out and gain consents from its customers to allow the sale of its contract backlog to third parties for completion. (Byers, Tr. 6804-05).

Response to Finding No. 1349:

Complaint Counsel erroneously uses PDM's assignment of contracts to CB&I at the time of the Acquisition as support for the feasibility of its finding. Complaint Counsel fails to recognize that PDM was going out of business and customers recognized that they had little choice but to assign their contracts to someone. Further, PDM was assigning its contracts to an already established and accomplished tank contractor as opposed to the government created company that customers will be asked to assign their contracts to. Complaint Counsel's proposed remedy order requires CB&I to somehow force its customers to agree to this assignment without specifying how customer acceptance is even remotely possible. Due to the thousands of uncertainties that are involved in such a proposal, customers have testified that they are unwilling to agree to such a proposition. (*See* J. Kelly, Tr. 6265; FOF 9.21-9.31).

1350. Complaint Counsel's Order requires Respondents to gain customer approval to transfer work contracts in order to strengthen the competitiveness of the New PDM. (Order ¶ II.C.).

Response to Finding No. 1350:

Complaint Counsel has failed to cite any evidence within the record which supports the proposition that customers will consent to an assignment of their existing contracts to a newly formed tank contractor that has been created from divested assets. (*See* RFOF 1347, 1349). Customers have testified to that they are concerned about the viability of a divested entity. (J. Kelly, Tr. 6265; FOF 9.21-9.31). Complaint Counsel has failed to provide any record evidence to explain how it is possible to "require Respondents to gain customer approval." (*See* RFOF 1349).

6. *Key Personnel*

1351. In order to be an effective competitor, New PDM will need personnel with experience in the relevant product markets.

Response to Finding No. 1351:

Respondents have no specific response.

1352. Currently, CB&I enjoys a competitive advantage over other firms due to the concentration of experienced industry personnel in its divisions. Luke Scorsone testified that the combination of human resources was the primary benefit of a merger of CB&I and PDM, specifically "the coming together of some of the technical capability, the ability to execute work more efficiently, the ability to serve our customers better." (CX 646 at 106 (Scorsone, IHT)).

Response to Finding No. 1352:

Complaint Counsel's proposed finding is incorrect. Respondents do not have a competitive advantage over other firms in the relevant product markets. (*See* FOF 3.53-3.255, 4.16-4.54, 5.22-5.78). Respondents have no specific response to the statement of Mr. Scorsone.

1353. Experienced employees are specially trained and therefore valuable in this industry. Mr. Knight, formerly a salesman for PDM EC, testified that hiring people off the street for PDM field crews is "not economical." It "would involve training costs" because PDM' s "field crews are trained in our procedures and with our equipment." (CX 615 at 25, 47 (Knight, IHT)). Similarly, project managers with no past experience in managing tank construction projects must be trained. (CX 615 at 50 (Knight, IHT)).

Response to Finding No. 1353:

Complaint Counsel's proposed finding is irrelevant and incorrect. Complaint Counsel relies on the statements of Mr. Knight, a first level salesmen with no responsibility or experience with hiring personnel or field crews. (*See* FOF 5.225). Mr. Knight does not manage or supervise anyone at CB&I and did not have any supervision or management authority at PDM. (Scorsone, Tr. 4809). Mr. Knight is a salesmen that is solely focused on selling his products. (Scorsone, Tr. 4809-10; FOF 5.225).

Record evidence has shown that CB&I hires field crew personnel on a job to job basis. Field crew workers are free to work for a number of companies (Rano, Tr. 5952-53), and tend to move from job to job depending on where work is available. (Rano, Tr. 5957). Because field crews are very migratory, CB&I hires its general field labor on a job to job basis. (Glenn, Tr. 4119-20; Rano, Tr. 5917-18, 5952-53; *see also* FOF 5.550). Using local labor is cheaper than employing traveling workers because it reduces the need to pay increased expenses associated with room and board for out-of-town workers. (Rano, Tr. 5909-10). CB&I recruits local labor by advertising in the local media, and making contacts with local labor leaders and local government officials. (Rano, Tr. 5908-09; *see also* FOF 5.554).

1354. In order to manufacture the relevant products, CB&I must transfer personnel that are experienced in the construction of low temperature and cryogenic tanks and TVCs. Mr. Braden, the President of CB&I's Water Division testified that "there's a fairly steep learning curve in our business, and to go out and try to fill experienced positions would require some effort... People have to become familiar with our products and our processes. Processes more than anything." (CX 552 at 62 (Braden, Dep.)).

Response to Finding No. 1354:

Record evidence has shown that CB&I hires field crew personnel on a job to job basis. Field crew workers are free to work for a number of companies (Rano, Tr. 5952-53), and tend to move from job to job depending on where work is available. (Rano, Tr. 5957). Because

field crews are very migratory, CB&I hires its general field labor on a job to job basis. (Glenn, Tr. 4119-20; Rano, Tr. 5917-18, 5952-53; *see also* FOF 5.550). Using local labor is cheaper than employing traveling workers because it reduces the need to pay increased expenses associated with room and board for out-of-town workers. (Rano, Tr. 5909-10). CB&I recruits local labor by advertising in the local media, and making contacts with local labor leaders and local government officials. (Rano, Tr. 5908-09; *see also* FOF 5.554).

