UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

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

DECISION AND ORDER PARTIALLY DENYING RESPONDENTS' PETITION FOR RECONSIDERATION AND DIRECTING FURTHER BRIEFING ON SPECIFIC REMEDY ISSUES

I. Introduction

On December 21, 2004, we issued our final decision in this matter and found that the acquisition by Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company ("CB&I" or "Respondents") of certain Pitt-Des Moines, Inc. ("PDM") assets was likely to lessen competition substantially in four relevant markets in the United States: (1) field-erected liquefied natural gas ("LNG") storage tanks; (2) field-erected liquefied petroleum gas ("LPG") storage tanks; (3) field-erected liquid nitrogen, oxygen, and argon ("LIN/LOX") storage tanks; and (4) thermal vacuum chambers ("TVCs").[1] Having concluded that the acquisition violated

[1]This Decision and Order uses the following abbreviations for third-party companies referenced herein: American Tank & Vessel, Inc. ("AT&V"), Aker Kvaerner ("Kvaerner"), Bechtel Corporation ("Bechtel"), British Petroleum ("BP"), Cheniere Energy, Inc. ("Cheniere"), CMS Energy ("CMS"), Dynegy, Inc. ("Dynegy"), El Paso Corp. ("El Paso"), Freeport LNG

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, we ordered CB&I to reorganize its Industrial Division (and to the extent necessary its Water Division) into two, separate stand-alone divisions and divest one of them.[2]

On February 1, 2005, pursuant to Rule 3.55 of the Commission's Rules of Practice, 16 C.F.R. §3.55, CB&I filed a Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth ("Respondents' Petition").[3] The petition alleges that demand in the LNG tank market has increased since the record's close and that new entrants have bid on and been awarded LNG tank jobs.[4] Respondents identify awards associated with four LNG projects as evidence of post-acquisition entry: (1) Dynegy's award of an LNG tank contract to Skanska; (2) Sempra's award of an engineering, procurement, and construction ("EPC") contract to Kvaerner/IHI; (3) Freeport LNG's award of an LNG tank contract to Technigaz/Zachry; and (4) Cheniere's award of an LNG tank contract to the MHI/Matrix team.[5] Based on these awards, the petition argues that "the competitive landscape has . . . undergone a sea-change, rendering inaccurate the Commission's predictions" on the difficulty of entry.[6] According to Respondents, these changed conditions necessitate that we reconsider our decision

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Development LP ("Freeport LNG"), Ishikawa Heavy Industries ("IHI"), Matrix Service Co. ("Matrix"), Memphis Light, Gas & Water ("MLGW"), Sempra Energy LNG ("Sempra"), S.N. Technigaz ("Technigaz"), Skanska AB ("Skanska"), Toyo Kanetsu K.K. ("TKK"), TRW Space & Electronics ("TRW"), Whessoe International ("Whessoe"), Yankee Gas Services Co. ("Yankee Gas"), Zachry Construction Corporation ("Zachry"). All other company references use the company's full name or the only name referred to in the record.

[2]Op. at 105

[3]This Decision and Order also uses the following abbreviations for citations to the record:

Tr. – Transcript of testimony before the Administrative Law Judge
RAB – Respondents' Appeal Brief
CCACAB – Answering and Cross-Appeal Brief of Counsel Supporting the Complaint
RRCARB – Respondents' Reply and Cross-Appeal Response Brief
OA – Transcript of the Oral Argument on Appeal held November 12, 2004
CX – Complaint Counsel's Exhibit
Op. – Commission Opinion issued December 21, 2004 (*in camera*).

[4]Respondents' Petition at 2.

[5]*Id*. at 7-10.

[6]*Id*. at 2.

and rescind our order of divestiture.[7] In addition, Respondents assert that our Order imposed relief beyond that ordered by the Administrative Law Judge ("ALJ") and requested by Complaint Counsel in their cross-appeal. Respondents therefore argue that they did not have an opportunity to address the appropriateness of the remedy.

Complaint Counsel oppose Respondents' Petition[8] and argue that Respondents do not meet the standard for reopening the record, which limits a petition to new questions raised by a decision or order of the Commission that the petitioner had no opportunity to argue.[9] Specifically, Complaint Counsel assert that Respondents' Petition does not present a new question because, in this proceeding, Respondents have already raised the argument that post-acquisition entry constrains CB&I.[10] Complaint Counsel further argue that although Respondents' Petition contains new evidence, Respondents failed to timely raise this evidence, because the events described in the petition occurred prior to oral argument and the issuance of our decision.[11] In addition, Complaint Counsel argue that the evidence presented by Respondents does not show that the alleged new entry has restored the competition lost from the acquisition.[12] Finally, Complaint Counsel argue that the remedy raises no new questions under Rule 3.55.[13]

In this Decision and Order, we examine the two issues that Respondents' Petition raises – the sufficiency of entry and the relief in our Final Order – under two separate standards. We first discuss the requirements for granting reconsideration under Rule 3.55 and our reasons for rejecting Respondents' Petition under this standard. We then exercise our discretion under Rule 3.72(a) to consider the merits of Respondents' Petition. We find that Respondents have not shown that entry has restored the competition lost from the acquisition. We thus deny Respondents' Petition on the merits insofar as it raises issues concerning the effectiveness of new entry. Finally, we address Respondents' request that we modify our remedy, and we order further briefing from the parties on specific remedy issues.

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[7] *Id*. at 18.

[8] Complaint Counsel's Opposition to Respondents' Petition to Reconsider, filed Feb. 11, 2005 ("Complaint Counsel's Opposition").

[9] Complaint Counsel's Opposition at 4 (citing 16 C.F.R § 3.55 (2005)).

[10] *Id*. at 6-9.

[11] *Id*. at 10-13.

[12] *Id*. at 12 (citing U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 3.0 (1992, as amended 1997), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (hereinafter *Merger Guidelines*)).

[13] *Id*. at 27.

II. Standard for Granting a Petition for Reconsideration under Rule 3.55

Rule 3.55 requires that a petition for reconsideration "be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."[14] This standard recognizes that litigation must end at some point, and that decision makers must render their judgment based on a finite body of evidence. We thus view reconsideration of a fully-litigated opinion and order as an "extraordinary remedy which should be used sparingly."[15]

A. Post-Acquisition Entry

Respondents' main argument – that increased demand has triggered entry that constrains CB&I post-acquisition – is not a new question raised by our decision. Rather, because the acquisition resulted in near-monopoly or monopoly in each of the relevant markets, this case turned on whether entry and expansion in the relevant markets could restore the competition lost from the acquisition. During the administrative trial, Respondents argued at length that demand in the LNG tank market had increased and spurred three new entrants with the ability to constrain CBI – Skanska/Whessoe, TKK's joint venture with AT&V, and Technigaz's joint venture with Zachry.[16] As support for Respondents' argument, they presented evidence that Dynegy considered bids from these three new entrants and excluded CB&I from bidding on its Hackberry import terminal.[17] At oral argument, Respondents again highlighted the Dynegy project and stated that this project was "dispositive"[18] of the case and showed that "CB&I has no ability to exercise market power."[19] Respondents also argued that the presence of the new

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[14]16 C.F.R. § 3.55. Respondents' Petition addresses only the LNG tank market. In addition, Respondents request that if we re-open the record, they be allowed to present evidence of entry in the LPG and LIN/LOX markets. We presume that Respondents have presented their strongest case for reopening the record. Indeed, Respondents state that the evidence of post-acquisition entry in the LPG and LIN/LOX tank markets does not show "as dramatic a transformation" as the LNG tank market. Respondents' Petition at 2, n.3. Because we have found Respondents' Petition unpersuasive as to the LNG tank market, we conclude that we need not take evidence on the LPG and LIN/LOX markets.