1355. Lack of sufficient personnel will limit New PDM's capacity to handle multiple projects. Mr. Cutts of AT&V testified that AT&V faces capacity constraints from the lack of field, marketing and engineering personnel. (Cutts, Tr. 2372-73 (In order to replace PDM, AT&V would need "a key marketing person in cryogenics and a key technical person in cryogenics. And then I'd probably also want the foremen and pushers and all the gear for about four more crews."); Harris, Tr. 7595).

Response to Finding No. 1355:

Complaint Counsel's proposed finding is incorrect, incomplete, and unsupported by the record evidence. Complaint Counsel relies on statements by Mr. Cutts of AT&V that are not supported by the record. Mr. Cutts testified that he was able win three LIN/LOX projects with his current staff. Despite AT&V's lack of any LIN/LOX specific sales personnel, ATV was able to sell the LIN/LOX projects to BOC and Air Liquide. (Cutts, Tr. 2568-69; *see also* FOF 5.26-5.42). Record evidence has shown that the hiring of experienced personnel is an easy process. Although it had never done so before, AT&V is in the process of hiring a sales person with LIN/LOX experience and knowledge of the LIN/LOX customers. ATV is using the salesperson as a consultant and in negotiation to hire the individual full time. (Cutts, Tr. 2560-61; *see also* FOF 5.26-5.42).

Finally, the record cite Harris, Tr. 7595 provided by Complaint Counsel has absolutely nothing to do with the proposed finding. Dr. Harris is not providing any opinions about personnel or AT&V at this point in the record.

1356. Prior to the acquisition, PDM EC employed 231 salaried employees and 768 hourly employees. (CX 822 at 8; *see* CX 522 at 26 (in July 2000, PDM EC employed 717 hourly field personnel)). PDM EC's salaried employees included 46 engineers, 36 draftsmen, and 17 estimators. (CX 522 at 26).

Response to Finding No. 1356:

Respondents have no specific response.

1357. CB&I employees work on a number of projects simultaneously. (Glenn, Tr. 4168). Dr. Simpson stated his expert opinion that CB&I and PDM EC were able to compete so effectively, in part, because "they had large engineering staffs to design the structures, and they had field erection crews in the U.S. to build the structures." (Simpson, Tr. 3156). Dr. Simpson's understanding is that PDM EC and CB&I each had over a hundred engineers alone. (Simpson, Tr. 3157).

Response to Finding No. 1357:

Respondents have no specific response.

1358. Although Respondents laid off personnel as a result of the acquisition, Mr. Braden, the President of CB&I's Water Division, is not aware of any "employment agreements or conditions" that preclude CB&I from hiring additional personnel in the event of a divestiture or break-up of the company." (CX 552 at 61-62 (Braden, Dep.)). Therefore, CB&I can hire additional employees to be transferred to New PDM or can hire employees to replace those already transferred.

Response to Finding No. 1358:

Complaint Counsel's finding assumes CB&I can replacement employees, but has failed to show what costs will CB&I incur as a result, and if that cost will prevent CB&I from acting as a low cost competitor, which Dr. Harris says is required for any remedy to be effective. (Harris, Tr. 7367-68; 7375-76; FOF 9.18-9.20). Complaint Counsel presents a theory that was not discussed at trial and with no evidence to support its implications.

1359. Without sufficient experienced personnel, New PDM will not be able to compete with CB&I. Complaint Counsel's Order therefore requires CB&I to take any actions necessary "to ensure the transfer to or employment by the Acquirer" of sufficient experienced personnel. (Order, ¶ II.F.).

Response to Finding No. 1359:

Respondents have no specific response.

7. *Intellectual Property, Including PDM's Name*

1360. In order for a divestiture order to be effective, Respondents must divest all of the intellectual property and other intangible assets related to the relevant products, including the PDM name, rights to which are under the collective control of Respondents.

Response to Finding No. 1360:

Complaint Counsel's proposed finding is not supported by the record evidence. Complaint Counsel has failed to provide any record citations for its proposition. Additionally, Respondents have not presented any evidence to demonstrate that its proposed remedy will be effective. (*See* FOF 9.1-9.39).

1361. Mr. Cutts, vice president of AT&V, testified that AT&V would need the following assets to effectively compete in the relevant markets: "... their customer base, a list of all their customers, all their bids, everyone they've bid to in the last ten years. Second, their technical specifications associated with cryogenic LNG applications. Their welding systems associated with certain cryogenic applications. Their name, so I don't have to spend ten years building our name and fighting everybody in the industry who says things that aren't true about us." (Cutts, Tr. 2372).

Response to Finding No. 1361:

Complaint Counsel's proposed finding is not supported by the record evidence because Mr. Cutts' own admissions illustrate that AT&V did not need the list of assets recited by Complaint Counsel to effectively compete in the relevant product markets. Mr. Cutts said his wish list would "improve [his] ability to compete," not that it would allow him to compete. (Cutts, Tr. 2371; FOF 9.35-9.39). Mr. Cutts, further admitted that he is already familiar with the customers in the relevant product markets. (Cutts, Tr. 2559-60). AT&V did not need CB&I's customer list to learn this information. AT&V also has adequate sales staff to be competitive. ATV's current sales staff enabled it to sell the LIN/LOX projects to BOC and Air Liquide. (Cutts, Tr. 2568-69). AT&V was also able hire a salesperson with cryogenic experience as a consultant. (Cutts, Tr. 2560-61). AT&V was also capable of developing its own technical specifications for LIN/LOX tanks which enabled AT&V to successfully construct a LIN/LOX

tank to the satisfaction of BOC. (Cutts, Tr. 2563-64). AT&V did not need to acquire CB&I's technical specifications in order to develop their own design. (Cutts, Tr. 2564). AT&V's welding systems were also more than sufficient to enable it to successfully construct the LIN/LOX tank for BOC. (Cutts, Tr. 2565; *see also* FOF 5.26-5.42).

Finally, Complaint Counsel's proposition suggests that AT&V needs CB&I's name to be competitive. AT&V did not need to change its name in order to be awarded three LIN/LOX projects. (Cutts, Tr. 2568-69). Additionally, as demonstrated by Complaint Counsel's subsequent question, changing a companies name is not that valuable: "You don't think that the procurement person might at some point figure that you're not actually the CB&I that he thought he was going to be dealing with?" (Cutts, Tr. 2242). Since participants in the industry will know the history of a company, they will not be fooled by a simple name change. As a result, Compliant Counsel's proposed finding is not supported by the evidence.

Most critically, this finding disproves Complaint Counsel's own proposed remedy. Why create a new entity from scratch when an existing competitor can be given some targeted assets to make it more competitive? The very passage that Complaint Counsel cites from Mr. Cutts' testimony proves that he only needs a few things to reach PDM levels. (Cutts, Tr. 2242; FOF 9.35-9.39). Why create a new entity, with all the attendant risks -- not the least of which is risking turning CB&I into a high cost competitor, which would neutralize the creation of a new PDM, assuming that it will be competitive -- when this Court can focus on giving an existing competitor what little more it might need to become more competitive? Not only is this more likely to make a competitor lower cost, it creates less risk of raising CB&I's costs to the point where it is no longer a low cost supplier. (Harris, Tr. 7367-68, 7375-76; FOF 9.18-9.20).

1362. Because tank suppliers learn through trial and error, New PDM would need CB&I/PDM's standards, manuals and guides relating to the relevant products, in order to avoid

repeating past mistakes and improve its design and product line. (Cutts, Tr. 2373 (technological information includes "purchasing standards, design standards, calculations, drafting standards, vendor list[s]"); Cutts, Tr. 2388-89 (AT&V considers the manual information valuable because "there could be information that improves our design, product line")).

Response to Finding No. 1362:

AT&V did not need to obtain all of the technical information suggested by Complaint Counsel in order to be awarded three LIN/LOX projects. (Cutts, Tr. 2568-69; *see* RFOF 1361). AT&V was capable of developing its own technical specifications for LIN/LOX tanks which enabled AT&V to successfully construct a LIN/LOX tank to the satisfaction of BOC. (Cutts, Tr. 2563-64). AT&V did not need to acquire CB&I's technical specifications in order to develop their own design. (Cutts, Tr. 2564; *see also* FOF 5.26-5.42). Given AT&V's already formidable abilities, focusing on adding to its existing capabilities is a more sensible remedy.

1363. Without providing New PDM with CB&I/PDM's intellectual property, it may take New PDM as long as two years from developing the initial concept to securing its first contract. (Newmeister, Tr. 1585).

Response to Finding No. 1363:

Complaint Counsel never presented any evidence to determine how long it would take a divested company to compete effectively. (*See* FOF 9.1-9.39). The record citation to a statement by Matrix indicating how long it took Matrix to enter the LIN/LOX market fails to support Complaint Counsel's hypothetical situation involving a potentially divested company. As a result, Complaint Counsel's finding is not supported by the record. Additionally, it is more likely to be effective by adding such intellectual property to an existing competitor than attempting to create a new one.

1364. CB&I currently possesses over 100 U.S. patents which give CB&I a cost advantage over other competitors. (CX 230 at CB&I-PL 055446). These patents provide CB&I with a "strong position with proprietary technology." in the LNG market. (CX 230 at CB&I-PL 055453). For example, CB&I has a patent for an ultrasonic technique for examining welds. This

technique is used in LNG tank projects and is safer and more efficient than examining welds using radiography. (CX 1550 at 258-61 (Bacon, Dep.); CX 241 at CB&I-PL 4000565; *see id.* at 261-62; *id.* at 291-94, 296 (Bacon, Dep.) (CB&I has patents on a "scaffoldless tank erection method" that lowers the cost of erecting flat bottom tanks). A proper divestiture should license this technology and any other patented technology to New PDM. (*See* Order, ¶ *II.E.*).

Response to Finding No. 1364:

Respondents have no specific response except to state that CB&I does not have a cost advantage over other competitors. (*See* FOF 3.53-3.255, 4.16-4.54, 5.22-5.78).

1365. CB&I must also release its interest in, and transfer to New PDM the right to use, the PDM name. The CB&I and PDM names are critical to the viability of New PDM because of the goodwill and reputation associated with these names that has been built up over decades. (Cutts, Tr. 2389 ("the PDM name, like the CB&I name, could obviously break down a lot of walls and barriers.")). In order to build a reputation similar to that of PDM, Mr. Cutts estimates that AT&V would have to spend over a million dollars in marketing alone for the next three years. (Cutts, Tr. 2382).