[15]*See, e.g., Donald Riggs v. Anthony Auto Sales Inc.*, No. Civ. A 97-0507, 1998 U.S. Dist. LEXIS 21639, at *6 (W.D.La. Aug. 28, 1998) (applying this standard to a motion to reconsider under Fed. R. Civ. P. 59(e)).

[16]*See generally* RAB at 34-40.

[17]*Id*. at 35.

[18]OA at 6.

[19]*Id*. at 9-10.

entrants constrained CB&I's pricing for two sole-source contracts.[20] For example, they asserted that the customers could have terminated negotiations with CB&I and sought out another supplier had they not been satisfied with CB&I's price.[21]

Our Opinion specifically considered these assertions and rejected Respondents' entry argument. After an examination of the bidding history, entry conditions, and post-acquisition bidding evidence in the relevant markets, we concluded that:

> Respondents' evidence of entry into the LNG tank market and expansion of smaller incumbents in the LPG and LIN/LOX tank markets establishes neither that entry or expansion into these markets is easy nor that it has actually occurred at a level that will meaningfully constrain CB&I post-acquisition. Although some companies have shown interest in these markets, we find that this mere interest and intention to compete does not make them competitors sufficient to replace the competition lost from CB&I's acquisition of PDM.[22]

Respondents' Petition merely seeks to provide additional factual support for a position that Respondents have already argued. It thus does not meet the mandatory requirement of Rule 3.55 that the petition present only new questions raised by Commission decisions or orders.

Previously unavailable new evidence can form a basis for reconsideration provided that it meets Rule 3.55's requirements.[23] To present such evidence, however, a petitioner also must satisfy the standards for reopening the record and admitting new evidence. Among other things, a petitioner must demonstrate that it acted with diligence to bring forth the new evidence in a timely manner.[24] Respondents' Petition does not show that they have met this requirement. Rather, the evidence relied on by Respondents' Petition is a mixture of events that occurred before we issued our decision in December 2004 and events not accompanied by a date. For example, Respondents' Petition states that Dynegy sold its Hackberry facility to Sempra in

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[20]RAB at 35-37; OA at 10-12.

[21]OA at 10-12.

[22]Op. at 90.

[23] *Cf. Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977) (upholding the FTC's decision to allow admission of new evidence where *inter alia* the evidence was unavailable at the time of trial). *See also Riggs*, 1998 U.S. Dist. LEXIS 21639, at *7 (stating that one ground for reconsideration under Fed. R. Civ. P. 59(e) is to allow the moving party to present "newly discovered evidence or previously unavailable evidence").

[24]*Brake Guard Products, Inc.* 125 F.T.C. 138, 248 n.38 (1998).

February 2003 and rebid the EPC contract shortly thereafter.[25] Although it is unclear from Respondents' Petition at what point the EPC contract was awarded, it states that CB&I submitted its bid in August 2004, approximately five months before we issued our decision. Similarly, Respondents' Petition states that Freeport LNG awarded the tank subcontract for its project in June 2004.[26] Our Rules provide Respondents with the opportunity to petition to reopen the record at any time before we issue our decision.[27] We thus conclude that Respondents have not met their burden under our rules for either reopening the record or reconsideration of an issued decision.[28] We therefore deny this portion of Respondents' Petition under Rule 3.55.[29] As discussed below, however, we will further address these matters under our discretionary authority.

B. Relief in Final Order

Respondents' Petition also asserts that the remedy ordered by the Commission goes

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[25]Respondents' Petition at 7.

[26]*Id*. at Ex. 2.

[27]A petition to reopen the record may be filed prior to the ALJ's filing of his Initial Decision, 16 C.F.R §3.51(e), or before oral argument. 16 C.F.R. 3.54(a). *See also Rambus, Inc.*, Dkt. No. 9302 (Dec. 6, 2004) (Order Directing Redesignation of the Record); *Brake Guard Products, Inc.* 125 F.T.C. at 248 n.38 (noting the standard for reopening the record in a pending administrative litigation after trial has ended but before the Commission has issued its opinion). In addition, a petition may be filed before we issue our decision. 16 C.F.R. 3.54(a). *See Chrysler Corp.*, 87 F.T.C. at 750 n.38 (admitting materials three weeks after oral argument).

[28]*See Novartis Corp.*, 1999 FTC LEXIS 212, at *1 (Jul. 2, 1999) (denying a petition for reconsideration where respondent could have introduced evidence of the factual developments that occurred after the record's close at an earlier stage). *See also Riggs*, 1998 U.S. Dist. Lexis 21639, at *7 (a Rule 59(e) motion to reconsider may not be used to "present evidence that could have been raised prior to the entry of judgment").

[29]Respondents' Supplement to Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth, filed February 14, 2005 ("Respondents' Supplement") states that Cheniere awarded an LNG tank to MHI/Matrix on February 4, 2005. Because our Rules do not contemplate such a filing, we treat Respondents' Supplement as a request for leave to file the supplement and accordingly grant that request and analyze it on its merits. Unlike the other evidence presented in Respondents' Petition, the event described in this Supplement occurred after we issued our decision and was thus previously unavailable. For the reasons we have already stated, however, we find that this evidence raises no new question and thus fails to meet Rule 3.55's mandatory requirements.

further than the relief ordered by the ALJ and that requested by Complaint Counsel and thus raises a new question that Respondents had no opportunity to address.[30] The crux of Respondents' argument is that our requirement that CB&I equally divide its current "Relevant Business" and divest one of the units is virtually limitless on its face, goes beyond the assets related to the Engineered Construction ("EC") and Water Divisions, and inappropriately includes some assets owned by CB&I pre-acquisition and others acquired by CB&I post-acquisition.[31] Specifically, Respondents challenge the Order's definition of "Relevant Business," which includes "all assets of every description . . . engaged, directly or indirectly, in all aspects of engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating or selling any: water storage tank or system; industrial process system . . . ; flat bottom tank, pressure vessel or sphere; low temperature or cryogenic tank system; vacuum chamber or system; steel plate fabrication; and specialty structure, including the Relevant Products."[32] They ask us to eliminate CB&I's requirement to divest the "unrelated assets" and require the acquirer to justify the divestiture of assets beyond those acquired from PDM.[33]

As we explained in our Opinion, however, the Notice of Contemplated Relief that accompanied the Complaint in this matter stated that if the Commission determined that the acquisition was anticompetitive, it might order "[r]eestablishment by CB&I of two distinct and separate, viable, and competing businesses, one of which shall be divested by CB&I."[34] The Notice further elaborated that a divestiture could include "such other businesses as necessary" and "all intellectual property, knowhow, trademarks, trade names, research and development, customer contracts, and personnel, including but not limited to management, sales, design, engineering, estimation, fabrication, and construction personnel. . ."[35] This language contemplates the very type of relief that we subsequently ordered and put Respondents on notice that the Commission might order the remedy they now challenge.