Response to Finding No. 1365:

Complaint Counsel's proposed finding is incorrect and not supported by record evidence. (*See* RFOF 1361). Complaint Counsel suggests that bestowing a divested entity with the PDM name will enable it to become competitive. There is no evidence to support the notion that customers will be fooled by a newly created company using the PDM name. As was demonstrated during Mr. Cutts' testimony, simply calling a newly created company PDM will not actually lead any customers to believe that the new company is in fact PDM. (Cutts, Tr. 2242). Since participants in the industry well know the history of this Acquisition (since most testified at this trial), they are certainly aware that PDM ceased to exist as a result of CB&I's Acquisition of PDM. They will not be fooled by a simple name change. Complaint Counsel has failed to present any evidence that naming a divested company PDM would aid in the success of the company. As a result, Compliant Counsel's proposed finding is not supported by the evidence.

1366. Following complete divestiture, CB&I will nevertheless continue to benefit from the trade secrets and other intellectual property it has absorbed from PDM. To assure that the acquirer will be able to compete on an equal footing with CB&I, as PDM once did, Complaint Counsel's proposed Order mandates that the combined intellectual property of CB&I and PDM must be shared with New PDM. (Order, ¶ II*.E.*; *see* Simpson, Tr. 3609).

Response to Finding No. 1366:

This finding is entirely punitive and nonsensical. According to Complaint Counsel, the idea is to create an entity like PDM was before the Acquisition, not to create an entity which is far stronger and more powerful that PDM was before the acquisition. (FOF 9.35-9.39).

8. *Training and Technical Assistance*

1367. CB&I will need to provide training to the personnel of New PDM. CB&I invests heavily in training its various construction crews, and its crews are specialized in specific structures or tasks, such as tank erection, foundational work, field-erection, piping, electrical work, or insulation. (CX 258, CB&I-H001794).

Response to Finding No. 1367:

Complaint Counsel's finding is irrelevant. If CB&I "invests heavily" in the training of its employees, and new PDM is to be made up of all CB&I employees, they will not need to be trained because they will have already been trained by CB&I. (FOF 9.35-9.39).

1368. Training and technical assistance will allow New PDM to have access to the best practices implemented by CB&I after the acquisition. Since the acquisition, CB&I, has spent "maybe thousands of man-hours looking into the cost basis, looking into the technical basis, looking into what the actual procedures or equipment or whatever it is that's involved" in the engineering, design, fabrication and erection of tanks sold by CB&I and PDM. Based on this analysis, CB&I has adopted "best practices" for supplying tanks and operating its company. (CX 1550 at 301-303 (Bacon Dep.)). Because these business exploits may lower the costs of supplying the relevant products, the divestiture to Newco should include these "best practices."

Response to Finding No. 1368:

If new PDM employees are CB&I employees, they will already have knowledge of the CB&I's best practices. (RFOF 1367; FOF 9.35-9.39).

1369. Technical assistance alone would be insufficient to restore an effective competitor. Mr. Gill testified that he has obtained technical assistance in the past, but that it has not increased his effectiveness as a competitor for TVCs. (Gill, Tr. 202 ("[I]t would take more than mentoring" for Howard Fabrication to be competitive)). Likewise, Mr. Patrick Neary of TRW testified that technical assistance would be insufficient to make a thermal vacuum chamber provider as competitive as PDM EC and CB&I. (Neary, Tr. 1458).

Response to Finding No. 1369:

Complaint Counsel's proposed finding is incomplete, overbroad and contradicted by the manifest weight of the evidence. (See FOF 6.107-6.109, 6.116-6.121). Complaint Counsel's proposition attempts to include all relevant product markets while only citing record evidence from TVCs. Record evidence has demonstrated that in the LNG, LPG, and LIN/LOX market, there is ample competition and any competitive problems that may be found could be remedied by CB&I providing technical assistance. (*See* FOF 3.53-3.255, 4.16-4.54, 5.22-5.78).

In the TVC market, customers have testified that it would benefit competition if CB&I were to mentor an existing large tank construction company like Matrix, Nooter or Puget Sound Fabricators ("PSF") on CB&I's next field-erected TVC project by integrating that company's engineering, fabrication and field-erection crews into the entire process. (Scully, Tr. 1230-31; Higgins, Tr. 1275-76). In fact, the newly mentored company would possibly have more current experience in constructing a field-erected TVC than CB&I. (Scully, Tr. 1231; *see also* FOF 6.107). Complaint Counsel cites to Mr. Gill in support of its claim that such technical assistance is not useful, however, technical assistance would not help Howard because it is too small of a company with less than two million dollars in sales. Customers have testified that there are large companies in the marketplace that can build field-erected TVC's if they are given some training and instruction, such as Matrix, Nooter, and PSF. (Scully, Tr. 1229-30; *see also* FOF 6.108). For example, Boeing has also testified that it would consider using a TVC supplier that had gained its experience by working as a joint venture partner with CB&I on each phase of

the construction process of a future field-erected TVC project. (Proulx, 1756-57; *see also* FOF 6.109).

1370. Because training and technical assistance are necessary in order to restore a viable competitor in the relevant markets, the Order requires CB&I to equip New PDM with the knowledge base necessary to be a competitor. (Order, ¶¶ II.E, IV.).

Response to Finding No. 1370:

Complaint Counsel failed to provide any record citation to support its proposed finding. Compliant Counsel has also failed to present record evidence to demonstrate that a remedy is necessary or that its proposed remedy will be effective. (*See* RFOF 1282-1374; FOF 9.1-9.39).

9. *Additional Safeguards to Ensure that it is Enforced*

1371. The divestiture will require the appointment of a monitor trustee to oversee its effective implementation, as recognized by Respondents. (Simpson, Tr. 5715). The appointment of a trustee is a normal part of the divestiture process. *See* Casey Triggs, "FTC Divestiture Policy," 17 Antitrust 75, 76 (2002)).

Response to Finding No. 1371:

Complaint Counsel failed to present any evidence as to how a remedy in this case would be instituted. A monitor trustee is supposed to monitor, not create the very structure of the divestiture which Complaint Counsel asks this Court to abdicate to a trustee. This Court must know how its order will be implemented before turning it over to a trustee. (See FOF 9.1-9.39). Further, Complaint Counsel cites to the cross-examination of Dr. Simpson. When Respondents asked Dr. Simpson how a remedy would be implemented, he responded "I don't know exactly how it would be implemented." (Simpson, Tr. 5715). Complaint Counsel also attempts to cite to an article on divestitures in an effort to support their proposition. Respondents are at a loss to understand how Complaint Counsel can propose a finding of fact based upon an article that is not part of this trial record.

1372. The monitor trustee would work with the Commission's Compliance Division, a specialized division whose purpose is to oversee and implement Commission divestiture orders, to reestablish CB&I/PDM into two viable and competitive entities. (*See* Order, ¶ V).

Response to Finding No. 1372:

Complaint Counsel failed to support its finding with any evidence from the record regarding the remedy process during trial. (*See* FOF 9.1-9.39). Complaint Counsel proposes that the Court should abdicate its role to a compliance division that is accountable to no one and from whom no appeal is possible.

1373. One customer, Mr. Jeffrey Sawchuk, testified that any concerns regarding relief would depend on how the restored competitors are set up. (Sawchuk, Tr. 6066). Proper monitoring of the divestiture would address Mr. Sawchuk's concern.

Response to Finding No. 1373:

Complaint Counsel never asked any customers if "proper monitoring of the divestiture" would elevate their concerns regarding the Acquisition. As a result, Complaint Counsel's finding is not supported by the record. (*See* FOF 9.1-9.39). Mr. Sawchuk himself said that there were not enough engineers to split CB&I into two companies. (Sawchuck, Tr. 6077-78; FOF 9.31). This is not a problem that can be solved by "proper monitoring." Again, Complaint Counsel is overreaching and has not demonstrated the consequences of the action they beseech this Court to order. Additionally, numerous customers expressed concerns not merely with the divestiture process itself but with the very possibility of a divestiture. LNG customers testified that they have "some real concerns" about Complaint Counsel's proposed remedy and believe it would be a disadvantage to breakup CB&I. (Sawchuck, Tr. 6077; J. Kelly, Tr. 6265; Bryngelson, Tr. 6155; *see also* FOF 9.8- 9.31).

1374. The only effective remedy that will restore competition is the divestiture of the PDM assets that CB&I acquired and the reestablishment of PDM as a independent, viable competitor. In order to restore competition, CB&I must divest certain tangible and intangible assets, such as fabrication facilities, personnel, and the PDM name. In addition, CB&I must

provide the divested entity with technical assistance and assist the divested entity in building a track record.

Response to Finding No. 1374:

Complaint Counsel's proposed finding fails to make even one citation to any evidence contained within the record. Additionally, the proposed finding is incorrect because Respondents have shown that no competitive harm has occurred and therefore there is no need for a remedy. (*See* RFOF 1282-1374; FOF 9.1-9.39). Further, there are other remedies available. (*See* Opening Br. at section IX, p. 158-172; Reply Br. at section V). Complaint Counsel has also failed to show that their proposed remedy will be effective in restoring any competitive problems that this Court may find. *Id*. If a remedy is required, Complaint Counsel has not shown that a lesser alternative will not be more effective than the proposed remedy of divestiture. *Id*. As a result, Complaint Counsel's proposed remedy lacks support from the record evidence.

COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over Respondents Chicago Bridge & Iron Company, N.V. ("CB&I), Chicago Bridge and Iron Company and Pitt-Des Moines, Inc. ("Pitt-Des Moines").

Response to Conclusion No. 1:

Respondents have no specific response to this conclusion of law.

2. The Commission has jurisdiction over the subject matter of this proceeding pursuant to Section 7 of the Clayton Act, 15 U.S.C. 21, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Response to Conclusion No. 2:

Respondents have no specific response to this conclusion of law.

3. At all relevant times herein, Respondents were engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and affected commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Response to Conclusion No. 3:

Respondents have no specific response to this conclusion of law.

4. The FTC is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act. Clayton Act § 11(a), 15 U.S.C. § 21(a).

Response to Conclusion No. 4:

Respondents have no specific response to this conclusion of law.