In addition, Complaint Counsel's cross-appeal of the Initial Decision raised the specific issues that Respondents' Petition claims they had no opportunity to address. In their cross-appeal, Complaint Counsel argued that the Commission would need to order divestiture not only of the acquired assets but also of "assets necessary to reconstitute a competitor."[36] They further

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[30]Respondents' Petition at 13-14.

[31]*Id*. at 14-16.

[32]*Id*. at 15-16 (quoting Final Order at 3-4).

[33]*Id*. at 16.

[34]Op. at 101.

[35]*Id*.

[36]CCACAB at 67-68.

argued that the Commission should assign a percentage of CB&I's work in progress to the potential buyer, require Respondents to take steps to encourage experienced employees to transfer to the buyer, and appoint a monitor trustee.[37] All three of these requests suggest relief beyond divesting those assets acquired from PDM. Moreover, Complaint Counsel attached a proposed order with language identical to our definition of "Relevant Business" to their cross-appeal brief.[38] Respondents' Reply and Cross-Appeal Response brief acknowledged the proposed order and argued at length that the three main requirements urged by Complaint Counsel were unnecessary.[39] Respondents therefore not only had ample opportunity to argue the points raised in their petition[40] but took advantage of that opportunity. Accordingly, we conclude that Respondents' Petition to reconsider the relief in the Order does not satisfy the standards of Rule 3.55 and deny it. However, we consider the issues raised by CB&I about the breadth of relief under our discretionary authority.

III. The Commission's Discretionary Authority to Consider a Petition

Section 5(b) of the FTC Act, 15 U.S.C.§ 45(b), provides that "the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any order made" under Section 5 of the Act. Section 3.72(a) of the Commission's Rules of Practice, 16 C.F.R.§ 3.72(a)(2005), provides us with discretion under such circumstances to "enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, . . . order or opinion issued by the Commission . . . ." Because the sufficiency of entry in the relevant markets was a particularly important issue in this case, we exercise our discretion here and consider new evidence that might bear on the ability of new entrants to restore competition sufficiently in the LNG tank market. In addition, although Respondents should have raised their remedy concerns before now, we take seriously our responsibility to protect markets and conclude that we should not disregard completely the specific difficulties Respondents raise about the implementation of our Final Order. We therefore have determined to exercise our discretion to consider Respondents' Petition.

A. Post-Acquisition Entry

Predicting future market behavior is never easy and is particularly difficult in markets

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[37] *Id*. at 70-77.

[38] *Id*. at App. A.

[39] RRCARB at 45-58.

[40] *See Indiana Federation of Dentists*, 101 F.T.C. 718 (1983) ("Since the language to which respondent refers was contained in the draft order accompanying complaint counsel's answering brief, it is not a matter upon which respondent can claim to have had no previous opportunity to argue.").

characterized by changing conditions such as increased demand. Moreover, *General Dynamics*[41] and its progeny instruct that our analysis be forward-looking, which means that we must consider the most recent market realities. At the same time, evidence of past market behavior is often a good predictor of future developments, especially in the absence of evidence that there have been fundamental changes in market dynamics. Therefore, to evaluate Respondents' arguments, we consider evidence related to the pre-acquisition dynamics of this market, post-acquisition evidence adduced at trial, and new evidence presented by Respondents' Petition.

We agree in principle that a new supplier's ability to bid on and win an award to build an LNG tank is relevant to a showing that it has the capability to constrain CB&I sufficiently (and thus to replace the competition lost from the acquisition).[42] For a number of reasons, however, we conclude that Respondents have not shown that the competition lost from CB&I's acquisition of the PDM assets has been restored.

To begin, we find Respondents' argument – that CB&I's post-acquisition losses conclusively demonstrate that CB&I is sufficiently constrained – unpersuasive. Entry might signal that post-acquisition prices have increased to a level that makes the market attractive to new firms. Whether those new entrants are able to compete at the price that prevailed before the transaction is another matter.[43] We thus view the evidence that CB&I has not won every post-acquisition bid as inconclusive. In addition, the post-acquisition awards to a company other than CB&I do not show that CB&I is constrained at the pre-acquisition level. Finally, although Respondents did not present much evidence related to CB&I's post-record wins, we glean from the available material that CB&I has obtained at least three sole-source, turnkey contracts for LNG projects since the record's close.[44] When those contracts are added to the five post-acquisition projects CB&I had been awarded prior to the record's close, it is clear that CB&I has obtained many more contracts for LNG projects than it has lost. For these reasons, we conclude that CB&I's post-acquisition losses standing alone do not answer the ultimate question in this case – whether competition has been restored to the pre-acquisition level. We therefore adhere to our earlier conclusion that CB&I's acquisition of the PDM assets substantially lessened competition in the U.S. market for field-erected LNG tanks and thus violated the antitrust laws.

1. Analysis of Respondents' Evidence

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[41]*United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

[42]*United States v. Syufy Enters*., 903 F.2d 659, 665 (9th Cir. 1990) (finding a merger to monopoly acceptable where a post-merger entrant took a significant share of the first-run film market away from the incumbent firm).

[43]*See* F.M. Scherer & David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 362 (3d ed. 1990) ("The higher prices are, the more rapidly potential entrants will perceive the attractiveness of entry").

[44]*See* Complaint Counsel's Opposition at Ex. C, Ex. E, Ex. F.

Despite Respondents' assertions, we believe it is a mistake simply to accept that evidence of post-acquisition LNG tank awards to suppliers other than CB&I necessarily means that CB&I is constrained at the pre-merger level. Such a viewpoint fails to account for the possibility that post-acquisition prices have increased beyond the pre-acquisition level and also runs afoul of basic economic principles.[45] This point is especially salient when a firm acquires its closest competitor and achieves a monopoly position in a market characterized by high entry barriers. Economic theory teaches us that under such circumstances, the merged firm has both the incentive and ability to raise price.[46] At a sufficiently high price, however, even a monopolist is constrained by competition from distant substitutes[47] and the possible entry of new suppliers.

Respondents' entry argument therefore misses a crucial point – the fact that actual or potential entry constrains the monopolist's ability to increase price without limit does not show that competition lost from an acquisition has been replaced. For example, a new entrant may be incapable of restoring competition to the pre-acquisition level because its costs do not allow it to compete at the price that prevailed in the market prior to the acquisition. In such instances, entry is a direct result of the monopolist's pricing above the competitive level rather than a force that will return the market to the status quo ante.

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[45]This error is commonly known as the cellophane fallacy, which derives from criticism of the Supreme Court's decision in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). *See United States v. Oracle*, 331 F. Supp. 2d 1098, 1121 (N.D.Cal. 2004) ("The error in the logic of *Du Pont* is that 'the existence of significant substitution in the event of further price increases or even at the current price does not tell us whether the defendant already exercises significant market power.'" (citing *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 471 (1992)). *See also* Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 Antitrust L.J. 187, 197 (2000); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 960-63 (1981).

[46]Generally speaking, the monopolist can set price without fear of losing sales to another competitor in the market. Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 87 (3rd ed. 2000) ("A monopoly sets its price without fear that it will be undercut by a rival firm"); Richard Posner, ANTITRUST LAW 11 (2d ed. 2001) ("The monopolist will never be content to charge a price at which the demand for his product is *inelastic*, that is, a price at which the proportional reduction in the quantity demanded as a result of raising price slightly would be less than the proportional increase in price."). Such monopolistic reaction may include not only higher nominal price but also reductions in quality of service or responsiveness to customer needs, such as CB&I's evident unwillingness to engage in competitive bidding and insistence on sole-source, turnkey contracts. *See Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978) (identifying quality, service, safety, and durability as important elements to a bargain).

[47]*United States v. Eastman Kodak Co.*, 853 F. Supp. 1454, 1469 (1994) (quoting Landes & Posner, *supra* note 45, at 961).

Where a new entrant has some ability to compete, but lacks the ability to restore the competition lost from an acquisition, a monopolist will not necessarily lower its price to the level that prevailed before the acquisition. To do so would mean foregoing monopoly profits.[48] We see this dynamic in the facts of this case. CB&I recognizes that its insistence on sole-source, turnkey contracts might cause some customers to select other suppliers for preliminary work and that those suppliers may, in turn, have an advantageous position for bidding on the LNG tanks in question.[49] This possibility of lost business, however, has not altered CB&I's behavior. As a result, we find that CB&I need not have won every post-acquisition contest to demonstrate that it has obtained and exercised market power as a result of the acquisition.[50] Rather, the exercise of market power by CB&I may explain why other suppliers have entered and some customers have switched to suppliers that lack CB&I's cost advantages and experience. As numerous courts have observed, "At a high enough price, even poor substitutes look good to the consumer."[51]

2. Post-Acquisition Projects

Respondents' post-acquisition examples of entry also fail to demonstrate that CB&I is constrained to the pricing that prevailed before the acquisition. For each of the post-acquisition projects identified by Respondents, CB&I has insisted on sole-source, turnkey contracts, despite the fact that many LNG customers have expressed a desire not to structure their LNG projects in this way.[52] This pattern shows a lack of competition as to "one of the elements of a bargain"[53]

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[48]Posner, ANTITRUST LAW, *supra* note 46, at 73 n.31.

[49]*See, e.g.*, Tr. at 4938 (Scorsone stating that CB&I's refusal to bid on LNG tanks separately from the EPC contract for the Dynegy project and Dynegy's subsequent selection of Skanska as the EPC means that it cannot "force" customers to select it as an EPC contractor). *Cf. Id.* at 4232-33 (Glenn predicting that Freeport LNG's choice of Technip to perform preliminary engineering work may translate into an EPC contract if the Freeport LNG is satisfied with Technip's work).

[50]Carlton and Perloff, *supra* note 46 at 92.

[51]*Eastman Kodak Co.*, 853 F. Supp at 1469. *Cf. Oracle*, 331 F. Supp. 2d at 1121 ("[B]ecause a monopolist exercises market power by increasing price until the cross-price elasticity of demand is so high that a further price increase would be unprofitable, a high cross-price elasticity of demand at current prices, by itself, does not demonstrate that the seller lacks market power").

[52]*See* Tr. at 4568-71 (Dynegy wanted to bid the LNG tanks separately from the engineering work to save costs); Tr. at 6974-76, 6978 (Freeport LNG wanted to bid the EPC award for its project competitively and thus contacted other companies to assist with the preliminary work after CB&I refused to do any work absent being awarded a sole-source, turnkey contract for the facility); Tr. at 6069-71 (BP initially wanted to bid the LNG tanks for its

important to customers and evidences an exercise of market power by CB&I. It is true that Dynegy, Freeport LNG, and Cheniere, each of which did not want to grant sole-source, turnkey contracts, awarded LNG tank contracts to other suppliers post-acquisition. However, given CB&I's refusal to undertake work on terms other than its own, we are not convinced that these alternate suppliers sufficiently constrain CB&I. In addition, one of the awards identified by Respondents (Sempra's award to the Kvearner/IHI team) is an EPC contract for the entire facility rather than an award for LNG tanks. Because winning an EPC contract for the entire LNG project does not necessarily show an ability to compete for building an LNG tank, Respondents have not shown that this award is probative of competition in the relevant market.[54]

a. Dynegy's Hackberry Terminal

Respondents first argue that after the record's close, CB&I lost the LNG tank award for Dynegy's Hackberry facility to Skanska. While it is true that the LNG tank contract for this project was awarded after the record closed, CB&I's preclusion from bidding on this tank was discussed at length during trial, argued on appeal, and addressed in our Opinion.[55] At the time of the Record's close, the contest for this award was between Skanska/Whessoe and TKK/AT&V. That Skanska/Whessoe prevailed over TKK/AT&V when CB&I did not submit a bid is not probative of Skanska's ability to constrain CB&I sufficiently. We thus adhere to our previous finding that this project does not support Respondents' argument that post-acquisition entry sufficiently constrains CB&I.

Respondents also argue that Dynegy could have accepted a late bid from CB&I if it were not satisfied with the bids from the new entrants. This argument was also raised at trial by

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three facilities competitively, but awarded CB&I sole-source, turnkey contracts for the facilities after CB&I refused to do preliminary work absent such a commitment). We found that this behavior suggested that CB&I did not view the new entrants as meaningful competition. Op. at 64-65. Respondents' Petition suggests that CB&I has continued this policy despite customers' preference to the contrary. For example, Mr. Blum's declaration makes clear that CB&I attempted to negotiate a sole-source, turnkey contract with Cheniere, which ultimately hired another company solely to do the preliminary work. Respondents' Petition at Ex. 5 ¶ 4.

[53]*Prof'l Engineers*, 435 U.S. at 695. *See also* discussion *supra* note 46.

[54]For example, at trial the head of CB&I's Industrial Division identified two separate sets of competitors for constructing LNG tanks and performing EPC duties. *Compare* Tr. at 4948 (identifying LNG tank competitors as Skanska/Whessoe, Technigaz/Zachry, TKK/ATV, Daewoo/S&B and possibly MHI and IHI) *with* Tr. at 4935 (identifying EPC competitors as Halliburton, KBR, Flour, Technigaz, Skanska Whessoe, Black & Veatch, Daewoo, Tractebel, and Chiyoda JGC).

[55]Op. at 58-60.

Respondents' economic expert, Dr. Harris.[56] Although our Opinion did not specifically address this particular piece of evidence, it considered and rejected both Dr. Harris' specific testimony and assumptions related to the Dynegy project and Respondents' general argument that the Dynegy project showed sufficient post-acquisition entry.[57] There is also no evidence in the record to suggest that LNG tank customers accept late bids, and Respondents do not point to a single example of such behavior in their petition. Therefore, we conclude that Respondents' theoretical argument is not supported by the evidence and reject it.

b. Sempra's Hackberry Project

Prior to oral argument, Dynegy sold its Hackberry facility to Sempra. Rather than keeping Skanska as the EPC, Sempra solicited new bids for an EPC contractor and ultimately awarded the contract to the Kvaerner/IHI team.[58] Respondents argue that because Kvaerner/IHI was awarded this project, sufficient entry in the LNG tank market has occurred.[59] Respondents' argument, however, does not account for the fact that an EPC contract is different from an LNG tank contract. An EPC contractor performs the engineering, procurement, and construction of the LNG facility and is essentially a general contractor for the entire facility. Because EPC contractors often subcontract the construction of an LNG tank, we find that an EPC award is not necessarily probative of competition in the LNG tank market.