5. On or about February 7, 2001, CB&I acquired Pitt-Des Moines' Water and Engineered Construction Divisions ("PDM"). The acquisition is a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Conclusion No. 5:

Respondents have no specific response to this conclusion of law.

6. The FTC has jurisdiction pursuant to Section 11 of the Clayton Act, 15 U.S.C. § 21, to bring this administrative proceeding against the CB&I/PDM merger.

Response to Conclusion No. 6:

Respondents have no specific response to this conclusion of law.

7. Section 7 of the Clayton Act prohibits any acquisition of stock or assets "where in any line of commerce ... in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18.

Response to Conclusion No. 7:

Respondents have no specific response to this conclusion of law.

8. Section 7 of the Clayton Act is intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act.

Response to Conclusion No. 8:

Respondents have no specific response to this conclusion of law.

9. Section 7 of the Clayton Act uses the word "may" to indicate that the concern is with probabilities, not certainties. Section 7 does not require proof from Complaint Counsel that a merger has caused higher prices in the affected market. To satisfy Section 7, the FTC need only show a reasonable probability that the proposed transaction would substantially lessen competition in the future. All that is necessary is that the merger create an appreciable danger of anticompetitive consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.

Response to Conclusion No. 9:

Complaint Counsel provides an incomplete statement of its legal burden. Complaint Counsel has the initial burden of proving a Section 7 violation, and the ultimate burden of persuasion in a Section 7 case "remains with the government at all times." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990). *See also United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995). Complaint Counsel must show that the Acquisition is reasonably likely to have "demonstrable *and* substantial anticompetitive effects." *Kraft Foods*, 926 F. Supp. at 359 (emphasis added). A "mere possibility" of anticompetitive effect is not enough to win a Section 7 case; there must be a "reasonable probability" of such an effect. *Id.* (citing *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 351 (2d Cir. 1979)). A showing of "reasonable probability" is required because Section 7 "deals in 'probability,' not '*ephemeral possibilities*.'" *Id.* (quoting *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 (1974)) (emphasis added). Complaint Counsel must prove that the commerce affected by the Acquisition is substantial. *United States v. Baker Hughes, Inc*., 731 F. Supp. 3, 9 (D.D.C. 1990). A showing of a "substantial" anticompetitive effect is required of the government in a Section 7 case. *Id.* (citing *United States v. Dupont & Co.*, 353 U.S. 586, 595 (1957). (*See* Respondents' Conclusions of Law 1-3.)

10. Under Section 7 of the Clayton Act, the FTC makes out a *prima facie* case, and gives rise to a presumption of violation, by showing: (1) the "line of commerce" or product market; (2) the "section of the country" or geographic market; and (3) the transaction's probable effect on concentration in the product and geographic markets.

Response to Conclusion No. 10:

Respondents have no specific response to this conclusion of law.

11. Field-erected liquefied natural gas storage tanks ("LNG") are an appropriate line of commerce for evaluating the likely competitive effects of the acquisition.

Response to Conclusion No. 11:

Respondents' response to this proposed conclusion of law is set forth at RFOF 54-66.

12. LNG import terminals are an appropriate line of commerce for evaluating the likely competitive effects of the acquisition.

Response to Conclusion No. 12:

Respondents' response to this proposed conclusion of law is set forth at RFOF 54-66.

13. LNG peak shaving plants are an appropriate line of commerce for evaluating the likely competitive effects of the acquisition.

Response to Conclusion No. 13:

Respondents' response to this proposed conclusion of law is set forth at RFOF 54-66.

14. Field-erected liquid nitrogen, oxygen and argon storage tanks ("LIN/LOX") are an appropriate line of commerce for evaluating the likely competitive effects of the acquisition.

Response to Conclusion No. 14:

Respondents' response to this proposed conclusion of law is set forth at RFOF 67-75.

15. Field-erected liquid petroleum gas storage tanks ("LPG") are an appropriate line of commerce for evaluating the likely competitive effects of the acquisition.

Response to Conclusion No. 15:

Respondents' response to this proposed conclusion of law is set forth at RFOF 76-83.

16. Large (over 20 feet in diameter), field-erected thermal vacuum chambers ("TVC") are an appropriate line of commerce for evaluating the likely competitive effects of the acquisition.

Response to Conclusion No. 16:

Respondents' response to this proposed conclusion of law is set forth at RFOF 84-94.

17. The United States is the appropriate geographic region for evaluating the likely competitive effects of the acquisition in each of the above lines of commerce.

Response to Conclusion No. 17:

Respondents' response to this proposed conclusion of law is set forth at RFOF 95-98.

18. The Parties are in agreement about the relevant product and geographic markets.

Response to Conclusion No. 18:

Respondents' response to this proposed conclusion of law is set forth at RFOF 54-98.