With this distinction in mind, we find that the evidence presented by Respondents does not specifically address whether CB&I lost the LNG tank contract to Kvaerner/IHI. Rather,

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[56]Tr. at 7349 (Dr. Harris testifying that Dynegy "had the opportunity to have CB&I bid and turned them down"). Dr. Simpson, Complaint Counsel's economic expert, addressed Dr. Harris' argument and stated that Dynegy might not violate its own bidding rules because "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." Tr. at 3338. *See also* Tr. at 3341-42 ("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 that might indicate that the person submitting the late bid would not follow the buyer's instructions in other areas, then the buyer – that would be a basis for why the buyer would be reluctant to purchase from that late bidder.").

[57]*See generally* Op. at 58-60, 83-88.

[58]Respondents did not submit this information until they filed the current petition. Instead, they argued in their appeal briefs and at oral argument that Skanska was a viable competitor, *because* it had been named EPC contractor for Dynegy's Hackberry facility. RAB at 15; OA at 6.

[59]Respondents' Petition at 5, 8 n.15.

Respondents present a declaration from Michael Miles, a CB&I employee,[60] which states that "CB&I lost the EPC contract for the Hackberry project to Aker Kvaerner/IHI. The tank subcontract went with the EPC contract."[61] This statement, of course, does not tell us whether Kvaerner/IHI might subcontract the LNG tank work to another company.

Even if we assume that Kvaerner/IHI will build the LNG tank, the special circumstances that surround this EPC award lead us to question whether this project demonstrates that the competition lost from the merger has been restored. In particular, it does not appear that CB&I had the bonding capacity necessary to win the EPC contract, which allegedly led to the LNG tank subcontract.[62] CB&I initially partnered with Bechtel to bid on this project.[63] Bechtel agreed to "perform the systems design work and procurement work" for the terminal (essentially to be the EPC contractor), and CB&I planned to undertake the "tank design and construction on a turnkey basis for Bechtel."[64] However, Bechtel withdrew at the last moment, and CB&I was forced to bid alone for the entire project.[65] Bechtel's very late withdrawal likely had a negative impact on CB&I's chance of winning the EPC award for this project. Presumably, CB&I agreed to submit a bid with Bechtel for this project because the Bechtel/CB&I combination presented certain advantages over a bid from CB&I alone.

c. Freeport LNG

At the time we issued our decision, Freeport LNG had awarded Technip the front-end engineering and design ("FEED") contract and hired S&B/Daewoo to help with the FERC

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[60]Although we give Respondents the benefit of the doubt and credit Mr. Miles' declaration, so far as it goes, we note that CB&I cast some doubt on his credibility at trial. Mr. Miles contacted and met with employees at Howard Fabrication, CB&I's competitor, to propose that CB&I and Howard Fabrication work together to give TRW a price for an upcoming TVC bid. Tr. at 245. To explain why this possibly collusive conduct was not problematic under the antitrust laws, Mr. Scorsone explained that "Mike Miles is a first-level salesperson for CB&I," who does not set contract prices on his own authority. Tr. at 5061-62. *See also* Complaint Counsel's Opposition at 17.

[61]Respondents' Petition at Ex. 2 ¶ 10.

[62]In testifying about another project of similar size, CB&I's CEO, Gerald Glenn, stated that CB&I was rejected as EPC contractor, because it did not have the bonding capability necessary to handle the project. Tr. at 4151, 4939.

[63]Respondents' Petition at Ex. 2 ¶ 6.

[64]*Id.*

[65]*Id.* at Ex. 2 ¶ 7.

drawings.[66] However, because the EPC contractor had not yet been selected and possible tank constructors had yet not been identified, we concluded that this project was at too early a stage to be probative of competition in the LNG tank market.[67] After the record's close, Freeport LNG awarded Technip the EPC contract for this project, and Technip subsequently sent out requests for proposals ("RFPs") to potential tank subcontractors.[68] Respondents argue that because the tank subcontract was ultimately awarded to Technigaz/Zachry, this project demonstrates that competition has been restored post-acquisition.[69]

As with Sempra's EPC award, the evidence that Respondents presented about the Freeport LNG project raises serious questions about the probative value of this award. Mr. Miles' declaration states that "Technip had been working in association with Zachry in the project's FEED stage and . . . Zachry's involvement in the FEED and EPC contract gave Technigaz/Zachry the advantage in the tank bid."[70] Freeport LNG turned to Technigaz/Zachry for the preliminary work on this project only after CB&I refused to do such work – absent a commitment from Freeport LNG that CB&I be awarded a contract to build the entire facility on a turnkey basis.[71] CB&I's refusal to perform this preliminary work thus appears to have resulted in the LNG tank being awarded to Technigaz/Zachry. Consequently, this project is not good evidence that Technigaz/Zachry sufficiently constrains CB&I or that a future entrant could constrain CB&I.

d. Cheniere's Corpus Christi and Sabine Pass Projects

Respondents' Petition finally argues that Cheniere's selection of Black & Veatch to provide FERC assistance and FEED and of Bechtel to act as the EPC contractor for both its Corpus Christi and Sabine Pass projects shows that meaningful entry has occurred. These awards, however, do not inform us about competition in the relevant market, LNG tanks. Neither Black & Veatch nor Bechtel builds LNG tanks and each will thus have to subcontract

[66]Respondents argued on appeal that this project is evidence that competition had been restored in the LNG tank market. RAB at 27.

[67]Op. at 62.

[68]Technip pre-qualified Technigaz/Zachry, Skanska/Whessoe, TKK/AT&V, S&B/Daewoo, and CB&I. Respondents' Petition at 8.

[69]*Id*. at 8-9.

[70]*Id*. at Ex. 2 ¶ 15.

[71]Tr. at 7065-66, 7069-70. *See also* Complaint Counsel's Opposition at 9-10 n.11.

that work.[72]

In the supplement to their petition, Respondents state that Cheniere awarded its Sabine Pass LNG tank contract to MHI/Matrix and argue that this award shows that new entrants have been able to establish a presence in the U.S. market.[73] We note that the sole evidence of MHI/Matrix's award comes from an amended declaration of Ronald Blum, which states that on February 4, 2005 he "learned that the LNG tank subcontract [sic] for the Sabine Pass project [had] been awarded to MHI/Matrix."[74] Even if we assume that Mr. Blum's information is correct, we doubt that this incident has sufficient predictive significance because CB&I insisted that Cheniere grant CB&I a sole-source turnkey contract as a condition for performing any of the preliminary work.[75]

e. Early-Stage Projects

Respondents also assert that Kellogg, Brown & Root has been chosen to do the preliminary engineering and FERC work for Mitsubishi's Long Beach project and that this award further evidences entry.[76] We find Respondents' argument flawed because Kellogg, Brown & Root does not build LNG tanks – CB&I's declaration from Mr. Miles even states that he expects CB&I to bid for the tank work.[77] Thus, Kellogg, Brown & Root's award is irrelevant to competition in LNG tank market.

With respect to the LNG tank work, Respondents also assert that "[i]t strains credulity to suggest that Mitsubishi would agree that its affiliate MHI is unqualified to build an LNG tank."[78] Respondents may be correct – Mitsubishi may think that its subsidiary, MHI, is technically able to build an LNG tank. However, as we stated in our Opinion, technical qualifications alone do

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[72]Tr. at 521, 4936-37. Respondents' Petition recognizes this fact with respect to Bechtel and states that "Bechtel subsequently asked CB&I and others to submit new bids for the LNG tank construction on both projects." Respondents' Petition at 9.

[73]Respondents' Supplement at 3, Ex.1.

[74]*Id*. at Ex. 1 ¶ 9.

[75]Respondents' Petition at 9 (stating that "CB&I unsuccessfully attempted to negotiate a sole-source contract for the EPC position.").

[76]*Id*. at 10-12.

[77]Tr. at 4936-37; Respondents' Petition at Ex. 2 ¶ 16.

[78]Respondents' Petition at 10.

not equate to a supplier's ability to constrain CB&I at the pre-acquisition level.[79] Furthermore, even if we presume that MHI will be awarded the LNG tank because of its affiliation with the customer, this project would tell us nothing about competition in the LNG tank market when the tank builder is not affiliated with the customer.

Respondents also point to two projects – Exxon/Mobil's Sabine Pass and Corpus Christi terminals and Washington Gas Co.'s peak-shaving plant – as demonstrating competition because suppliers other than CB&I have been pre-qualified. As our Opinion explained at length, such early stage projects are not sufficiently advanced to provide us with evidence about these bidders' ability to constrain CB&I.[80]

3. CB&I's Post-Acquisition Wins

Even if we credit the losses identified in Respondents' Petition, we must consider those losses relative to the post-acquisition work that CB&I has obtained to determine the extent of competition in the LNG tank market. Although Respondents did not provide much evidence related to the work CB&I has obtained, it appears that CB&I has successfully negotiated at least three sole-source contracts since the record closed.[81] In addition to these contracts, CB&I had already obtained five sole-source commitments after the acquisition but before the record closed.[82] Thus, of the eleven LNG tank contracts that have been awarded post-acquisition,[83]

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[79]Op. at 57 ("We do not suggest that the new entrants would be totally incapable of building an LNG tank in the U.S." "The fact that CB&I has cultivated these skills through decades of experience means that it has some advantages compared to a supplier that has not yet built a tank.").

[80]*Id*. at 62-63.

[81]The post-acquisition projects comprise: (1) a terminal expansion for Dominion's Cove Point facility; (2) a terminal expansion for Trunkline LNG's Lake Charles facility; and (3) a peak-shaving plant for Yankee Gas in Waterbury, Connecticut. Complaint Counsel's Opposition at Ex. C, Ex. E, Ex. F.

[82]At the close of the record, CB&I had negotiated (or was negotiating) sole-source contracts for: (1) El Paso's Elba Island facility; (2) British Petroleum's three import terminals; (3) CMS' Lake Charles terminal; and (4) a facility for Poten & Partners. Op. at 60 n.356. While these projects total six, we have not included the CMS project in our count, because it is the same as the October 7, 2003 award to CB&I for the Lake Charles facility. *See* Complaint Counsel's Opposition at Ex. C. Panhandle Eastern Pipeline (a subsidiary of CMS) and its subsidiary Trunkline were sold by CMS to Southern Union Company. CMS Energy Corp., SEC Form 10-K Report at 14 (Mar. 12, 2004) ("In June 2003, CMS Gas Transmission sold Panhandle to Southern Union Panhandle Corp., a newly formed entity owned by Southern Union"), http://www.sec.gov/Archives/edgar/data/811156/000095012404000855/k82154e10vk.txt. Although this 10-K filing was not part of the record, we take official notice of it under 16 C.F.R.

CB&I has successfully negotiated eight on a sole-source basis.

We are mindful that there is some variation in the value of the post-acquisition projects in terms of both size and number of tanks, which complicates the ability to state CB&I's precise market share. However, even accounting for these differences, it appears that CB&I has obtained sole-source contracts for the vast majority of the LNG tank work post-acquisition.[84]

We also do not suggest that CB&I's ability to obtain the majority of the post-acquisition work alone demonstrates market power. Respondents rightly point out that even those firms that bid unsuccessfully can *theoretically* constrain CB&I.[85] However, we are not convinced that the alleged new entrants have the attributes necessary to replace the competition lost in the LNG tank market as a result of CB&I's acquisition of PDM. At trial, numerous customers testified that an LNG tank supplier would need to have experience, a solid reputation, experienced supervisors, access to local labor forces, and regulatory expertise to compete effectively in this market. The bidding evidence further established that customers take into account each of these elements when they analyze a bidder's strength. Moreover, the history of this market has shown

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§ 3.43(d).

[83]We have excluded the Dynegy project from our analysis, because Dynegy sold the Hackberry facility to Sempra, which re-bid the project and selected a new EPC.

[84]The three projects that Respondents assert CB&I lost after the record's close – the Sempra, Freeport LNG, and Sabine Pass terminals – total eight tanks (three 160,000 cubic meter full-containment tanks for the Hackberry terminal, two tanks for the Freeport LNG import terminal, and three single containment tanks for the Sabine Pass project). Respondents' Petition at Ex. 2(B) ¶ 3, Ex. 5 ¶ 3. CB&I has negotiated contracts to build six LNG facilities, which comprise at least nine LNG tanks and likely many more. The Cove Point terminal expansion will contain two 160,000 cubic meter tanks. Complaint Counsel's Opposition at Ex. F. The Lake Charles terminal expansion involves a 140,000 cubic meter tank, and the Yankee Gas facility will have a smaller full-containment tank. *Id*. at Ex. C, Ex. E. In addition, CB&I has negotiated sole-source contracts with BP (for three separate import terminals), Poten & Partners, and El Paso. Op. at 60 n.356. Because both the BP and El Paso projects will be import facilities, they are likely to comprise more than one LNG tank (the import facility awards in the record generally comprise more than one LNG tank). *See, e.g.*, Tr. at 6961, 6968 (Freeport LNG's facility comprises two LNG tanks); Tr. at 4539-40 (Dynegy's Hackberry Facility comprised three LNG tanks).

[85]Respondents made this identical argument at trial and on appeal, RAB at 35; *see generally* Tr. at 4860-72, and we found the evidence in the record did not support it. Op. at 64-65.

that LNG tank suppliers without a U.S. presence have failed to compete effectively with CB&I.[86]

Respondents did not argue at trial or on appeal that the attributes we have identified as necessary to compete were unnecessary. Rather, they asserted that three new entrants – Skanska/Whessoe, TKK/AT&V, and Technigaz/Zachry – could restore competition *because* their U.S. construction presence provided them with these attributes.[87] Luke Scorsone, the head of CB&I's Industrial Division, testified at length that Skanska/Whessoe's, TKK/AT&V's and Technigaz/Zachry's U.S. construction presence differentiated them from suppliers that had no U.S. presence and had bid unsuccessfully on previous projects.[88] He also stated that this U.S. presence made the new entrants very serious competitors.[89] Respondents' Petition does not put forth any evidence to suggest that such experience (and the attributes that flow from it) is no longer necessary for an LNG tank supplier to compete effectively.