19. The Herfindahl-Hirschman Index ("HHI") is an appropriate measure of market concentration.

Response to Conclusion No. 19:

While the Herfindahl-Hirschman Index ("HHI") is a recognized method of measuring market shares under the Merger Guidelines, HHI statistics are irrelevant in this particular case. The Merger Guidelines require that the Complaint Counsel calculate market shares "using the best indicator of firms' future competitive significance." *Merger Guidelines* § 1.41. Complaint Counsel has failed to calculate shares using the best indicator of firms' future competitive significance, thus the HHIs, as calculated by Complaint Counsel, are irrelevant in this case. *See* Opening Br. § I, FOF 7.113-7.115, 7.119, 7.130, 7.235-7.237. Further, courts have been skeptical of reliance on market share calculations, and have made clear that they are only a starting point for an analysis of competitive effects. The Supreme Court has instructed lower courts to look beyond market share statistics, because "only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate

setting for judging the probable anticompetitive effect of the merger." *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (internal citations and quote marks omitted). The Court noted that such statistics "were not conclusive indicators of anticompetitive effect" and that "[e]vidence of past production does not as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *Id*. at 498. *See also, e.g., United States v. Baker Hughes* , 908 F.2d 981, 984 (D.C. Cir 1990); *United States v. Syufy Enters.*, 903 F.2d 659, 665 n.6 (9th Cir. 1990); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984) (citations omitted).

20. The acquisition by CB&I of PDM significantly increased concentration in the relevant product markets in the United States, and result in highly concentrated markets.

Response to Conclusion No. 20:

Complaint Counsel's proposed conclusion is irrelevant for the reasons stated above. (*See* RCOL 19; Opening Br. at Part II).

21. The market shares and HHI concentration levels that resulted from this merger in the relevant markets make the merger so inherently likely to lessen competition substantially that it is presumptively unlawful under Section 7 of the Clayton Act.

Response to Conclusion No. 21:

Complaint Counsel's proposed conclusion is irrelevant for the reasons stated above *supra* RCOL 19; Opening Br. at Part II)

22. Having established a *prima facie* case, the burden of producing evidence that the merger is not, in fact, anticompetitive shifts to Respondents. To meet their burden, Respondents must show that the market-share statistics give an inaccurate prediction of the acquisition's probable effect on competition.

Response to Conclusion No. 22:

Respondents have no specific response to this conclusion of law.

23. Proof of ease of entry by other firms may rebut the presumption of anticompetitive harm, but Respondents have failed to do so here.

Response to Conclusion No. 23:

Complaint Counsel's proposed conclusion of law is incomplete and incorrect because: 1) ease of entry is one of many ways in which Respondents can rebut Complaint Counsel's prima facie case; and 2) contrary to Complaint Counsel's claim, Respondents have successfully rebutted its prima facie case, assuming *arguendo* that it properly established its prima facie case. (*See* Opening Br. at Part III-VI).

24. Entry must be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of a merger. In order for entry to be sufficient to restore competition, it must be entry that replaces the competition that existed prior to the acquisition and such entrants must be profitable at pre-merger prices. Even a showing of actual entry is insufficient to alleviate concern, unless that entry also indicates the likelihood of sufficient growth by the entrant to deter or counteract the anticompetitive effects of the merger. Respondents have offered no evidence to satisfy these requirements, and specifically have offered no evidence that any alleged entrant will enter the relevant product markets in the United States within two years, be profitable at pre-merger prices, and fully replace PDM as a competitive force.

Response to Conclusion No. 24:

Complaint Counsel's proposed conclusion is improper because the Merger Guidelines do not establish a criteria for evaluating entry that is binding on the Court; instead the Merger Guidelines, if anything, are binding on Complaint Counsel and it is Complaint Counsel's burden to show that it brought this proceeding in accordance with its own Guidelines. The proper legal analysis under which entry should be analyzed is set forth in *United States v. Baker Hughes*, 908 F.2d 981, 987-88 (D.C. Cir. 1990), which makes clear that Complaint Counsel cannot shift its burden by requiring Respondents to prove what Complaint Counsel suggests is required. (*See* Opening Br. at Part I).

25. Due to entry barriers, entry by new suppliers or the expansion of fringe suppliers is not likely to avert the anticompetitive effects of the merger in the relevant markets.

Response to Conclusion No. 25:

Complaint Counsel's proposed conclusion is false because: 1) Respondents have shown that entry is easy; and 2) that entry has and will avert any potential anticompetitive effects resulting from the Acquisition. (*See, e.g.*, FOF 7.58, 7.92-7.101, 7.118, 7.113, 3.68-3.227, 4.16-4.54, 5.22-5.71, 5.79-5.184).

26. Respondents have not presented an efficiencies defense in support of the merger.

Response to Conclusion No. 26:

Respondents have no specific response to this conclusion.

27. Respondents have asserted an "exiting assets" defense. The antitrust laws, and this Tribunal, do not recognize the existence of such a defense.

Response to Conclusion No. 27:

Complaint Counsel's proposed conclusion of law contains the false assertion that there is no legal support for an exiting assets defense. This defense is recognized in *In re Olin Corporation*, 113 F.T.C. 400 (1990), and is a necessary part of the determination of whether the effects of the Acquisition are to lessen competition. If PDM would have ceased to exist but for the Acquisition, the competitive effect is the same as if there had been no Acquisition. (*See* Opening Br. at Part VIII.)

28. The antitrust laws recognize a "failing firm" or "failing division" defense. In order to satisfy this defense, Respondents must demonstrate that: 1) PDM would be unable to meet its financial obligations in the near future; 2) PDM would not be able to reorganize successfully under Chapter 11 of the Bankruptcy act; 3) PDM has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would keep its tangible and intangible assets in the relevant markets and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of PDM would exit the relevant markets. Respondents failed to prove each of these elements.