We find, however, that the new entrants Respondents' Petition identifies lack experience in the U.S. LNG tank market.[90] For example, Kvaerner/IHI has no experience in building LNG tanks in the United States and is not partnered with a U.S. construction firm.[91] Similarly, MHI does not have a U.S. presence and, while Matrix is a U.S. firm, it has never built an LNG tank.

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[86]Lotepro teamed with Whessoe and Black & Veatch teamed with TKK to submit bids for MLGW's peak-shaving plant in Capleville, Tennessee, and their bids were well above that of CB&I. Tr. at 560, 3196-98.

[87]*See, e.g.*, RAB at 1 ("Each firm owns or is allied with a U.S. constructor to form a combination focused on competing for U.S. LNG projects").

[88]*See* Tr. at 4860-72.

[89]*Id*. Some customers also testified that although they would have concerns about contracting with foreign LNG tank suppliers, the new entrants' U.S. presence largely alleviated these concerns. *See, e.g.*, Tr. at 1322 (stating that if a foreign company teamed up with an experienced US tank construction firm, that action would alleviate Bechtel's concern with subcontracting the tank).

[90]The Opinion also discussed at length Technigaz/Zachry's lack of experience and why it was not a sufficient entrant. *See generally* Op. at 52-57. Respondents have not presented sufficient evidence to rebut these findings.

[91]Respondents also elicited testimony at trial that Kvaerner was not a good project manager. Tr. at 5543. Respondents took this position in an attempt to refute Complaint Counsel's argument that Whessoe's poor record in constructing LNG tanks outside of the United States would affect its ability to gain a foothold in the U.S. LNG tank market. Respondents accordingly argued that Kvaerner, which had previously owned Whessoe, mismanaged the projects at issue and that Whessoe would be more viable under Skanska's management.

Without such experience, it is unlikely that these suppliers have the ability to manage the project or attract and efficiently work with qualified field crews and local labor at the same level as PDM.[92] Indeed, Matrix testified at trial that it would not expect to win an LNG tank bid against CB&I given its inexperience.[93] The recent evidence of a Matrix win does not undercut this evidence, because the circumstances that surround the award do not demonstrate Matrix's ability to compete. We thus find that these firms do not have the capability to constrain CB&I at the pre-acquisition level.

We do not suggest that the new entrants will never be in a position to compete effectively with CB&I and thus constrain it. If the entrants that have been awarded LNG tank contracts successfully complete the projects, they will have established a foothold in this market. However, the evidence at trial established that it takes more than the successful completion of one LNG tank to be an effective competitor in this market. Thus, even if we were willing to assume that a few entrants will gain experience through their recent LNG tank awards, CB&I has not established facts sufficient to support a finding that such limited experience will allow those suppliers to constrain CB&I at the level PDM once did.

We also find evidence that the alleged new entrants' are unable to constrain CB&I in both CB&I's own conduct and its customers' responses. CB&I has adhered to an unwavering policy of insisting on sole-source contracts post-acquisition with little regard for whether its policy will cause some loss in sales.[94] Nonetheless, CB&I's market share appears to have *increased* post-acquisition – a trend that stands in sharp contrast to the dynamic that existed when CB&I competed with PDM. From 1990 to the acquisition, CB&I won five of nine of the LNG tanks awarded, PDM won the other four, and the value of the tank sales was roughly even.[95] The fact that CB&I has effected such an increase in market share while insisting on sole-source contracts suggests that CB&I obtained market power from the acquisition. Moreover, post-acquisition statements from CB&I's CEO suggest that CB&I views itself as unconstrained by new entry. At a shareholder discussion, he stated that CB&I can "win the work every time" if it chooses to do so.[96] Having carefully considered all this evidence, we adhere to our previous conclusion that the new entrants do not sufficiently constrain CB&I and that the competition lost

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[92]Op. at 33-42. One of Respondents' witnesses even testified that it would consider IHI only if it were partnered with a U.S. construction firm. Tr. at 7017.

[93]Tr. at 1604.

[94]*See* discussion *supra* note 52.

[95]Accounting for the value of the tanks, Dr. Simpson estimated that CB&I's total sales amounted to 45.3% and PDM's total sales amounted to 54.7% of the U.S. LNG tank market Tr. at 3055-58; CX 1645.

[96]*See* Complaint Counsel's Opposition at 8.

from the acquisition has not been replaced.[97]

4. Conclusions on the Sufficiency of Entry

We recognize that markets evolve and that monopolists may eventually be forced to adjust their behavior in light of new entry. However, the LNG tank market has historically been characterized by difficult entry conditions and dominated by CB&I and PDM for decades. There is inadequate evidence to suggest that the fundamental dynamics of this market have changed. Indeed, the evidence suggests that entry is extraordinarily slow in the LNG tank market and has not yet occurred on a sufficient scale.[98]

Four years have passed since the acquisition and, at most, we find that new entrants have taken only the first steps toward meaningful entry. Moreover, at this juncture, we cannot predict what impact, if any, the awards identified by Respondents will actually have on the LNG tank market. The new entrants' potential for meaningful entry is dependent on their successful completion of the LNG tanks. Even if they successfully complete these projects, we strongly doubt that they will be viewed as comparable to the former PDM in the future, because the customers in this market have a preference for experienced tank suppliers that have completed

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[97]Contrary to Respondents' assertions, the evidence presented in their petition is also manipulable and can thus be viewed skeptically. *See General Dynamics Corp.*, 415 U.S. at 504-05 ("If a demonstration that no anticompetitive effects had occurred at the time of trial . . . constituted a permissible defense to a §7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior."); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *B.F. Goodrich Co.*, 110 F.T.C. 207, 341 (1988) (same). *See also FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) (finding that the court of appeals gave too much weight to post-acquisition evidence that, among other things, showed a declining share).

Although Respondents do not control the bids made by other LNG tank suppliers or which bidder a customer might select for a given project, CB&I does have control over its own bid. It can thus bid high enough to ensure that another LNG tank supplier wins some share of the post-acquisition market (and thereby point to these wins as evidence that meaningful entry has occurred). Because we have found that the balance of evidence does not support Respondents' argument, we need not determine whether the post-acquisition projects pointed to by Respondents deserve less weight than other evidence.

[98]This conclusion is based on Respondents' new evidence as well as the post-acquisition evidence discussed in our Opinion. *See, e.g.*, Op. at 57-58, 81-82. *See also* Scherer & Ross, *supra* note 43 at 354 ("[U]ncertainty creates a switching cost that slows substitution in consumption. When the superiority of a product can be evaluated only after consuming or 'experiencing' the good, the substitution will depend upon the rate at which consumers sample new products.").

multiple projects in the United States.[99] For all these reasons, we find that the evidence in Respondents' Petition does not demonstrate that new entry has restored the competition lost from the acquisition. We therefore affirm the findings in our Opinion and conclude that CB&I's acquisition of the PDM assets violated Section 5 of the FTC Act and Section 7 of the Clayton Act.

B. Remedy Issues

We are mindful that an evidentiary hearing on the scope of relief might be necessary where the trial does not address the issue of appropriate relief or where there is a factual dispute about the relief required to remedy an antitrust violation.[100] As we stated in our Opinion, however, Respondents did not proffer evidence at trial or on appeal to suggest that the provisions Complaint Counsel requested (many of which we implemented) were unnecessary.[101] Rather, they argued that Complaint Counsel bore the burden of establishing that their Proposed Order was efficacious and feasible.[102] We rejected this argument as not grounded in the law and thus concluded that we need not remand this case for an evidentiary hearing on relief.

Respondents' Petition similarly does not present any evidence to suggest that the remedy we ordered is unnecessary. Rather, it argues that "the Commission assumed without evidence, argument, or specific analysis that an equal division of the broadly defined 'Relevant Business' was necessary to achieve that goal."[103] They argue that, while we offered a rationale for our conclusion that certain types of assets needed to be included in the remedy, we "made no findings and cited no evidence supporting [our] conclusions as to the *quantity* of such additional

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[99]It is worth noting that, as with the LIN/LOX tank market (which underwent a huge growth spurt and then faced declining demand), Tr. at 1542, the LNG tank market will likely flatten at some point in the future as the number of completed LNG tanks begins to meet demand. The fact that gaining a reputation in these markets requires more than winning one job is highly relevant to this point – even if those suppliers who have won a bid complete successfully the LNG tank, it is unlikely that having completed one job will put these suppliers in parity with CB&I once demand slows.

[100]*United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).

[101]Op. at 104.

[102]*Id*. at 103-04. The only evidence Respondents identified in their appeal was customer testimony that, according to Respondents, demonstrated that a divestiture would harm competition by reducing "the number of competitors that can bid on large LNG projects." RAB at 52. We explained in our Opinion, however, that when read in context, this testimony did not support Respondents' argument. *Id*. at 100.

[103]Respondents' Petition at 15.

relief."[104] Respondents' argument is inconsistent with the law and misreads the Final Order.

A remedy must bear a reasonable relationship to correcting the harm that flows from the antitrust violation. This is, however, a guiding principle and does not require a finder of fact to calibrate the relationship perfectly. The Opinion discusses at length the facts that CB&I and PDM were roughly equal competitors prior to the acquisition, the acquisition eliminated this competition, and entry does not constrain CB&I at the pre-acquisition level. One way to replicate the competition lost from this acquisition under these circumstances is by a divestiture creating two independent entities, each equally capable of competing in the relevant markets. We need not demonstrate – as Respondents suggest – that the particular quantity of assets included in the divestiture perfectly remedies the harm from the acquisition. Rather, our remedy need only "eliminate the tendency of the acquisition condemned by §7."[105]

Moreover, contrary to Respondents' assertions, the Final Order does not require CB&I to divide its "Relevant Business" equally. Rather, it requires CB&I to "reorganize the Relevant Business into two independent, stand-alone operating divisions . . . each fully, equally, and independently engaged in all aspects of the Relevant Business."[106] It further states that the purpose of this provision is to "create two stand-alone business entities, each having approximately *equal shares of the markets* for the relevant products, each fully capable of being divested, and each fully (and to the extent practicable, equally) engaged in all aspects of the Relevant Business."[107] That is, the Final Order requires CB&I to create two entities equally capable of competing in the relevant markets. Instead of requiring CB&I to divide its "Relevant Business" along specific lines, the Final Order also allows CB&I the flexibility to decide how best to effectuate the Final Order's requirement.[108] As we stated in our Opinion, we took this approach to "give CB&I, which is best positioned to know how to create two viable entities from its current business, the opportunity to do so."[109] The provision is thus grounded in the evidence and adaptable enough to ensure that the remedy restores the competition lost from the acquisition in a way that will not impede the efficient operation of the relevant markets. We therefore reject Respondents' argument that the remedy is not reasonably related to the alleged violations.

Respondents make two additional arguments with respect to the remedy. First, they assert that the definition of "Relevant Business" is too broad and potentially encompasses every

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[104] *Id*. (emphasis in original).

[105] *Du Pont*, 366 U.S. at 325.

[106] Final Order ¶ III.A.

[107] *Id*.

[108] *Id*.

[109] Op. at 94.

project CB&I constructs. They thus argue that we should eliminate the requirement that CB&I divest these unrelated assets.[110] Second, Respondents request that we modify the Final Order to make clear that the relief does not include assets beyond CB&I's domestic business and contracts. Although Respondents should have raised these issues well before now, we have decided to seek additional briefing on each of them. This approach should ensure that the divestiture will include the assets necessary for an acquirer to compete effectively in the relevant markets without imposing unnecessary requirements on CB&I and interrupting the efficient operation of the market.

Therefore, we direct Respondents to file a brief within 10 days of service of this Decision and Order. The brief should specifically identify those assets in the "Relevant Business" definition that are unnecessary to build the relevant products and the water tank products. To the extent the brief identifies any assets, we direct Respondents to explain why the inclusion of such assets is unnecessary, especially in light of the facts that: (1) the assets identified in the "Relevant Business" definition match those identified in PDM's offering memorandum to CB&I; and (2) the assets defined as CB&I's "Relevant Business" are integrated with the assets necessary to build the relevant products.[111] Respondents may include an alternative suggestion for a divestiture package that is consistent with our findings that "the additional water tank assets, allocation of customer contracts, and transfer of employees are necessary to ensure that the divested entity can compete effectively in the relevant markets" and that the provision of technical assistance and administrative services may also be needed.[112] Respondents' brief should also address which assets outside of the United States the "Relevant Business" definition encompasses and why the inclusion of such assets is unnecessary for an effective divestiture. Complaint Counsel may file a response within 10 days after service of Respondents' brief on these issues.

Accordingly,

IT IS ORDERED THAT Respondents' Petition, filed February 1, 2005, is **DENIED** to the extent it seeks reconsideration pursuant to § 3.55 of the Commission's Rules of Practice, 16 C.F.R. § 3.55; and

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[110]Respondents also request that we require the acquirer to justify the divestiture of assets beyond those acquired from PDM. Respondents' Petition at 16. We reject this request. Our Opinion specifically discussed whether a divestiture of the assets acquired from PDM would remedy the harm from the acquisition. Based on the evidence, we concluded that a divestiture of solely those assets "leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by § 7 has not been satisfactorily eliminated." Op. at 103 (citing *DuPont*, 366 U.S. at 331-32).

[111]For example, the evidence shows that employees that build the relevant products also build other types of water tanks. Tr. at 4058-60.

[112]Op. at 99.

IT IS FURTHER ORDERED THAT Respondents' Petition is **DENIED** on its merits under § 3.72(a) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(a), insofar as it raises issues concerning the effectiveness of new entry; and

IT IS FURTHER ORDERED THAT Respondents file a brief within 10 days of service of this Decision and Order, addressing the issues identified in Part III.B of this Decision and Order; and

IT IS FURTHER ORDERED THAT Complaint Counsel respond to Respondents' brief on these issues within 10 days of service or, in the alternative, give the Commission notice within that 10-day time period that no response will be filed.

By the Commission.

Donald S. Clark
Secretary

ISSUED: May 10, 2005