Response to Conclusion No. 28:

Complaint Counsel's proposed conclusion of law is unnecessary and irrelevant for the reasons set forth in Part VIII of Respondents' Opening Brief.

29. Respondents have not produced any significant evidence rebutting the presumption of violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Response to Conclusion No. 29:

Complaint Counsel's proposed conclusion of law is false. Complaint Counsel has failed to establish a presumption of violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. (*See* Opening Br. § I). Even if it had, Respondents have presented significant evidence rebutting such a presumption. (*See* Opening Br. at Parts III-VI).

30. Had Respondents produced significant evidence sufficient to rebut the presumption, the burden of producing further evidence of anticompetitive effect would have shifted to Complaint Counsel.

Response to Conclusion No. 30:

Respondents have produced significant evidence sufficient to rebut any presumption Complaint Counsel might have established; accordingly the burden of producing further evidence of anticompetitive effect has shifted to Complaint Counsel in this case. (Opening Br. at Part I).

31. Although Complaint Counsel is not required to prove the existence of actual anticompetitive effects resulting from the merger, such evidence, either in the form of unilateral post-merger price increases or coordinated interaction, negates any attempt to rebut the FTC's *prima facie* case, and independently establishes a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

Response to Conclusion No. 31:

Complaint Counsel's proposed conclusion of law is not legally supported and is irrelevant because Complaint Counsel has not shown any actual anticompetitive effects. (*See* Opening Br. at Part VI; Reply Brief at Part III). *See also United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990) (setting forth legal framework for analysis of Acquisition).

32. Because the merger would eliminate competition from PDM, CB&I's closest competitor in the relevant markets, the merger is likely to increase CB&I's ability to raise prices unilaterally. Anticompetitive price increases are more likely in a merger involving the two firms that buyers consider to be their first and second choices. A merger involving the first and second

lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller.

Response to Conclusion No. 32:

Complaint Counsel's proposed conclusion of law is flawed in several ways. First, Complaint Counsel has not met its burden of showing that the Acquisition is likely to substantially reduce competition in the relevant markets. (Opening Br. at Part II). Complaint Counsel failed to establish a prima facie case, and even if it did, Respondents have successfully rebutted its prima facie case. (Opening Br. at Parts III-VI; Reply Brief at Part II). Complaint Counsel's proposed finding ignores the impact of entry on a market involving "the first and second lowest-cost sellers." The supposed "additional evidence" produced by Complaint Counsel to meet its burden is wholly deficient. (*See* Reply Brief at Part III). Finally, a critical flaw in Complaint Counsel's proposed conclusion of law is that Complaint Counsel did no cost analysis whatsoever in support of its assertion that CB&I is the lowest cost competitor. (FOF 7.152-7.158).

33. The acquisition is likely to give rise to coordinated anticompetitive effects through tacit or express collusion. Section 7 of the Clayton Act seeks to prohibit excessive concentration, and the oligopolistic price coordination it portends. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and raise price.

Response to Conclusion No. 33:

The Acquisition is not likely to give rise to coordinated anticompetitive effects through tacit or express collusion. Complaint Counsel has presented no valid evidence proving collusion is likely, and evidence indicates that in fact the nature of these industries prevents collusion. (*See* Opening Br. at Part VI; Reply Brief at Part III).

34. Complaint Counsel need not show a likelihood of explicit collusion. A merger violates Section 7 of the Clayton Act if the remaining firms will be more likely to engage in conduct that is likely to result in higher prices, even if that conduct, in itself, would be entirely lawful. Section 7 seeks to prevent a market structure that enhances the ability to engage in both

explicit and tacit collusion. The relative lack of competitors eases coordination of actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist.

Response to Conclusion No. 34:

Complaint Counsel's proposed conclusion of law is irrelevant since there is no evidence of explicit collusion. (*See* Opening Br. at Part VI; Reply Brief at Part III).

35. Complaint Counsel has offered substantial evidence of anticompetitive effects resulting from the merger, any of which would independently mandate a finding against Respondents as a matter of law.

Response to Conclusion No. 35:

It is untrue that Complaint Counsel has offered substantial evidence of anticompetitive effects resulting from the merger. (*See* Reply Brief at Part III).

36. CB&I's acquisition of PDM violates Section 7 of the Clayton Act because "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." 15 U.S.C. § 18. The acquisition also constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.

Response to Conclusion No. 36:

Complaint Counsel has failed to meet its burden of proving that the Acquisition has the effect of substantially lessening competition or tending to create a monopoly. (*See* Opening Br., Parts I-VI; Reply Brief at Parts I-III).

37. The Order entered herein is appropriate to remedy the violation of law found to exist, and to protect the public now and in the future.

Response to Conclusion No. 37:

Complaint Counsel's proposed order is wholly inappropriate since 1) there is no violation of the Clayton Act, 2) even if there were a violation of the Clayton Act, Complaint Counsel's proposed remedy is unsupported by evidence, and 3) record evidence establishes that the remedy proposed by Complaint Counsel would harm customers. (*See* Opening Br. at Part XI; Reply Br. at Part V).

Dated: April 16, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Greg J. Miarecki, hereby certify that on this 16th day of April, 2003, I served a true and correct copy of Respondents' Reply Findings of Fact & Conclusions of Law -- Public Version, by hand delivery upon:

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